



March 21, 2011

*Via Electronic Mail*

ILRP Framework Comments

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Chairperson Hart and Members of the Board:

These comments are submitted on behalf of California Rural Legal Assistance Foundation, Clean Water Action, and Community Water Center. We are a group of nonprofit organizations concerned about the impacts of groundwater contamination on Central Valley communities and the environment.

As you know, today many thousands of people in the Central Valley cannot use the tap water in their homes for drinking or cooking due to nitrate contamination. In some areas in the Valley, more than 20% of small public water systems are already unable to supply safe drinking water, including many of our Valley's schools, which must use their shrinking educational budgets just to supply safe water to students and teachers. Many more communities are on the edge, forced to pay for expensive nitrate treatment or close wells, limiting local drinking water supplies and creating additional barriers to local economic development.

Although we are deeply concerned that the Framework is being adopted as a resolution rather than a regulation, the Framework can still provide important guidance to Board staff members as they develop implementing orders, so long as the Board supports those measures currently contained in the proposed Framework and includes certain additional measures. To that end, we would like to offer specific suggestions to strengthen that guidance in order to protect the Valley's groundwater resources effectively.

As previously stated in comments on the draft program, an effective regulatory program must contain the following elements: 1) effective on-farm programs that actually reduce polluted runoff; 2) basic data collection on farm practices and water quality in order to establish a baseline, evaluate management practices and measure progress towards water quality objectives; 3) clear standards for compliance to ensure that water quality goals and timelines are met; 4)

strong enforcement powers to ensure compliance; and 5) provisions for cleanup and abatement of legacy agricultural contamination.

While the proposed Framework has incorporated changes that appear to include many of these elements, there are a number of important changes that are needed to protect and restore groundwater supplies fully, which are explained in detail below.

### **I. Compliance and Mitigation Mechanisms Must be Improved from the Current Proposed Framework**

Our principle concern with the current staff-proposed Framework is its lack of an adequate compliance standard for groundwater, and relatedly, the lack of an easily-implemented mitigation mechanism that would enable polluters to contribute to treatment or the provision of sources of safe drinking water for impacted communities. We are aware that there are many diverse sources of community drinking water contaminants. Nevertheless, agriculture is the largest source of nitrate loading of groundwater, and nitrate contamination of a drinking water source is very expensive for local communities and domestic well owners to treat or mitigate. Unfortunately, under the proposed Framework, these costs will continue to fall entirely on impacted communities, most of which are some of the poorest in our State and least able to access safe water supplies.

Reliance on traditional pollution liability mechanisms is inadequate in this arena. Given that irrigated agriculture is a non-point source, it is almost impossible to track a molecule of nitrate from a drinking water well to its exact source. Furthermore, even where possible, pinpointing the exact source would at the very least require significant amounts of money and resources to investigate and successfully litigate. We agree that asking the Regional Board to conduct such an investigation in every domestic or public drinking water well would not be the best use of our State's limited resources.

Instead, we urge the Board to include clear compliance standards and easily-implemented mitigation mechanisms into this Framework. The Framework should clearly provide that any agricultural discharger that is causing or contributing to an exceedance of water quality objectives will be subject to enforcement actions. The Framework should also clearly provide that enforcement actions shall result in contributions to a mitigation fund that will help fund mitigation actions by impacted disadvantaged communities or low-income domestic well owners to secure a safe source of drinking water.

Inclusion of clear compliance standards and an associated mitigation program is a vital component of any regulatory program for irrigated agriculture in the Central Valley for the following reasons: (1) agriculture is a significant nitrate contributor and cannot exist in most of the Valley without discharging *some* nitrate to groundwater; (2) nitrate contamination in the Valley's groundwater severely impacts the health and economics of environmental justice communities; and (3) as discussed above, there are significant challenges to applying traditional pollution liability mechanisms to irrigated agriculture. While it is vital that the orders reduce and eliminate ongoing contamination, the Board's mandate is not just to protect but also to restore water quality. Furthermore, this is an issue of environmental justice, as low income communities

and communities of color are disproportionately impacted by nitrate contamination of drinking water. The Board's current waiver program has resulted in disproportionate impacts to environmental justice communities, and as such, the Board has an obligation to correct that discriminatory impact.

A compliance and mitigation program is not unprecedented; in fact, it is part of the Central Coast's proposed agricultural order, as referenced below. Once included in the Central Valley's program, we believe it can serve as a model and be incorporated into other point and non-point source regulatory programs, both within and outside of this region. Specific recommendations on the changes needed are outlined below:

***Clear Compliance Standards:***

In all orders issued under this program, there must be enforceable standards applied to all agricultural dischargers not to cause or contribute to exceedances of water quality objectives. This is legally required under Porter-Cologne, the Basin Plans, the Non-Point Source Policy, and the Anti-Degradation Policy. To be clear, this standard does NOT hold agriculture responsible for all groundwater in the Central Valley meeting water quality objectives, but rather, under this standard, an agricultural discharger cannot contribute to an exceedance of water quality objectives. In other words, pursuant to this compliance standard, an agricultural discharger that is contributing to an exceedance of a water quality objective would be out of compliance with the program and subject to an enforcement action.

Unfortunately, and contrary to the law, the proposed Framework only creates a groundwater compliance standard of “**a demonstrated improvement in water quality or a reduction in discharge.**” This vague and illegal standard is inappropriate, because it does not require dischargers to stop contributing to exceedances of specific water quality objectives at any point in time or space. If there is no requirement not to contribute to exceedances of water quality objectives, water quality objectives will never be met, and drinking water in the Central Valley will continue to deteriorate.

Furthermore, without such an enforceable compliance standard, it will be nearly impossible to implement any kind of mitigation program to require those dischargers that are causing or contributing to exceedances to pay for or contribute to mitigation programs that provide safe drinking water to impacted communities and domestic well owners.

Under the Basin Plans, water quality objectives are current standards for water quality, not general goals that may or may not be achieved at any time in the future. Instead of adopting a compliance period for groundwater that does not even include a time frame for implementation, much less a reasonable one, we suggest (1) that the Framework and subsequent orders measure discharger compliance by whether there is any cause or contribution to exceedances of water quality objectives, and (2) that enforcement actions directing dischargers to help with mitigation for impacted communities commence within a year of the adoption of the proposed orders. Again, this is appropriate because without such direction by the Regional Board, it is sanctioning continued pollution of local drinking water sources and allowing the costs to be borne entirely by those least able to avoid exposure and secure safe sources without assistance.

### ***Create a Mitigation Funding Mechanism:***

The proposed Framework creates no mechanism to facilitate implementation of a mitigation program. Specifically, the Board should direct staff to create a Supplemental Environmental Program (SEP) or create a separate enforcement account to direct fines or compliance order contributions to fund mitigation of the impacts of nitrate and other drinking water contaminants for impacted communities and domestic well owners.

Where a farm is contributing to exceedances of water quality objectives, an enforcement action should direct this discharger to fund mitigation and, at minimum, to ensure the discharger contributes to safe drinking water provision for private domestic well owners. It is important that mitigation includes low-income private well owners because private domestic wells tend to be shallower and more immediately impacted by management practices. Unfortunately, the discussion of the suite of potential enforcement actions in Key Element 5 omits exaction of fines to fund mitigation efforts (or direct provision of alternative water sources).

Staff should consider adopting the language from the Central Coast Order (Item 46):

“ ... in compliance with Water Code section 13304, the Central [Valley] Water Board may require Dischargers to provide alternative water supplies or replacement water service, including wellhead treatment, to affected public water suppliers or private domestic well owners.”

### ***Greater Emphasis on Enforcement:***

The proposed Framework does not address enforcement except to remove one tool, the prohibition of discharge, with the argument that use of this mechanism would reduce the Board’s enforcement discretion and expend staff resources. We strongly disagree with this characterization. The proposed Framework already limits staff’s ability to enforce the program aggressively through its reliance on third party coalitions to implement most facets of the program. Removing the threat of a prohibition of discharges renders this program even more toothless.

## **II. The Proposed Framework Should Include Reporting of Fertilizer Application**

The most significant contaminant of groundwater is nitrate, which leaches through excess fertilization of irrigated fields. A very basic tool for identifying potential problem areas is a requirement that dischargers report their fertilizer application and that this information be made publicly available. This will help the Board prioritize operations for inspection and will also provide very basic information about the success of the program in reducing inputs to groundwater. Therefore, data collection should include information on fertilizer application for all dischargers that have been placed in Tier 2 or Tier 3 due to nitrate contamination of groundwater. This tool is not meant to replace needed best practices, monitoring, or implementation of nutrient management plans; it is simply a shorthand guide for the Board to understand where problems might be occurring in an aquifer and better understand trends and changes in threats to water quality.

### **III. Incentives for Good Actors**

We strongly support measures in the Framework that reward dischargers that are certified organic farmers or that voluntarily adopt and implement a Farm Water Quality Management Plan. We do recommend that Farm Water Quality Management Plans for dischargers that would otherwise be classified as Tier 3 for nitrate contamination be required to include Nutrient Management Plans.

### **IV. Tier 2 Classification Must Be the Rare Exception:**

Classification of lands into Tier 2 should be the rare exception. Otherwise, this tier could become the loophole swallowing the rule. As discussed above, determining the exact source of nitrate in a well or the relative contribution from different sources of contaminants such as nitrate is a scientific challenge that often takes significant time and resources, when it is successful at all. Under the proposed program, it appears that if an area is classified in Tier 2, it will take a minimum of eight years (three years of transition and then five years of study) to determine whether an area should be in Tier 1 or 3, and that is assuming that studies are able to make a clear determination. In the meantime, dischargers would not be required to make any improvements, create management plans, or conduct monitoring to determine best practices.

It is vital, therefore, that Tier 2 not be used as a means for dischargers to avoid instituting any changes or improvements while an issue is studied for years, but rather be reserved to only those lands where there is a genuine question as to whether agriculture is contributing to the problem at all. Specifically, any area that has water quality data showing elevated groundwater levels for nitrate or pesticides, or other constituents associated with agricultural discharge, must be classified as Tier 3 for that contaminant unless or until aquifer-specific studies can conclude that irrigated agriculture is not contributing at all to elevated concentrations. Although the proposed program seems consistent with such a tier determination, it is unclear how the tier determinations will actually be applied until we see the proposed orders. However, given that there will be limited time for stakeholder input in the development of the orders, it is important that the Board emphasize the need to minimize classification into Tier 2, particularly for vulnerable groundwater areas and areas with elevated levels of contaminants such as nitrate and pesticides that are clearly associated with agriculture to at least some degree.

Furthermore, if there is no groundwater quality or hydrological data for an area to determine threat levels, Tier 2 classification should be limited in time to a maximum of the three-year transition period to make an initial determination as to whether a high threat exists (*i.e.* it should be classified into Tier 3). Sampling can be conducted in one year from existing relatively shallow local domestic wells to determine whether there are elevated levels of constituents discharged by agriculture, and therefore the three-year transition period should be plenty of time to do an initial characterization as to whether it is a high threat area. Once the initial characterization of a high threat area is made (*i.e.*, elevated levels and/or vulnerable groundwater environment), additional studies would be conducted under Tier 3 to further refine understanding of agriculture's relative contribution and the performance of management practices to protect water quality.

Finally, there should be a clear mechanism in each order to allow for reclassification where new data or further analysis shows water quality problems that are caused or contributed to by irrigated agriculture.

**V. Anti-Degradation Policy Will Need to Be Implemented In Each Order; Framework Analysis is Insufficient on Its Own.**

The proposed program regulates agricultural discharges with the potential to degrade high quality waters. Therefore, the State Anti-Degradation Policy applies (as Board staff has acknowledged in its master responses to comments). The Anti-Degradation Policy imposes a procedural requirement on the Board to engage in a balancing analysis to determine whether and what amount of additional discharges causing further degradation of Central Valley waters will be in the maximum benefit to the people of the State. Further, the Anti-Degradation Policy obligates the Board to identify and require management practices that constitute “Best Practicable Treatment or Control” (BPTC), *i.e.*, management practices that will ensure that discharges will not violate water quality objectives and will maintain the highest water quality consistent with the maximum benefit to the people of the state.

The analysis that has taken place thus far at the programmatic level does not satisfy the requirements of the Anti-Degradation Policy. Specifically, contrary to the Board staff’s assertions in its individual responses to comments, the Board must identify the amount of degradation that will occur under the program (as currently proposed) and conduct a balancing analysis to determine whether that level of further degradation is in the best interests of Central Valley residents. This balancing analysis must assess not only the costs to the agricultural industry of enhanced regulatory controls limiting discharges but also the economic and social costs of *not* requiring more stringent discharge controls to Central Valley communities that are impacted by contamination of their drinking water supply from agricultural discharges. While Board staff has commissioned a report that amply explores costs to industry, this analysis has been almost entirely lopsided, as the full costs to communities on the other side of the equation have not been fully documented, considered, or properly weighed. This flawed analysis does not support a finding by the Board or Board staff that the level of degradation permitted by the proposed program is in the maximum benefit to the people of the state.

If the Board chooses to adopt the Framework as currently proposed, without conducting a further and more full anti-degradation analysis as described above, then the Board will need to conduct a full anti-degradation analysis prior to adopting each of the subsequent orders implementing the Framework in order to satisfy the State Anti-Degradation Policy. This will necessarily entail making a baseline determination; that is, identifying where there are high-quality waters within the geographic scope of each order and how much degradation will occur in those areas under the program. The Board will then need to assess the socioeconomic impacts of the proposed further degradation on impacted communities within the region and weigh those costs against economic costs to agriculture and make a balanced determination as to exactly how much further degradation is truly within the best interests of the people of the state. This is what the plain language of the State Anti-Degradation Policy requires.

Furthermore, Board staff has stressed in its responses to comments that the Anti-Degradation Policy only applies to those discharges that have the potential to degrade high quality waters and that the Anti-Degradation Policy does not apply to discharges to waters that are not high quality. We therefore feel obliged to remind the Board that “high quality waters” are waters that, as of 1968, did not exceed water quality objectives with respect to any given constituent (*e.g.*, nitrate). Even if the Board were to determine that certain waters do not constitute “high quality waters” with respect to a particular constituent, the Basin Plans themselves prohibit discharges to such polluted waters. Thus, Board staff’s suggestion that in these areas, the Board need only require management practices that reflect a so-called “best efforts’ approach” (as opposed to BPTC) is misplaced. Any further discharge containing elevated levels of that constituent to such waters would violate the Basin Plans.

## **VI. The Framework Must Ensure Public Information and Transparency**

### ***Drafting Individual Orders/Waivers:***

The process for adopting this regulatory program differs considerably from that of other regions, which drafted and edited their orders in full public view with ample opportunity for public review and feedback. In this case, staff recommends adoption of this framework by the Board, after which they intend to develop the regional orders with no public input or review, until each order is published for Board adoption. This is wholly inadequate for several reasons.

First, the framework allows major exceptions to most of its conditions, so that the exact terms or even basic outline of each final order cannot be confidently predicted. While some flexibility may be appropriate given the extremely variable conditions of the orders, the fact remains that each order will require careful review. The small window of public scrutiny prior to the Board hearing should be replaced by an iterative process that allows suggestions to be incorporated and reviewed as the order is developed.

Second, the framework was developed and analyzed at the programmatic level. Regional orders will encounter unique issues. Local stakeholders (storm water agencies, small communities, water systems and watershed groups, among others) have a unique perspective and knowledge that must be tapped to ensure that the orders actually accomplish the goal of improving water quality - and to ensure that no project-level CEQA analysis is needed.

Finally, the assignment of Tiers requires public scrutiny, particularly decisions on the Tier 2 “unknown contributor” classification. Local entities may have additional information that can be used to ascertain the source of unknown contamination. The Monitoring and Reporting Plan that accompanies the order should be subject to similar ongoing public review.

We recommend an alternative process; that staff notify local stakeholders when development of an order begins, and invite comment on its content. Those stakeholders should then be copied on any drafts that are shared with third party coalitions.

### ***Electronic Data Collection:***

We appreciate the commitment to electronic data collection; however, within the Framework, that commitment comes with a caveat that information will not be collected from the coalitions until that mechanism is set up. This raises the very real possibility that a significant amount of information will not be made publicly available in a timely fashion, if at all. At minimum, we recommend the following:

1. Groundwater Monitoring information should be made public through integration into the publicly accessible GAMA Geotracker database. This database was developed to accept electronic data submission; there is no reason to delay the collection and submission of groundwater monitoring results.
2. An on-line summary form should be provided, perhaps using the Central Coast Water Board on-line form as a template, where Tier 2 and 3 growers will annually provide basic information about their operation, including best practices currently being implemented.
3. On-line fertilizer use reporting should be required in areas impacted by nitrates, with reporting modeled on the existing electronic Pesticide Use Reporting.

Finally, summary data on program implementation must identify by name and location all operations that are not in full compliance with the order. Third-party coalitions are meant to provide economies of scale in terms of monitoring and reporting, not to provide cover for a few bad actor operations.

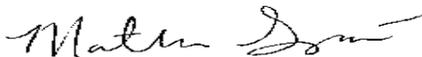
### **Conclusion**

We urge the Board to incorporate our recommendations into the framework prior to adoption.

Sincerely,



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