State Water Resources Control Board
Ex Parte Communication Disclosure Regarding Pending Order

Pending Order
Draft Order WQ re: Waste Discharge Requirements General Order R5-2012-0116

Name, title, contact information of person completing form
Steve Shimek, The Otter Project, 831/663-9460, exec@otterproject.org

Date, time, location of meeting
June 27, 2017, 2:00 p.m. – 3:00 p.m., Cal-EPA Building

Type of Communication
Oral communication occurred.

Participants
Member Steve Moore
Member Tam Dudoc (part time)
Darrin Polhemus
Phil Wyels
Emel Wadhwani
Nate Kane
Jim Wheaton
Steve Shimek
Lynn Saxton

Name of person(s) who initiated the communication
Steve Shimek

Describe Communication
Discussed the possible schedule for release of the Draft East San Joaquin Order. Provided SWRCB staff and members with guiding principles involved environmental stakeholders are looking for including:

- Enforceable standards
- Enforceable milestones and timelines
- Adequacy of monitoring
- Grower/Landowner transparency and accountability
- What pieces are precedential and what are not.

General discussion of these points followed. Jim Wheaton passed out the attached handout.

ENVIRONMENTAL LAW FOUNDATION

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To: State Water Resources Control Board Chair Felicia Marcus
Board Members Dorene D'Adamo, Steven Moore, and Tam Doduc
From: James Wheaton and Nathaniel Kane, Environmental Law Foundation
Date: June 27, 2017

Re: Opposition to Secrecy in Eastern San Joaquin Waste Discharge Requirements

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Environmental Law Foundation has, over the last 25 years, consistently advocated for transparency in environmental regulation and has challenged secrecy in court, often successfully. These comments, while supportive of the Environmental Justice and general environmental groups' comments on this matter, are ELF's alone.

Third Party Coalitions Can Be Useful, But Secrecy Is Not

The use of third party coalitions to address problems associated with groundwater pollution is laudable. State law supports it. (Water Code section 13269.) So do we. However, the law does not support secrecy, or using coalitions to hide vital data from the Regional Boards, or from the public. Secrecy impedes knowledge. It impedes evaluation of whether measures are working. It impedes enforcement. It impedes problem-solving.

We understand why coalitions and their grower-members want secrecy. If one is doing something that pollutes a public resource, secrecy impedes detection, it impedes public response, it impedes enforcement, it impedes calls for change, it impedes change itself. Growers and Coalitions know this. Coalitions have candidly stated that one selling point to joining one is that it offers secrecy.

However, the law does not support it. Today therefore we advocate that the Regional and State Boards state, with convincing clarity, that secrecy will not be part of any regulatory program to address groundwater pollution from irrigated agriculture in the Eastern San Joaquin Region.

The Law Prohibits Secrecy

The following statutes, policies, and court decisions demonstrate that allowing polluters to keep information about the pollution of public water bodies secret is unlawful:

- **By law, reports of pollution are ALWAYS public.**
  Water Code 13260 requires that dischargers of waste that could affect the quality of the waters of the state must file a public "report of the discharge" with the appropriate board. Thus, reports of pollution are always public.

- **By law, monitoring data under a waiver is always public.**

The only exception to this is if a board adopts a waiver of WDRs under Water Code section 13269. However, that expressly requires that "[m]onitoring requirements. . .be designed to verify[] the adequacy and effectiveness of the waiver's conditions." (subsection 13269(a)(2)). Importantly therefore, all ***"[m]onitoring results shall be made available to the public***." (*Id.*) Thus all monitoring reports and reports of pollution are public. There are *no* exceptions.

- **The State Board's Policy requires that data be public.**
  The State Board's Nonpoint Source Policy requires feedback mechanisms to both the Board ***and the Public*** so both can determine if a program is working. This does not allow masked, anonymized or aggregated reporting. *Monterey Coastkeeper v. Cal. State Water Resources Control Board* (Aug. 10, 2015) at 34 and 37, Sac. Sup. Ct. No. 34-2012-80001324.)

- **Pollution data is not a "Trade Secret"**
  Growers cannot avoid public disclosure of nitrogen application data by calling it a "trade secret." Those who have tried this lost before the Regional Board and a court. (*Rava Ranches v. California Water Quality Board, Central Coast Region* (Nov. 17, 2016); *Triangle Farms v. California Regional Water Quality Board, Central Coast Region* (Dec. 29, 2016) (Mont. Sup. Ct Nos. 16CV000255 and 16CV000257.)

- **Aggregating pollution data through a cooperative impedes detection and prevention**
  Where "monitoring data [is] submitted... by a cooperative monitoring group" that does not identify individual dischargers, "neither the Board, nor the cooperative monitoring group, nor (in many cases) the grower can identify **where the pollution is coming from or [how to] effectively reduc[e] the pollution and degradation**." *Monterey Coastkeeper, supra,* at 34.

- **A Cooperative cannot be used to withhold monitoring data from the public**
  Withholding monitoring data from the public violates Water Code section 13269. (*Zamora v. Central Coast Regional Water Quality Control Board* (Oct. 28, 2016) San Luis Obispo Sup. Ct. No. 15CV-0247.)
  - "Two pillars of the Water Quality Act are to protect the quality of community water supplies and to promote public access.…**The public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public's water supplies.**" (*Id.* at 2.)

- **Any data a Board uses to do it its job is a public record**
  Withholding records used by the Water Boards in regulating water quality violates the Public Records Act. There is no excuse for it. (*Id.*)
  - "There is no justification for such obfuscation**: the strong interest in public accountability cannot be overcome** by vague notions of privacy or unsupported allegations of terrorist threats to polluted groundwater supplies." (*Id.* at 3.)

- **Public access to data and records is not just a good idea. It's the law.**
  Public access to all data in any way used by a Board is required by statute. (Govt Code section 6250 *et seq*). It's also required by our Constitution. (Cal. Const., art. I, sec 3(b)(1)).

Defects In Any Proposed WDR (Or Waiver)

With these laws and principles in mind, we are specifically concerned about the following features of any potential Waste Discharge Requirements (or waiver) for the Eastern San Joaquin:

- **Allowing third-party coalitions to keep nitrogen data secret.** Coalitions are helpful where they assist the Board and growers in gathering data and determining compliance; they are harmful where they expand that role to hide data from the public.
- **Allowing individual nitrogen data to be reported on a township- or sub-basin-wide level, instead of on a field level.** Doing so is wrong on many levels: it masks the polluters; it prevents the Board and public from determining whether and which field level management practices are in fact effective at reducing pollution; it allows a company to pollute a public resource anonymously.
- **Allowing compliance with nitrogen targets to be accomplished on an aggregated basis rather than on the level of an individual operator.** In addition to the dangers above, this also allows those with poor practices to effectively hide among and take advantage of neighbors with better practices.
- **Allowing third-party coalitions to prevent the public and the Water Boards from identifying operators that are exceeding nitrogen targets**. This impedes enforcement by the Board, and knowledge and involvement by the public.

Secrecy Is Not Necessary

Regional Boards that have moved towards transparency have not regretted the decision. The Central Coast Board, with ELF as an intervenor, successfully litigated agriculture's challenge to making nitrogen-applied data public. (*Rava* Ranch and *Triangle Farms, supra*.) Before and during the *Zamora* litigation, in which ELF successfully challenged that Board's approval of a workplan by a coalition to keep notification reports of polluted drinking water wells secret, representatives of the local coalition represented to the Board that it might cease operations if it could not promise secrecy to its members. Yet after the Regional Board lost in court and subsequently adopted a new transparency policy to prohibit future secrecy, that coalition submitted a new workplan to the board, without all the secrecy provisions.

Secrecy is neither necessary nor legal for the regulation of irrigated lands in California. In short the Boards do not need secrecy and cannot offer it. The cooperatives and their members want it, but now know they cannot have it; instead they have resorted to threats that if they do not get secrecy they can sell, they will disband and toss a major administrative task back onto the Boards. That threat is hollow and can be disregarded.

So, ELF understand why cooperatives can be an important part of the task ahead. It also understand why cooperatives want secrecy as well. We do not understand why the Boards any longer entertain the notion. The time has come to state with clarity that the provisions to mask data, keep identities of polluters anonymous, or keep data secret are no longer an issue.