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Staff and Legal Review of East San Joaquin Draft Order (Revision 2)

On October 10, 2017, the State Water Resources Control Board (“State Water Board” or “SWB”) issued a *second* staff-proposed draft order for the Eastern San Joaquin River Watershed Agricultural Order (ESJ Order), SWRCB/OCC Files A-2239(a)-(c) (“Draft Order”). The State Water Board will hear public comment on the Draft Order in a public workshop on Wednesday, December 6, 2017. Written comments are due on Friday, December 15, 2017. Following review of comments, the State Water Board is scheduled to consider adoption of the second staff-proposed order on Tuesday, January 23, 2018. The second draft attempts to minimize the reporting burden associated with ILRP and privacy concerns in comments provided in 2016, but there are many requirements which remain or have been modified which still pose concern.

There are changes with respect to member reporting requirements, monitoring requirements, and regional board oversight. Changes include *all* growers must now participate in outreach events, complete Farm Evaluations, certify Irrigation and Nitrogen Management Plans (**INMP**), and monitor domestic well quality on farm and report water quality exceedances for multiple constituents (potentially having to provide replacement drinking water). Coalitions must submit field level data, complete additional Nitrogen Applied/Nitrogen Removed (**A/R Ratio**) and Nitrogen Applied minus Nitrogen Removed (**A-R Ratio**) report analysis, develop N Removed coefficients for all crops alongside the Management Practices Evaluation Program (**MPEP**), and develop new member submittal templates. Member field-level data provided to the Regional Board will be identified by “Anonymous Member ID,” and “Anonymous Parcel ID” with grower specific information and APNs subject to request by the Regional Board if it determines a compelling reason exists.

Recall that the Kern River Watershed Coalition joined in the appeal of the ESJ Order to the State Water Board, out of concern that it would be addressed by the State Water Board before the Tulare Lake Basin Area Order (Order R5-2013-0120 or “Tulare Lake Order”) and that the ESJ Order, including any SWB changes, would be precedential. In fact, the majority of the changes proposed by the Draft Order appear to still be precedential and will apply throughout California. Therefore, the proposed changes are once again of interest to the Kern River Watershed Coalition. Technical and legal concerns are summarized below, followed by a more detailed breakdown of the material proposed changes to Draft Order – by Member, Coalition and then Regional Board - to the ESJ Order. Finally, this memorandum concludes with review of the relative changes in costs that will likely result to the affected parties including the Kern River Watershed Coalition and its members, if the proposed draft order is adopted as written.

Items of Concern for Comment

Technical

- Revisions were made with limited consideration of increased costs or realistic timelines for Members, Coalitions, OR Regional Board.

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- Domestic well monitoring and reporting is an undue burden on growers and the ILRP is an inappropriate program to provide public health information. There are also jurisdiction issues regarding sampling wells on farm. It would appear likely that the Regional Board will require members/owners to provide replacement drinking water where on-farm wells have exceedances, even though Draft Order defers that determination to the Regional Board.
- Anonymous individual field/grower level data will now be submitted instead of aggregated township data. Although the information is anonymous, it is still possible for members to be identified.
- There are changes and additions to each required member submission, all members are now required to submit all reports, and all members are required to certify INMP reports. Requires full template redevelopment and grower training. The associated costs and timelines have not been appropriately considered by the State Water Board.
 - INMP complexity increases dramatically and includes many more components. Some required components are not consistently available or will require additional research (evapotranspiration, nitrogen sequestration, secondary yield), all members will be required to certify and submit Summary Reports increasing the cost burden to growers.
 - The Farm Evaluation is simplified and shifted to a report submitted every five years, and some sections moved to INMP.
 - A new reporting framework for management plans is established called the Management Plan Implementation Report (**MPIR**).
- Concern over addition of legacy pesticides to groundwater monitoring. The regional board will include 1,2,3-Trichloropropane (1,2,3 TCP) and 1,2-Dibromo-3-Chloropropane (DBCP) to the groundwater testing protocol but it is not the purview of ILRP to regulate legacy issues.
- Coalitions and the MPEP process must define N Removed coefficients for 99% of crops by March 1 2023; although this can be funded partially by grants, this is a large cost burden to the coalitions.
- Field specific records are required to be housed in a secure offsite location by an independent entity that specializes in the protection of data for 10 years. 10 year retention applies to the Member as well. It is unclear if this means that we must have an additional database to house our data in addition to our own, which would be at significant cost. Members must meet the same records retention requirements of 10 years.



- Potential for Surface Water Monitoring Program requirements to be changed and or expanded based on State Board Expert Panel. May re-define what is considered “representative monitoring” and dramatically increase required monitoring.

Legal (Preliminary/Subject to Further Research and Change)

- The State Water Board is acting in excess of its jurisdiction by using the ILRP to remedy 1,2,3 TCP and DBCP, which are no longer applied and legacy issues.
- It is legally improper for the proposed changes to the ESJ Order to apply to Kern River Watershed Coalition members without consideration of the unique Tulare Lake Order record of proceedings and a hearing in those proceedings. Failure to provide notice and a hearing on the extensive record in the Tulare Lake Order proceedings, including unique facts and circumstances in the Kern River sub-watershed, is unreasonable and contrary to procedural due process and other applicable provisions of law including Water Code sections 13320(b) and 13267(b)(1),
- The Draft Order, including the cost-benefit analysis pursuant to Water Code section 13267(b)(1), is legally deficient for failure to prepare an economic analysis of the costs all the proposed changes to the ESJ Order, as applied statewide, as required Water Code and the California Environmental Quality Act (“CEQA”).
- The Draft Order’s proposed changes are not or have not been appropriated determined to be within the scope of the existing “programmatic” EIR (PEIR) for the ILRP, and thus there is non-compliance with CEQA.
- The Draft Order fails to acknowledge that certain required grower data constitutes a trade secret and/or confidential business information protected from disclosure by law. (Note that this argument is weaker than before due to the qualified Anonymous Member ID protection.)

East San Joaquin Order Background

- Regional Board’s ESJ Order: two petitions of the order filed by the environmental justice (EJ) community, and Agriculture Industry and ILRP Coalitions (including South San Joaquin Valley Water Quality Coalition) led to State Water Board asserting jurisdiction over the order on its own motion.
- First proposed SWB staff revisions to ESJ Order released February 8, 2016. After holding public workshops in Sacramento and Fresno and receiving substantial written comments, including from the Regional Board’s staff, the first proposed draft ESJ Order was taken back under consideration and a second proposed draft of revisions prepared by SWB staff was released on October 10, 2017.



- Aspects of the Draft Order will be considered precedential, but not all. It is not clear, but doubtful, that we will be able to have a hearing or meaningful proceeding on the Regional Board's Tulare Lake Basin Area ILRP order.
- The Draft Order proposes commission of a future surface water monitoring statewide expert panel for review of representative monitoring and recommendations.
- Basis for the Draft Order's proposed revisions include the Agricultural Expert Panel Report, Non-Point Source Policy, and Central Coast Decision.

Member Changes (relative to 2016)

2016 & 2017 provisions

- All members required to attend outreach and education events by 2020
- The INMP is the Nitrogen Management Plan (**NMP**) updated to include irrigation planning with irrigation method, crop evapotranspiration, projected irrigation use, irrigation water concentration, nitrogen sequestered in wood
 - Reporting frequency increases to annually for all members, irrelevant of size or vulnerability. Certification is required for all by March 2020.
 - INMP may be valid for up to three years for consistent crops per Executive Officer approval
 - INMP Summary report includes yield, N content in irrigation water, and irrigation type. First submission of low vulnerability March 2021.
- Domestic well monitoring required for all enrolled acreage starting Jan 2019
 - Annual tests if test concentration is >8 mg/l N, every 5 years if <8 mg/L
 - Lab must follow chain of custody and upload directly to Geotracker
 - Must notify affected residents of results above maximum contaminant limit (**MCL**), assumed required to provide replacement water

New 2017 provisions

- INMP updated to include outlier identification, irrigation practices, nitrogen management practices, crop age primary & secondary crop harvest yield
- INMP Summary Report updated to include outlier notification, crop age, irrigation management practices implemented, nitrogen management practices implemented, certification method



- Farm Evaluation to be updated to include only crops, acreages, pesticide practices, well information, sediment & erosion control practices. Only due every 5 years starting March 2021.
- MPIR to be developed respective to a Surface Water Quality Management Plan (**SQMP**) or Groundwater Quality Management Plan (**GQMP**) by the third party, requires if a member is in or out of a SQMP/GQMP and which applicable practices have been implemented. Due starting March 2019.

Removed from 2017 revision

- Farms categorized as small (<60 acres) medium (>60 acres), large (>250 acres)
- Farms are no longer classified as being in high vs low groundwater vulnerability areas
- INMP summary report includes grower calculated A/R ratio, A-R

Coalition Changes

2016 & 2017 provisions

- Coalition must develop coefficients to convert yield to N removed for all growers,
 - Current year A-R and A/R ratios to be calculated
 - A/R ratios analyzed by crop type, irrigation method, soil conditions, and farming operation size, comparison of A/R 1-year and A/R 3-year ratios
 - Multi-year A-R and A/R ratios
- SQMP & GQMP must provide list of recommended practices to implement,
- MPEP shall support determination of N removed coefficients, define appropriate ranges for multi-year A/R ratio target values by crop

New 2017 provisions

Reporting

- Each template (INMP, Farm Evaluation, MPIR) must be created and submitted to the EO for approval
- MPEP must include A/R and A-R data collected in annual reports, MPEP groundwater monitoring limited to a depth to water (DTW) 10 ft
- Must submit annual report on management practice implementation and Nitrogen application by July 1.
 - Must include INMP summary report data (outlier status, certification, irrigation method, irrigation practices, nitrogen management practices), MPIR



(SQMP/GQMP field, management practices specific to SQMP/GQMP), Farm Evaluations (pest management practices, sediment & erosion management practices, irrigations wells, abandoned wells)

- The third-party shall submit the Individual Field AR Data by Anonymous Member ID Table beginning **1 July 2019**, and annually thereafter: anonymous id, crop, N in fertilizers, n in organics/compost, N in irrigation water, total N, N removed, A/R ratio, A-R difference, 3-year A/R ratio.
 - The third-party shall submit Individual Field AR Data by Anonymous APN ID Table beginning 1 July 2021 and annually thereafter: anonymous APN id, crop, N in fertilizers, N in organics/composts, N in irrigation water, total N applied, N removed, A/R ratio, A-R, 3-year A/R ratio
 - The third-party shall submit Township AR Data Table beginning 1 July 2019 and annually thereafter: township, crop, total acreage, total N fertilizer, total N organics/compost, total N in irrigation, total N applied, total N removed, A/R ratio, a-r difference
 - Coalition can establish own outlier processing methodology, it is no longer defined by the Order
- The third party may conduct drinking water supply monitoring on behalf of members. Member must notify board if in exceedance.
 - GQMP may be developed in consideration of DPR groundwater protection areas and Stat Board hydro-geologically vulnerable areas. Process for tracking implementation of management practices and A/R 3-year ratio results must also be described.
 - Potentially must participate in stakeholder process with EJ to establish methodology for determining targets for nitrogen loading on a township by township basis.

Outreach

- Outreach events and materials shall include information on nitrogen application practices and the potential impact of nitrates on groundwater and, as appropriate depending on the anticipated grower audience, shall be provided in multiple languages. (IV.C.8)
- Provide additional INMP self-certification training for Members notified as being outliers for reported AR data and who opt not to use a specialist for INMP certification. This INMP self-certification training shall be focused on assisting Members in reducing their overall A/R 3-year ratio and shall require in-person attendance. (IV.C.8.c)

Removed from 2017 revision

- Coalition must supply developed coefficients to growers for grower calculations



- Members with greater than 1 standard deviation of the average A/R will be notified, and field data identified to the Water Board
- Field level data INMP and Farm Evaluation to be submitted by the coalition annually with A/R information uploaded to Geotracker (by 2019).
- MPEP groundwater monitoring limited to a DTW of 7ft
- Coalition must report domestic well monitoring results in annual report and ensure affected residents are notified.

Regional Board Changes

2016 & 2017 provisions

- Receive field level data of both INMP and Farm Evaluations and validate Coalition analysis, confirm follow up with outliers, create acceptable ranges of A/R ratios based on submitted field level data alongside coalition

New 2017 provisions

- Assumption that Regional Board will enforce replacement water provision by members with drinking well monitoring results above WQO
- Water Board must make anonymous field-level data tables available to researchers and stakeholders to support studies and analyses, including modeling of nitrate loading to groundwater.
- Must report on progress toward develop A/R ratio targets to the State Board annually starting 2019
- Will work with stakeholder group of EJ/AG to approve methodology to establish targets for nitrogen loading on a township by township basis (within two years)
- Regional board will include 1,2,3 TCP and DBCP to the groundwater testing protocol.



Cost Review of 2017 Revision Changes

Requirement	Affected Party	Precedential?	Cost Change
Outreach required for all Members	Members, Coalition	Statewide	Increase
Create INMP, MPIR, Farm Evaluation Templates	Coalition, Board		Increase
Annual INMP Summary for all members	Members, Coalition		Increase
Certified INMPs required for all Members, additional certification training for outlier growers	Members, Coalition		Increase
Certified INMPs valid up to 3 years (upon EO approval)	Members		Potential Decrease
Farm Evaluations due once every 5 years	Members, Coalition		Decrease
Drinking Water Well Monitoring, replacement water	Members, Board	Statewide	Increase
Submit 4 versions of field level information to the Regional Board (MPIR, FE, NMP); board to audit coalition submissions	Coalition, Board	Statewide	Increase
Analyze A/R Ratios by multiple factors, develop targets with MPEP	Coalition, Board	Statewide	Increase
Additional Training & Outreach regarding new reporting	Coalition		Increase
MPEP & Coalition to focus on development of N removed coefficients	Coalition		Increase
Representative Monitoring Surface Water Program Update	Coalition, Board		Likely Increase (large?)