California Sportfishing Protection Alliance
Deltakeeper Chapter of Baykeeper

19 May 2006

Mr. Robert Schneider, Chairman
Ms. Pamela Creedon, Executive Officer
Mr. Bill Croyle
Ms. Wendy Cohen
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6144

VIA: Electronic Submission
Hardcopy to follow

RE: Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands

Dear Messrs Schneider, Croyle and Mesdames Creedon, Cohen,

The California Sportfishing Protection Alliance and the Deltakeeper Chapter of Baykeeper (hereinafter "CSPA/Deltakeeper") has reviewed the Central Valley Regional Water Quality Control Board's (hereinafter "Regional Board") tentative Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (hereinafter "Waiver") and submits the following comments. As the proposed Waiver, with several exceptions, is essentially an extension of the waiver adopted by the Regional Board in July 2003, we incorporate by reference the comments and exhibits submitted by the Environmental Coalition[1] to the Regional Board, State Water Resources Control Board (State Board) and the Sacramento Superior Court in 2002, 2003, 2004 and 2005. These comments are in the record of this proceeding.

When Sacramento Superior Court Judge Judy Hersher explained her rationale for upholding the 2003 Waiver, she stated that it was a new program that ought to be given an opportunity to succeed but that, if the matter came before her again and it wasn't working, her decision could be 180 degrees different. The dismal track record of the irrigated lands program over the last three years ensures that the facts and justification supporting renewal of the Waiver today are vastly different. Consideration of a renewed Waiver must now take into account that:

1. **Central Valley water quality is suffering from agricultural runoff pollution.** Three years of monitoring data collected by both the University of California Davis, under contract to the Regional Board, and the irrigated lands coalitions demonstrate that waterways are far more

[1] California Sportfishing Protection Alliance, Deltakeeper, San Francisco Baykeeper, Natural Resources Defense Council, Environment California and The Ocean Conservancy.

impaired by agricultural discharges than ever imagined. Virtually, every monitored waterbody violates water quality criteria; most are toxic to aquatic life.

2. **No compliance with simple monitoring, reporting requirements.** None of the coalitions have complied with the explicit monitoring and reporting requirements of the existing waiver. Two coalitions have failed to even secure approval of their monitoring plan and a third has long been operating on a "conditional approval." No coalition has established the number of monitoring sites required by the waiver, promptly reported exceedances of water quality standards, identified sources of violations, provided a list of implemented BMPs nor documented reductions in pollutant loading.

3. **No measurable progress.** Not a single coalition has documented the identification of a single source of pollution, specific management measures that have been implemented to address that pollution or quantification of the effectiveness of the management measures; i.e., load reductions the measures achieved.

4. **No enforcement against bad actors.** The Regional Board has failed to initiate a single enforcement action against any coalition or individual irrigated landowner despite repeated blatant failures to comply with the waiver's mandated requirements.

5. **No management plans required to prevent future pollution.** The Regional Board Executive Officer has failed to require coalitions to develop and submit Management Plans, as required where exceedances of water quality standards are identified.

6. **No identification of coalition members.** The coalitions have refused to provide their membership lists as required by the existing waiver. The coalitions' refusals have forced staff to expend vast amounts of limited resources in an effort to identify those not participating in the program. Unfortunately, the proposed Waiver backslides - allowing coalitions to simply provide parcel maps, in lieu of membership lists, so that Regional Board staff will continue to waste resources in finding out who is in and who is out. Indeed, since November 2005, some 1,800 hours using 20% of collect fees have been used in the effort to identify coalition members. In comparison to this nonsensical approach, the Central Coast Regional Board's irrigated lands waiver requires coalitions to provide membership lists.

7. **Insufficient resources lead to insufficient regulatory program.** The irrigated lands program is under funded and understaffed. The Regional Board's workplan identifies 34 personnel years (PYs) as minimally

necessary to implement the waiver. However, only 18.5 PYs are authorized. Only 12 PYs actually work on the waiver and only 5 PYs are funded by waiver fees.[2]

8. **No protections for groundwater.** The Waiver fails to address protection of vital groundwater resources despite the fact that irrigated agriculture has been identified as a source of groundwater pollution. The Central Coast Regional Board's irrigated lands waiver contains explicit requirements to prevent further pollution of groundwater.

9. **Irrigated Lands Program a failure.** Consequently, after three years of Waiver implementation, the program is unable to identify who is discharging pollutants, what pollutants are being discharged, who is participating in the program, who has or has not implemented best management practices (BMPs) or whether any reductions in pollutant loading or improvements in water quality have occurred. This information would have been readily available had the Regional Board not waived the requirement to file Reports of Waste Discharge.

The predictions of the environmental community that the irrigated lands program would fail dismally have come tragically true. After ignoring the problem for two decades, the Regional Board twisted an obscure provision in the Water Code reserved for de minimus discharges that don't threaten the state's waters into a rabbit-hole allowing the largest source of pollution to escape regulatory requirements applicable to virtually every other segment of society. The spectacular failures of the irrigated lands program now lead the Board to inexplicably propose to enlarge the rabbit hole and extend the Waiver for an additional five years.

In doing so, the Regional Board continues the transfer of the costs of pollution from polluter to the general public. It places Valley agricultural interests, representing less than 2.5% of the state's economy (including multipliers), above of the rights of 35 million California's who hold title to these rivers - two thirds of whom rely on these waters for all or part of their water supply. And it slaps the victims of agricultural pollution: an impoverished ecosystem and those who eat contaminated fish, swim in polluted waters or have to pay cleanup costs and higher utility fees, in the face.

Despite the glaring failures of the irrigated lands program, the Regional Board now has an historic opportunity to set a nationwide precedent in establishing a strong regulatory program for agricultural dischargers based sound science, accountability and measured pollution reductions rather than simply relinquishing development of all objective requirements to legally fictitious discharger coalitions that do not share the same goals as the Regional Board – or, for that matter, do not even share the same goals with many of the farms they purport to represent.

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[2] The use of fees collected for other programs (i.e., NPDES, 401 Certifications, etc.) for the irrigated lands program is blatantly illegal.

As drafted, the proposed Waiver's conditions will not reduce one ounce of pollution any time in the near future. Nothing in this new Waiver precludes agricultural dischargers from continuing the historic trend of discharging ever increasing volumes and toxicity of waste into the foreseeable future, undeterred by the vague and uncertain conditions contained in the proposed Waiver. At its core, the Waiver conditions perpetuate substantial discharges of billions of gallons of waste from thousands of farms to impaired waters throughout the Central Valley, causing irreversible and substantial harm to degraded and stressed ecosystems.

The proposed Waiver continues to fail to address the serious concerns raised by the environmental petitioners and notable experts over the years. It resorts to unsupported assertions without any effort to address or analyze the evidence in the administrative record. That evidence shows that the Waiver's conditions are illusory:

1. **Control requirements vague.** The Waiver's pollution control requirements are so vague they will ensure the waiver will fail to reduce pollution.

2. **Compliance requirements open-ended.** The Waiver does not require compliance with water quality standards in the foreseeable future.

3. **Pollution controls not required.** The Waiver's requirements do not establish any clear pollution control objectives such as estimating current pollution loadings and future loading reductions by which the success of a watershed coalition can be measured by the Regional Board, the public and the coalitions.

4. **No on-farm pollution control plans.** The absence of any requirement for farmers to maintain pollution control plans:
   a. Assures that individual farms will be unaware of their specific obligations and thus will not feel compelled to take personal responsibility for their share of pollution discharges;
   b. Compromises Regional Board oversight and enforcement; and
   c. Fails to assure that a coalition's overall plan is consistent with the efforts of its individual dischargers.

5. **Program efficacy undercut by insufficient fee base.** The inadequacy of the fee structure compromises Regional Board oversight and enforcement. Failure to require coalitions to demonstrate they have sufficient financial resources to comply with Waiver conditions undermines efforts to improve water quality.

6. **Accountability impossible with coalition-based structure.** Allowing unwieldy, legally-fictitious coalition groups to continue to play hide and seek with the actual responsible parties minimizes what little enforcement

powers the Regional Board has left itself and renders the individual waiver requirements largely meaningless and unenforceable.

7. **Monitoring program is insufficient.** The technical evidence in the record demonstrates that the monitoring program has not produced the information necessary to evaluate and oversee the coalition groups.

8. **Past staff experiences and common sense clearly show that the proposed program structure will not help the Regional Board protect water quality with limited resources.** Attempting to navigate coalition bureaucracies comprised for the most part of irrigation districts, commodity groups and other non-farmers in order to address problems arising from individual farms wastes valuable staff time and resources better spent on actual enforcement and regulatory duties.

9. **A new environmental document must be prepared.** The notion that the Regional Board's continuation of a negative declaration suffices to comply with CEQA for a decision approving tens of thousands of agricultural pollution discharges with no meaningful conditions – thereby virtually guaranteeing violations of standards for the foreseeable future – makes a mockery of that fundamental state law.

In addition, the Waiver contravenes numerous policies and binding provisions of the Water Code including: the Central Valley's Basin Plan, the state and federal antidegradation policies, the mandate that the boards shall require compliance with the conditions of a waiver, and the State Board's own guidance documents.

The Waiver, as currently proposed, does not serve the interests of California's 35 million residents. It arguably does not even serve the interests of the dischargers that it seeks to immunize from the Water Code's reporting and permitting requirements. It is certainly not fair to the tens of thousands of businesses and municipalities already regulated by the Regional Board.

Better alternatives are available, yet not included in the current proposal. In January 2004, at the Regional Board's request, staff developed and briefly circulated a prototype general order in an effort to illustrate how the provisions of the 2003 waiver could be incorporated into a permit structure. Unfortunately, it was not discussed further. Had the prototype general order been circulated concurrently with the proposed Wavier, the Board and the public would have had the opportunity to participate in a comparative dialogue concerning the effectiveness, enforceability and resource requirements of both approaches. Instead, all we have before us is the same smorgasbord of failure.

For all of these reasons, as elaborated more fully below, the Regional Board should reject the proposed Waiver. The Board should instead instruct staff to prepare a revised order requiring the issuance of general waste discharge requirements incorporating the conditions long recommended by the environmental community.

If the Board chooses to proceed with waivers, we insist they at least include the following conditions; many of which have been included in irrigated lands waivers adopted by other regional boards. These include:

1. All dischargers must file "notices of intent to comply" and reports of waste discharge.

2. Enrollees must prepare individual farm-based Pollution Prevention Plans.

3. Coalitions must develop management plans that address all water quality standards violations.

4. Specific timelines, performance measures and yardsticks, critical for measuring compliance and success, must be included as conditions.

5. Enrollees must comply with set requirements for discharges to groundwater, not just surface water.

6. The monitoring component must include independent third party monitoring.

7. A new environmental document must be prepared, circulated and considered for any renewal of the waiver.

8. Any new waiver must sunset upon completion of the EIR that is presently being developed.

Our major concerns are:

I. THE BOARD'S FINDINGS THAT THE WAIVER IS IN THE PUBLIC INTEREST IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE: THE BOARDS HAVE NO EVIDENCE AS TO WHAT, IF ANY, ADDITIONAL POLLUTION CONTROL MEASURES THE DISCHARGER COALITIONS WILL APPLY, WHEN AND WHERE THEY WOULD APPLY, OR WHETHER THEY WOULD BE EFFECTIVE
   - A. The Evidence Overwhelmingly Demonstrates That Discharges From Agriculture Have Violated Water Quality Objectives And Will Do So Again In The Future Pursuant To The Conditions of The Waiver
   - B. The Evidence Graphically Establishes That Coalitions Have Failed To Comply With Waiver Conditions
   - C. The Evidence Establishes The Regional Board Cannot or Will not Enforce Fundamental Waiver Conditions
   - D. The Evidence Shows The Waiver's Monitoring Program Is Deficient

E. Waiving Substantial Waste Discharges That Violate Water Quality Objectives Is Not In The Public Interest And Inconsistent With The Intent Of The Legislature
F. Waiving WDRs For Discharges of Agricultural Wastes That Have Been Identified As Causing Or Contributing To the Further Decline Of The Sacramento-San Joaquin Delta And California's Beleaguered Fisheries Cannot Be In The Public Interest
G. The Waiver's Conditions Violate the Water Code By Exempting Agriculture From Having To Comply With Water Quality Objectives For The Foreseeable Future
1. The Waiver Cannot Ensure Attainment Of Water Quality Standards
2. The Waiver's De Facto Time Schedule Is Illegal And Cannot Be In The Public Interest
H. The Waiver Conditions Do Not Assure Pollution Reductions By Individual Farms
1. Farm-Specific Pollution Prevention Plans Are Needed To Assure Reductions In Pollution Loadings
2. All Coalition Members Must Affirmatively Opt-In To A Coalition And Provide Relevant Information
3. Adequate Fees Are Essential To The Success Of Any Sustainable Program Addressing Agricultural Pollution Discharges
I. The Board Cannot Assume That A Program That Fails To Reach Out To Individual Dischargers Will Be Effective Because The Boards Have Not Gathered Any Evidence About Who, What, Where Or When Farming Discharges Occur
J. In Order For Coalitions To Be Successful, They Must Be Subject To Clear Conditions, Goals And Rational Checks & Balances
1. The Agricultural Discharge Program Must Limit The Size Of Coalitions
2. The Agricultural Discharge Program Must Establish A Clear Deadline For All Dischargers To Comply With Water Quality Objectives
3. Coalitions Must Be Obligated Each Year To Determine Their Existing Loadings And Estimate The Next Year's Reductions
4. Regional Board Review And Approval Of Key Milestones Must Be Included In The Program
5. The Current Conditions, Numerous Assertions In The Proposed Waiver Rely on Assumptions And Conjecture Rather Than The Weight Of The Evidence
II. THE PROPOSED WAIVER MUST ADDRESS INCREASING POLLUTION OF GROUNDWATER FROM AGRICULTURAL ACTIVITIES
III. THE PROPOSED WAIVER IS INCONSISTENT WITH THE REGIONAL BOARD'S BASIN PLAN AND THE STATE AND FEDERAL ANTIDEGRADATION POLICIES

1. The Regional Board's Finding That The Waiver Is Consistent With State Board Resolution No. 68-16 Is Contrary To Law, Not Supported By The Weight Of The Evidence And Inconsistent With Other Findings
    a. Neither the Dischargers Nor the Regional Board Have Demonstrated That Agricultural Discharges That Add Concentrations of Pollutants Well Above Natural Background Levels are to the Maximum Benefit of the Public or Will Comply With Objectives
    b. The Waiver Violates The High Quality Waters Policy That WDRs Be Issued to Discharges Triggering the Policy's Mandates
    c. The Regional Board Does Not Know What Control Measures Are or May Be Implemented by Agricultural Discharges Now or in the Future and Has No Evidence That "Best Practicable Treatment or Control" is Required by the Waiver
2. The Waiver is Inconsistent with the Basin Plan and Not Supported by the Weight of Evidence
3. The Regional Board Failed to Consider the Federal Antidegradation Policy
4. The Waiver is Inconsistent with Nonpoint Source Pollution Control Program Policy (NPS)

IV. THE REGIONAL BOARD'S NEGATIVE DECLARATION VIOLATES CEQA AND IS NOT BASED ON SUBSTANTIAL EVIDENCE

V. THE PROPOSED WAIVER VIOLATES STATE AND FEDERAL ENDANGERED SPECIES ACTS

Our specific comments follow:

I. THE BOARD'S FINDINGS THAT THE WAIVER IS IN THE PUBLIC INTEREST IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE: THE BOARDS HAVE NO EVIDENCE AS TO WHAT, IF ANY, ADDITIONAL POLLUTION CONTROL MEASURES THE DISCHARGER COALITIONS WILL APPLY, WHEN AND WHERE THEY WOULD APPLY, OR WHETHER THEY WOULD BE EFFECTIVE

The regional and state boards must apply a weight of the evidence standard when making findings under the Porter-Cologne Act. Water Code § 13330(d). "A decision which is contrary to the weight of the evidence is one which is contrary to the preponderance of the evidence. The purpose for which a court normally weighs the evidence is to determine which way it preponderates on a given issue." *Chamberlain v. Ventura County Civil Serv. Comm'n* (1977) 69 Cal.App.3d 362, 368. *See Marina County Water District v. State Water Res. Control Bd.*, (1984) 163 Cal.App.3d. 132, 138. As the Court of Appeal in *Chamberlain* explained:

> The term simply means what it says, viz., that *the evidence on one side outweighs, preponderates over*, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. . . . 'In civil cases a preponderance of evidence is all that is required, and by a "preponderance of evidence" is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

69 Cal.App.3d at 369 (emphasis supplied). This is in contrast to the "substantial evidence" test, which authorizes an agency to base its findings on any substantial evidence in light of the whole the record, whether that evidence preponderates or not.

Not one of the Regional Board's principle conclusions is supported by any evidence, never mind the weight of the evidence. The conditions adopted by the Regional Board largely ignore the evidence accumulated in the record and the substantial evidentiary gaps underlying many of the findings and conclusions.

A. The Evidence Overwhelmingly Demonstrates That Discharges From Agriculture Have Violated Water Quality Objectives And Will Do So Again In The Future Pursuant To The Conditions of The Waiver

Monitoring data in Regional Board files overwhelmingly refute the coalition's reckless claims that violations of water quality standards are relatively minor. Three years of monitoring by U.C. Davis, under contract to the Regional Board, and coalitions have established that virtually every agriculturally dominated waterbody violates water quality objectives. For example, Phase I monitoring of 24 Central Valley agricultural drains in 2003 found that 100% of the sites violated water quality standards. Limited toxicity testing, not even addressing sediment quality or impact on algal species, established that 30% of the sites were toxic to aquatic life. Phase II monitoring of 30 agricultural drains in 2004 revealed that 97% of the sites violated water quality standards and 80% were toxic. In a parallel and cooperative effort with Regional Board staff, U.C. Berkeley's Don Weston found acute sediment toxicity in major rivers, 8 of 19 creeks and 7 of 17 irrigation canals.

The more limited monitoring by coalitions of cherry-picked sites found similar results. For example, monitoring by the

- Eastside San Joaquin River Coalition during 2004 discovered that 100% of the sites violated standards and half were toxic. Eastside Coalition monitoring during 2005 identified some 229 exceedance of water quality standard in 13 monitored waterways and toxicity was found at more than half of the sites.
- San Joaquin & Delta Coalition monitoring during 2005 identified 176 violations: all sites monitored for all required parameters exceeded standards and all but one experienced toxicity.

- Westside San Joaquin River Coalition found that 100% of the sites violated water quality standards and almost 60% exhibited toxicity.
- The Rice Commission's initial sampling revealed that all of the monitored sites exhibited toxicity.
- Seven of the eight sites initially sampled by the South San Joaquin Coalition also showed toxicity.

The proposed Waiver recognizes agricultural discharges have been violating water quality objectives for many years yet provides no evidence as to how this program will stop violations. However, the Waiver implies that, as of the issuance of the 2003 Waiver, those violations have miraculously begun to dissipate. Nothing on the face of the Waiver or in the evidentiary record suggests that agriculture's anticipated violations of objectives has abated during the past three years or will abate during the proposed five-year life of the renewed Waiver. If anything, the record indicates that problems may be becoming more severe.

Essentially, the Waiver invites all Central Valley farmers to join coalitions and continue discharging "soil, silt, sand, clay, rock; inorganic materials (such as metals, salts, boron, selenium, potassium, nitrogen, etc.); organic materials (such as organic pesticides)" without discernable or monitored limits and without providing any information regarding quantities, rates or concentration of pollution. There is nothing in the proposed Waiver, as a practical matter, to prevent every single farmer in the Central Valley from increasing the volume, concentration, and toxicity of their pollution discharges because there is no realistic possibility of the Regional Board, or anyone else, applying the Waiver's conditions to prevent such increases.

B. The Evidence Establishes That Coalitions Have Failed To Comply With Waiver Conditions

The entire concept of employing a voluntary coalition-based approach to address discharges from irrigated lands is predicated on the assumption that the coalitions will comply with the explicit conditions of the adopted Waiver. The Regional Board files contain overwhelming evidence conclusively establishing that the coalitions have failed comply with the most fundamental Waiver conditions.

The extent of coalition noncompliance is eloquently described in Board staff's Ambient Monitoring Plan (AMR) reviews in 2005 and follow-up letters, staff report for the joint State and Regional Board update hearing in July 2005, the AMR reviews for 2006, executive officer monthly reports, and various other documents.

The 2003 Waiver's Monitoring and Reporting Program (MRP) directed coalitions to provide drainage schematics or their watersheds and yearly monitor all major drainages, 20% of intermediate drainages on a rotating basis and minor drainages where downstream exceedances are observed. The reality is that every coalition has monitored only a small fraction of the required sites and, with one possible exception, ignored

requirements to provide detailed drainage maps that met the explicit requirements of the Waiver.

The MRP required coalitions to develop and submit monitoring plans. Two of the seven coalitions have failed to develop approvable monitoring plans; one is operating under a "conditional approval (in the hopes that it will comply someday) and all have failed to monitor for all of the required parameters. The MRP required coalitions to: 1) promptly report water quality standard exceedances and conduct follow-up monitoring; 2) comply with explicit requirements to submit specific information in the Watershed Evaluation Reports, Communication Reports, Exceedance Reports, Evaluation Reports and develop Implementation Plans and 3) to inventory, evaluate and report presently used management practices and propose and evaluate potential new management practices.

Regional Board files bulge with correspondence documenting the coalitions' egregious failure to follow those requirements. For example, reporting of exceedances of water quality criteria has been highly sporadic and numerous exceedances have gone unreported. The MRP specifically requires a Communication Report and an Evaluation Report, containing specific information, to be submitted within 45 days of the filing of an Exceedance Report. These requirements have been ignored. A Watershed Evaluation Report was to have been submitted in April 2004 that included, among other things, "[m]aps of watershed area showing irrigated lands (including crop type), **drainage and discharge locations**. Maps or discussion shall provide details of the watershed showing **which fields are served by each drain**." This required information, crucial for tracking down and identifying sources of pollution, has never been provided any coalition. Coalitions were required to identify and track the implementation of existing and potential management practices within their watersheds. Yet, Regional Board staff still does not have an inventory of which management measures and their locations that are actually being implemented or considered for implementation.

The 2003 Waiver required coalitions to maintain a membership with information concerning each participant who knowingly elected to be a member of the coalition and to furnish those lists when requested. No coalition has ever provided a membership list.

California Water Code § 13269(e) states "[t]he regional boards and the state board **shall** require compliance with the conditions pursuant to which waivers are granted under this section. That coalitions have blatantly failed to comply with the conditions of the Waiver is indisputable.

C. The Evidence Establishes The Regional Board Cannot or Will not Enforce Fundamental Waiver Conditions

As previously noted, Porter-Cologne requires the Regional Board to require compliance with the conditions of the Waiver. Unfortunately, the Regional Board has been unable or unwilling to hold coalitions accountable for their intransigence and noncompliance. Despite the fact Board staff has issued numerous correspondence notifying coalitions of their repeated noncompliance with Waiver conditions, **the**

Regional Board has never initiated a single enforcement action against a coalition or discharger.

Perhaps, nothing is more illustrative of the utter failure of the irrigated lands program and the inability and unwillingness of the Board to enforce Waiver conditions than the furor that surrounded the simple request for coalitions to provide membership lists so that staff could identify those who are not participating in the program. The 2003 Waiver expressly requires coalitions to provide membership lists upon request. After more than a year, then Regional Board Executive Officer Thomas Pinkos issued a 26 August 2005 letter to the coalitions requesting their membership document. In a Modesto irrigated lands program meeting, the coalitions publicly denounced the request in scathing terms to Board Chairman Robert Schneider and Board Member Al Brizard; saying that the request was issued in bad faith, was a fundamental breach of trust and would sabotage their working relationship with the Board. They also accused staff of trying to destroy the program, not wanting to work with the coalitions and being callous, tactless and insulting. Disappointingly, Chairman Schnieder and Mr. Brizard publicly chastised staff for requesting the lists, stated that they would insist that the request be rescinded and sent Mr. Pinkos a 30 August 2005 letter asking him to withdraw the request.

On 14 September 2005, Chairman Schneider and Mr. Brizard held a private meeting with coalition leaders, that the public and the Board's Executive Officer were expressly prohibited from attending. Two days later, Mr. Pinkos reaffirmed his request for membership lists in a letter to the coalitions. Shortly after, Mr. Pinkos retired as Executive Officer. The new Executive Officer then directed staff to exclude requirements in the proposed Waiver requiring submittal of membership – or for that matter, any requirement that coalitions needed to even maintain such documents.

The preceding example is not an isolated situation. Several Board Members have engaged in closed-door meetings and ex parte discussions with coalition representatives and invited them to bypass staff and bring their concerns directly to the Board. As a result, coalitions have frequently voiced their displeasures to Board Members who, in turn, have intervened on their behalf and directed or urged staff to back off. After three years, thousands and thousands of farmers are still hiding and the coalitions continue to play the shell game of "hide the farmer."

Both the 2003 Waiver and proposed Waiver explicitly provide that upon receipt of an Exceedance Report, the Executive Officer may require coalitions to prepare and submit a Management Plan explaining how the reported exceedances will be addressed. **Despite thousands of identified water quality exceedances, the Executive Officer has almost never requested that a coalition submit a Management Plan (with only two exceptions).** [3] The Management Plans are the critical step in actually preventing pollution

[3] The exceptions are: 1) staff concluded that the Feather River Diazinon TMDL Implementation Plan was also a Management Plan pursuant to the Waiver and 2) staff required the Sacramento Valley Coalition to prepare a Management Plan to prevent the coalition's abandonment of several monitoring sites near Woodland where serious toxicity had been identified.

after pollution problems are identified. The Management Plan requires: 1) evaluation of the effectiveness of existing BMPs, 2) identification and implementation of additional actions or BMPs to achieve standards, 3) a description of how the new actions/BMPs will be evaluated, 4) establishment of a waste specific monitoring plan and 5) identification of the individuals who will implement, assess and evaluate the Management Plan.

The proposed Waiver only provides that the Executive Officer "may" require Management Plans. Even should the Executive Officer direct coalitions to prepare Management Plans; there is no simple, speedy remedy at hand to ensure compliance.

Due to the fact the coalitions are legally fictitious entities, the Board's traditional toolbox of Administrative Civil Liabilities, Cleanup & Abatement and Cease & Desist Orders is unavailable. These enforcement tools can only be used against individuals actually discharging wastes. The lack of membership list makes enforcement against individual difficult, if not impossible. And even if the identities of individual dischargers are known, enforcement is unlikely without edge-of-field monitoring to establish responsibility for violations. Individual dischargers have no responsibility to develop Management Plans under the Waiver. The Regional Board's only effective regulatory enforcement tool is rescission of a coalition's waiver. Past experience suggests this is highly unlikely. The Regional Board has never taken the initial step of rescinding approval for a single coalition despite rampant violations.

D. The Evidence Shows The Waiver's Monitoring Program Is Deficient

The Waiver continues the monitoring and reporting requirements adopted in July 2003 and slightly modified in August 2005. Revised monitoring and reporting requirements are expected later this year. Rather than objectively analyze the Waiver's monitoring conditions, the proposed Waiver simply ignores the technical evidence included in the administrative record demonstrating that the existing monitoring requirements are entirely deficient. Regional board staff has testified that, in their best professional judgment, the monitoring program adopted by the Board in July 2003 was less than what would be required to provide the data and information necessary to implement and enforce the Waiver's conditions. *See Testimony of Bill Croyle and Shakoora Azimi, transcripts of April 24 and July 10/11, 2003 hearing*. Reputable scientists submitted technical comments unequivocally concluding that the monitoring proposal ultimately adopted by the Regional Board was insufficient to achieve the stated goals. *See, e.g.* Comments of Dr. G. Fred Lee, Dr. Susan Kegley, et al; Environmental Petitioners' Supplemental Petition For SWRCB/OCC File A-1596(f), which is attached to these comments. In order to understand the issues at stake in this proposed Waive, Board members will need to review the synopsis of expert comments submitted during consideration of the 2003 waiver and attached to these comments.

During the 2003 Waiver proceeding, Regional Board staff proposed one monitoring site for approximately every eight square miles of irritated lands because they believe that was the minimal number of sites required to implement the Waiver and protect surface waters in the Central Valley. Following heated objections by the

agricultural community, the Board directed staff to significantly reduce the number of monitoring sites. The result, adopted by the Board, was that coalitions were required to monitor all of their major drainages, 20% of their immediate drainages and minor drainages where downstream exceedances are observed. Unfortunately, none of the coalitions have even complied with these modest, scaled-down monitoring requirements. For example, the Regional Board's 17 May 2006 review of the San Joaquin Delta Coalition's 2005 monitoring report found that sampling represents only 11.7% of the irrigated acres in the Coalition area. Most of the coalitions have cherry picked sites and included mainstream 303(d) listed waterbodies despite clear language in the waiver prohibiting monitoring of main stem waterways. The purpose of the monitoring program was to monitor agricultural drains and smaller streams, not large waterbodies where maximum dilution has already occurred. State programs monitoring major rivers already exist.

It is important to focus on drains and smaller tributaries because: 1) less information has been collected on these smaller waterbodies; 2) smaller waterway are disproportionally important as their increased energy inputs, higher invertebrate production, spawning, nursery and rearing habitat and lower discharge make these smaller aquatic systems vital to the overall health of the aquatic system and 3) larval fish and their food supplies are particularly vulnerable to adverse impacts of pesticides and other pollutants. Monitoring must be conducted at the basin, drain and field level in order to reliably evaluate the impacts of irrigated agriculture on receiving water. Monitoring at the field level is crucial for evaluating BMPs and determining if recommended management practices are being implemented properly or if benefits from adopted practices are actually being realized.

As of this writing, the Eastside San Joaquin Coalition and the San Joaquin Delta Coalition have failed to secure approval of their monitoring programs and the Sacramento Valley Coalition is operating on a "conditional approval" in the hopes that someday they will submit an approvable monitoring program.

A number of coalitions have avoided monitoring known hot spots. For example, the Sacramento Valley Coalition has never monitored the Main Canal or its laterals in Butte County despite the fact that some of the highest recordings of diazinon concentrations in the literature have been recorded there. Another example is the South San Joaquin Coalition that monitored clean water being conveyed to the fields but not polluted tailwater flowing from the fields. None of the coalitions have provided an acceptable schematic drawing of the waterways and conveyance systems within coalitions boundaries. Few of the coalitions have consistently followed up with additional monitoring where toxicity is identified as required by the existing waiver. None of the coalitions have consistently reported exceedances of water quality standards as required. None have pursued monitoring upstream to identify the specific sources of the exceedances. And none have identified or evaluated management measures that are currently implemented or proposed and implemented new management measures where exceedances have been identified.

Perhaps the most alarming evidence of coalition monitoring inadequacies lies in the comparison between the two years of monitoring data from agricultural drainages collected by U.C. Davis under contract to the Regional Board and the monitoring data collected by the coalitions. The U.C. Davis data reveals that virtually all monitored sites exceeded water quality standards and most sites experienced toxicity to aquatic life. The coalition monitoring data (with the exception of the Westside San Joaquin Coalition), while revealing numerous exceedances and frequent toxicity is far, far less rigorous.

E. Waiving Substantial Waste Discharges That Violate Water Quality Objectives Is Not In The Public Interest And Inconsistent With The Intent Of The Legislature

Because it is clear that violations of objectives will continue unabated for the life of the Waiver, there can be no serious dispute that the conditions embodied in the Waiver are adverse to the public interest. The bottom line public interest manifest in the Porter-Cologne Act is the achievement of water quality objectives. It cannot be seriously argued any waiver for substantial waste discharges that are causing or contributing to violations of water quality standards over vast areas of the Central Valley is not fundamentally at odds with the public interest.

The Legislature did not intend for the boards to waive reporting and permitting for substantial discharges of waste, even when those discharges were from farms: "Although farmers as well as other persons are theoretically required . . . to file reports of waste discharges with the regional boards, it has not been the general practice of the regional boards to request such reports or to issue waste discharge requirements covering agricultural operations and other land use, except in cases such as feeder lots or dairies, involving *substantial discharges of waste*." Report of the Assembly Committee on Water on the Porter-Cologne Act, Journal of the California Assembly ("Assembly Journal") 2679 (Reg. Sess. 1969), quoted in memorandum from Office of the Chief Counsel, SWRCB, to William R. Attwater, Chief Counsel ("Waiver Guidance") (Oct. 5, 1982), p. 3. Obviously, discharges of toxic and other pollutants from some seven million acres of irrigated farmland that are violating water quality objectives are, by any rational measure, "substantial."

In addition, the legislative history for Section 13269 shows that the Legislature intended waivers to be limited to situations where "reasonable practices are observed." Final Report of the Study Panel to the California State Water Resources Control Board, March 1969, Assembly Journal, p. 57 (quoted by Waiver Guidance, p. 4).[4] Although the coalitions have never submitted any substantial evidence of existing BMPs, despite massive exceedances of water quality standards, and the Regional Board has never gathered an inventory of currently applied BMPs, whatever those practices might be, they clearly are not reasonable, having resulted in the consistent violation of numerous water quality objectives for the past decade or more. Given the facts at hand, it is clear that the

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[4] The Assembly Report goes on to emphasize that, even when addressing agricultural discharges, Section 13269 "is not intended to limit the existing authority of the regional boards to issue waste discharge requirements that are needed to protect the quality of waters of the state." Assembly Journal 2679.

Legislature did not intend for waivers to supplant the primary regulatory mechanisms they established in Porter-Cologne – reports of waste discharge and WDRs – for agricultural discharges that are causing or threatening to cause violations of objectives.[5]

Rather surprisingly, the proposed Waiver continues to ignore the State Board's own Waiver Guidance limiting the waiver authority to de minimis discharges that do not require substantive pollution control conditions or violate water quality objectives. The Waiver Guidance, prepared by the State Board's Office of Chief Counsel (indeed written by the current Chief Counsel, Craig Wilson), carefully analyzes the Legislature's intent in enacting Section 13269. The Waiver Guidance concludes, "If a Regional Board has evidence that a discharge does not comply with the applicable basin plan, the Board generally cannot make the required finding that a waiver 'is not against the public interest.'" Waiver Guidance, p. 1. Although agricultural discharges and domestic waste discharges are the two possible exceptions to that general rule, the Waiver Guidance limits those exceptions to discharges "which are adequately regulated by another public agency. . . ." *Id*. The proposed Waiver ignores that clear guidance because agricultural discharges are causing widespread and alarming violations of water quality objectives for vast expanses of Central Valley waters, the guidance clearly mandates that a waiver is not authorized and WDRs and/or prohibitions instead must be issued. Moreover, no other agency besides the Regional Board has the authority to regulate all of agriculture's pollution discharges to the Central Valley's waters.[6] As the State Board's Waiver Guidance makes clear, under such circumstances, the Legislature had no intention for the boards to waive reports of waste discharge and WDRs for such substantial waste discharges.[7]

The proposed Waiver acknowledges the clear public interest standard provided by water quality objectives but simply ignores the numerous studies documenting the deleterious impacts of current agricultural discharges on the water quality of the Central Valley. In the decision upholding the Regional Board's July 2003 waiver, the State Board stated "[w]e expect that where the Regional Board determines, based on the monitoring data it receives, that management practices are not effective to protect water quality, it will issue waste discharge requirements." Certainly, waiving regulations

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[5] Nor is it surprising that, in 1969, the Legislature identified agriculture as an insubstantial discharger. As the Regional Board staff has explained, no deleterious impacts from agriculture were being seen in monitoring data collected during the 1970's and early 1980s (at the time of the 1982 waiver).

[6] Even assuming the Department of Pesticide Regulation may exercise some role in preventing discharges of certain pesticides, that agency cannot address the numerous other pollutants discharged by agriculture. And, with regard to pesticide discharges, DPR's programs do little, if anything, to protect water quality from farms' pesticide discharges. Indeed, because the only pesticide programs that have been in place for the last few decades are those implemented by DPR, it is apparent that DPR's program, by authorizing the use of highly toxic pesticides, facilitates violations of water quality objectives rather than prevents them.

[7] The Waiver Guidance also states that where the boards find it necessary to include conditions requiring compliance with objectives and monitoring, a waiver is inappropriate: "As a general rule, . . . if a Regional Board is sufficiently concerned about certain constituents in a discharge to condition a waiver upon compliance with basin plan limits and to require monitoring to ensure compliance, a waiver is inappropriate. Rather the discharge should be regulated under waste discharge requirements." Waiver Guidance, p. 7.

protecting contamination of the drinking water source of over twenty million Californians does not meet anyone's definition of public interest. The public's beneficial uses of these waters – from recreational to drinking water to living in a healthy environment are violated in the proposed Waiver.

The Regional Board already has ample data documenting that currently implemented BMPs are not effective to protect water quality. The farming community has steadfastly claimed that they are already implementing management practices, albeit they have not specified what those measures are. The monitoring data gathered by U.C. Davis and the coalitions conclusively establish that, whatever those BMPs might be, they are not working to protect water quality. Consequently, general WDRs are the appropriate regulatory mechanism, including enforceable and meaningful conditions.

F. Waiving WDRs For Discharges of Agricultural Wastes That Have Been Identified As Causing Or Contributing To the Further Decline Of The Sacramento-San Joaquin Delta And California's Beleaguered Fisheries Cannot Be In The Public Interest

It is undeniably puzzling that a proposal to waive waste discharge requirements for the largest source of pollutants identified as impairing Central Valley waterways is inexplicably silent in regards to the inhabitants of those waters.

Central Valley waterways are crucial habitat and migration corridors for a number species protected under federal and state endangered species acts. Species include: Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha* - federal and state listed as threatened); Central Valley steelhead (*Oncorhynchus mykiss* -federal listed as threatened); Delta smelt (*Hypomesus transpacificus* - federal and state listed as threatened); Sacramento splittail (*Pogonichthys macrolepidotus* - California species of concern); winter-run Chinook salmon (*Oncorhynchus tshawytscha* - federal and state listed as endangered); fall/late-fall-run Chinook salmon is both a federal and California species of concern; Green sturgeon (*Acipenser medirostris*) is federally listed as threatened and is a California species of concern and longfin smelt (*Spirinchus thaleichths*), hardhead (*Mylopharodon conocephalus*) and Sacramento perch (*Archoplites interruptus)* are identified as California species of concern. Further, a number of non-special status species, including striped bass, largemouth bass, smallmouth bass, catfish and panfish are found throughout the Valley.

The Delta's pelagic fisheries are experiencing catastrophic collapse. The California Department of Fish and Game's Delta smelt index, a measure of relative abundance, was only 26 in last fall's mid-water trawl survey compared to 899 in 1995 (the lowest in the 43 years of record). Longfin smelt abundance index was 129, the second lowest on record (it was 81,790 in 1967). The striped bass index was 121 (it was 20,038 in 1967). The Threadfin shad population index was 2866 (as recently as 2001, it was 14,402). Adult white sturgeon numbers have dropped from an estimated 144,000 in 1998 to a 50-year low of about 10,000 in 2005. Estuary phytoplankton production has

decreased about one order of magnitude while zooplankton production is down one to two orders of magnitude.

The special team of federal and state scientists investigating the pelagic organism decline in the Delta has identified toxic pollutants as one of the three major suspected causes of the collapse of the pelagic fishery. For example, recent U.C. Davis studies of Delta species such as striped bass found all of the fish tested had gastric inflammations, parasitic infestations, liver lesions, infections or a combination. These findings are consistent with earlier work that found nerve damage and developmental abnormalities among newborn bass. Scientists attribute these problems to a chemical stew of pesticides, herbicides and cancer-causing elements in Delta waterways, which in addition to fish habitat serve as drinking water for two-thirds of Californians. Indeed, every sample of Delta water collected by U.C. Davis' Aquatic Toxicology Laboratory, as part of its role in evaluating the pelagic fish decline, was found to be toxic to test species. Pesticides have also been found in fish tissue, placing subsistence-fishing communities at risk.

The Little Hoover Commission found last fall in its CALFED analysis that "*The Delta is so critical to California's future that no water policy will be successful if the estuary is not restored*." And yet, the Regional Board is again proposing to renew a grossly non-protective Waiver that hasn't been complied with, hasn't been enforced, hasn't resulted in a single BMP and hasn't reduced a single pound of pollution. In fact, it is just as likely that pollution has increase over the three years of the Waiver. No reasonable, rational human being can conclude that such an abandonment of common sense and fundamental ethical responsibility can be in the public interest.

G. The Waiver's Conditions Violate the Water Code By Exempting Agriculture From Having To Comply With Water Quality Objectives For The Foreseeable Future

The Waiver authorizes huge quantities of impairing pollution discharges without any clear date by which individual dischargers must abate such pollution and illegally waives compliance with water quality objectives, as well as the reporting and permitting requirements of Porter-Cologne. CSPA/DELTAKEEPER does not believe the Regional Board has authority pursuant to Section 13269 to waive compliance with objectives, either for several years, several hours or in perpetuity. The waiver of compliance with objectives, even if only for the duration of the waiver, is beyond the boards' authority.

1. The Waiver Cannot Ensure Attainment Of Water Quality Standards

The Waiver contains only a few directives that, at first blush, appear to touch on actual pollution reductions or resemble prohibitions. Read in context, both provisions illegally authorize ongoing violations of water quality objectives and fail to comply with Section 13269(e)'s mandate that "[t]he regional boards and the state board *shall require compliance with conditions pursuant to which waivers are granted. . . .*" First, the

Waiver generally states "The Conditional Waiver is consistent with applicable Basin Plans because it requires compliance with applicable water quality standards, as defined in Attachment A, and requires the prevention of nuisance. It requires implementation of a monitoring and reporting program to determine effects on water quality and implementation of management practices to comply with applicable water quality standards." Waiver, ¶ 20. At first impression, the provision would appear to have some application in the real world. However, the Waiver's findings then state that compliance with that directive need not occur at any specified time. The Waiver states:

> **Neither the Water Code nor Resolution No. 68-16 requires instantaneous compliance with applicable water quality standards.** Discharges from irrigated lands can and/or do contain wastes, as defined in Water Code section 13050, that could affect the quality of the waters of the State. The Conditional Waiver establishes an iterative process that requires Dischargers to evaluate and then implement and/or improve management practices in a timely manner to reduce wastes in discharges where it is determined that discharges from irrigated lands have caused or contributed to exceedances of applicable water quality standards. The Conditional Waiver's conditions that require evaluation and implementation of management practices will result over time in best practicable treatment or control to assure that pollution and nuisance will not occur and that the highest water quality is achieved. Changes in water quality that may occur as a result of the Conditional Waiver will be to improve, over time, the quality of the waters, not to cause further degradation. Thus, any change in water quality will be consistent with maximum benefit to the people of the State and will not unreasonably affect beneficial uses."

Waiver, ¶ 24 (emphasis added). This sophistic omelet of distortion and half-truth obviates any necessity of actual compliance. There are no timelines, compliance yardsticks or performance goals anywhere in the Waiver. No description is include for what, if any, management practices would be available or potential able to accomplish reductions in pollutant loading. The apparent directive for individual members of a coalition to comply with standards has little if any meaning; such compliance is not being required within the life of the waiver or at any specific time in the future. This empty verbiage simply fails to require anyone to do anything; as conclusively proved by the absence of the preparation of Management Plans or implementation of BMPs or the identification of sources of pollution despite the documentation of literally thousands of violations of water quality standards since the waiver was adopted in 2003. Simply claiming that there is an iterative process or that the Executive Officer may require a management plan to identify and evaluate potential management practices, identify additional actions, establish a schedule of implementation and the means of evaluating effectiveness means nothing in light of the Executive Officer's steadfast refusal to do so because of political pressure over the last three years.

Second, the Waiver also provides that "Individual Dischargers of Coalition Groups shall not cause new discharges of wastes from irrigated lands that impair surface water quality. Individual Dischargers of Coalition Groups shall not increase discharges of waste or add new wastes that impair surface waters not previously discharged by the individual Discharger." Waiver, Att. B, ¶ 9. Because the Waiver does not require any monitoring or reporting that would conceivably allow Regional Board staff or anyone else to enforce this requirement, this condition has no practical meaning in the real world and is simply a paper tiger. Likewise, the task is made even more infeasible by limiting it to discharges that impair surface water quality, a condition that, without requisite reporting and/or monitoring, is a meaningless and unenforceable admonition.

At a minimum, the discharge conditions must include provisions to assure that the Regional Board has the ability to require compliance with water quality objectives and that meaningfully prohibit new and increased pollution discharges. Environmental petitioners have suggested realistic conditions that would provide a basis for such enforcement. Recommendation have included farm specific pollution prevention plans that would provide information regarding past and current levels of discharges as well as edge of field monitoring for a statistically significant number of farms within a coalition. From this information, current management practice performance could be extrapolated for similarly situated farms. Likewise, CSPA/Deltakeeper has advocated for specific timelines of 10 years, or less where a TMDL requires it, for coalitions to achieve water quality objectives, a compliance schedule that could be legally implemented through WDR(s).

Any claim that the conditions of the Waiver will attain water quality standards is undercut by the admission that "[t]he Central Valley Water Board acknowledges that the Coalition Groups are not responsible for enforcing the terms and conditions of this Conditional Waiver or the Water Code." Waiver, ¶ 14. The coalitions are legally fictitious entities that are immune from Regional Board enforcement. Administrative Civil Liability, Cleanup and Abatement or Cease and Desist orders cannot be employed against coalitions. Only actual dischargers can be held accountable to Waiver conditions. The coalitions' success in playing "hide the farmer" over the last three years has ensured that the Regional Board has been unable to obtain compliance with the existing waiver's minimal conditions. It is fundamentally dishonest to suggest that Waiver conditions will ensure attainment of water quality standards where the Regional Board lacks an effective enforcement mechanism other than the draconian and politically difficult option of terminating a waiver.

The paucity of the claim is further illustrated by the Waiver's rationale for not adopting WDRs. The Waiver states "It is not appropriate at this time to adopt individual WDRs because although there is information that discharges of waste from irrigated lands have impaired waters of the State, information is not generally available concerning the specific locations of impairments, specific causes, specific types of waste, and specific management practices that could reduce impairments and improve and protect water quality." Waiver, ¶ 33. It is simply disingenuous to claim that WDRs are premature because of a lack of information where the refusal to require Reports of Waste

Discharge ensures that the information necessary to attain water quality standards will not be provided in the foreseeable future.

2. The Waiver's De Facto Open-ended Time Schedule Is Illegal And Cannot Be In The Public Interest

The Waiver states "[t]he Central Valley Board does not expect that all applicable water quality standards will be achieved in all water of the state in the Central Valley Region within the term of this Order. The conditions of the Conditional Waiver actions that will lead to achieving applicable water quality standards." Waiver, ¶ 50. It would be more accurate to say that, given the lack of specific implementation and performance requirements in the Waiver, it will be surprising if any water quality standard is achieved. Further, since the monitoring program doesn't require sampling for the spectrum of pollutants found in agricultural discharges, the Waiver, by design, cannot lead to achieving a number of the applicable water quality standards. We also note that the 2003 Waiver had a goal of achieving compliance with water quality "objectives within 10 years." See Waiver, ¶ 36. The proposed Waiver backslides from the previous Waiver.

In any case, the proposed Waiver is little more than an elaborate open-ended time schedule that waives compliance with water quality objectives by including an open-ended compliance period for every individual discharger within a Coalition Group. The Board is not simply establishing a "leisurely pace for complying with standards, as there is no express timeline to comply with standards. An open-ended compliance schedule is a de facto waiver of compliance with water quality standards. The Regional Board simply has no authority under Porter-Cologne to establish a de facto time schedule to waive compliance with water quality standards. In fact, it doesn't have authority to establish a time schedule in a Waiver. The Regional Board only has authority to establish a time schedule for a discharger's compliance as a condition of waste discharge requirements. Water Code § 13263 sets forth the Regional Board duty to issue waste discharge requirements, specifically providing that "[t]he requirements may contain a time schedule, subject to revision in the discretion of the board." *See also* 23 California Administrative Code § 2231(a) (regulations governing waste discharge requirements states "[t]ime schedules should be included in requirements for existing discharges when it appears the discharger cannot immediately meet the requirements.").

The legislature did not include any authority for the Boards to establish compliance schedules in a waiver. *See* WC § 13269. "Where the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." *Phillips v. San Luis Obispo County Dept. of Animal regulation* (1986) 183 Cal.App.3d 372, 380. The legislature's omission of compliance schedule authority from the waiver provision makes sense because the legislature never intended for waivers to be issued to discharges that could not already meet any conditions necessary to implement the applicable Basin Plans and water quality objectives.

Water Code § 13269 authorizes the Boards, under specified conditions, to waive two specific provisions of Porter-Cologne: "On and after January 1, 2000, the provisions

of subdivisions (a) and (c) of Section 13260, subdivision (a) of Section 13263, or subdivision (a) of Section 13264 may be waived . . . ." WC § 13269. Those four subsections include, respectively, reports of waste discharge for proposed new discharges, reports of waste discharge for proposed changes to discharges, WDRs, and the prohibition on new discharges pending issuance of WDRs or a waiver. Water Code §§ 13260(a), (c), 13263(a), 13264(a). "Under the maxim of statutory construction, *expressio unius est exclusio alterius,* if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." *See Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424. Hence, no other provisions of Porter-Cologne may be waived beyond those listed in Section 3269.[8]

The recent amendments to Section 13269 that went into effect on January 1, 2004 also clarify the legislature's intent that the public interest includes compliance with applicable Basin Plans. The new clarifying language added to section 13269 provides that WDRs or RWDs may be waived if the waiver "is consistent with any applicable state or regional water quality control plan and is in the public interest." Water Code § 13269. The Legislature also intended for the clarification that waivers be contingent on complying with applicable Basin Plans be applicable to the proceedings pending before the regional and state boards to replace the older waivers. As the September 8, 2003 Bill Analysis for SB 923 explains: [t]he author feels that the clarifications provided by this legislation are also particularly timely. SB 390 . . . sunset as of January 1, 2003 all existing waivers on WDRs, many of which were decades old and based on the unfounded premise that nonpoint pollution is not a significant threat to waters of the state. The RWQCBs are still developing replacement regulatory mechanisms for these discharges. SB 923 Bill Analysis, p. 4 (Sept. 8, 2003).

The presence of a schedule to comply with water quality objectives, especially one with no end date, guarantees that many discharges governed by the Waiver will not comply with those objectives in the interim. *See* AR 1937 (Finding 40). Because the Regional Board's Waiver authorizes those discharges in violation of water quality standards indefinitely into the future, the Board effectively waives compliance with those water quality standards, exceeding its waiver authority under Section 13269.

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[8] As the State Board's own Office of Chief Counsel has stated, ""[a] waiver may be issued by a Regional Board when it finds *the proposed discharge will implement the applicable basin plan* and that either the filing of a report of waste discharge or the issuance of waste discharge requirements is unnecessary." Office of Chief Counsel, Memorandum, dated Oct. 21, 1998. *See also* Office of Chief Counsel, Memorandum, dated Oct. 5, 1982 ("Can a Regional Board waive the adoption of waste discharge requirements for a discharge which does not comply with the applicable water quality control plan (basin plan)? No. If a Regional Board has evidence that a discharge does not comply with the applicable basin plan, the Board generally cannot make the required finding that a waiver ' is not against the public interest.'"). In the 1982 memorandum, the Chief Counsel's Office identifies two potential exceptions to waiving a discharge that is violating water quality objectives, including agricultural discharges: "Waivers for agricultural operations and domestic waste discharges which are adequately regulated by another public agency, however, may be exceptions to this general rule." That exception cannot apply where, as in this case, the discharges to surface water are not regulated by any other agency.

H. The Waiver Conditions Do Not Assure Pollution Reductions By Individual Farms

The Waiver, in large part, continues the Regional Board's failed policies of the past: "addressing" agricultural discharges by largely ignoring the sources of the pollution. Although finding a much more complex way to avoid any direct involvement with individual farms, at its core the Waiver's conditions focus on sanctioning new bureaucracies that by design create a go-between, which prevents effective and direct communication between the Regional Board and the original sources of agricultural pollution. This situation is further complicated by the absence of any conditions that would require an individual farmer to consider and commit to practical steps to immediately reduce their existing pollutant loadings. The creation of a go-between without requirements directly applicable to individual farms means that many farmers will not understand that they have an individual responsibility to reduce pollution and will simply sit back and wait for a "coalition" to take care of everything.

- Several key conditions recommended by the CSPA/Deltakeeper bridge this gap between the Regional Board and the individual dischargers, including farm specific identification, pollution prevention plans, and adequate fees. These recommended conditions are practical and will not undermine the use of a coalition approach.
- The conditions would make sure that each discharger is aware of their responsibilities (unfiltered by the coalitions).
- The identification and pollution prevention plan requirements would elicit commitments to quickly implement available and self-identified pollution reductions and would not overwhelm Regional Board staff but rather make it possible for them to evaluate a particular discharge or particular area with little delay, on short notice, and using fewer staff resources.
- These proposed conditions also would allow the coalitions and the Regional Board to evaluate the overall program submitted by the coalition to determine whether its goals and proposals are realistic and that there is true buy-in by their members.

By not requiring information from specific farms, there is simply no way for the Regional Board or the coalitions to know whether their proposals add up to water quality improvements. Only by requiring immediate improvements, coupled with improvements to the monitoring conditions, can the Regional Board claim with a straight face that the agricultural discharge program will reduce pollution with any certainty.

1. Farm-Specific Pollution Prevention Plans Are Needed To Assure Reductions In Pollution Loadings

CSPA/Deltakeeper suggests that the Waiver should include conditions requiring individual pollution prevention plans for each member farm, maintained onsite and at the relevant coalition's office and available to regional board staff upon request (without

conditions or any need to show existing water quality problems). The plans could include an assessment of current pollution control practices, volumes of irrigation return discharges, estimates of storm water flows, estimated loadings of key pollutants, planned management practices for the upcoming year and anticipated reductions in loadings of key pollutants from implementing those improvements.

CSPA/Deltakeeper does not envision the preparation of these plans to require experts or consultants, with the exception of hands-on guidance and assistance from the coalitions themselves. Each and every farmer knows or should know how much irrigation water they are using and how much is flowing off of their property. They know better than anyone the quantity of fertilizers and pesticides they are applying or how much soil they are losing to erosion. These plans would, of course, be refined over time as more data from the various coalitions becomes available regarding the efficacy of various management measures. Individual farms could then use data from general BMP monitoring done by the coalitions to more accurately estimate the loadings of their own management practices.

These plans would be immediately valuable to the coalitions and the board because, by adding up the loading estimates and reduction estimates, the coalitions could evaluate their overall estimates of loadings and potential reductions throughout their area. The board would have summaries of this information, which they could spot check, to help determine the merits of a coalition's overall proposal. To the extent a plan requires individual farmers to think objectively about how much pollution runs off their lands and to come up with creative and practical measures to incrementally reduce those pollution loadings which may save them money and help sustain their farm for the future, they will see the pollution prevention plan as a good investment. Lastly, to the extent there is a problem or a reason for the board to investigate a particular area or farm, the presence of an individual plan would greatly facilitate staff's ability to understand actual and upcoming efforts by those specific dischargers.

Individual pollution control plans would not undermine the remaining incentives included in the existing conditions for farmers to join coalitions. The two main incentives are cost savings and efficiencies in implementing monitoring programs and submitting annual reports. Responsible farming operations will prepare a pollution control plan as described above in order to have the opportunity to rely on a coalition to implement the more complex monitoring requirements and the additional annual reporting.

2. All Coalition Members Must Affirmatively Opt-In To A Coalition And Provide Relevant Information

The individual pollution prevention plans compliment the condition included in the existing waiver, and supported by CSPA/Deltakeeper, to have members of coalitions be identified and affirmatively signed up for the coalition. Unfortunately, staff has succumbed to coalition pressure and now proposes only that coalition's need only "submit a map sufficient for the Central Valley Water Board to identify which

landowners and/or operators of irrigated lands that discharge waste to water of the State, are knowingly participating in the Coalition Group…" This egregious backsliding can only place additional demands upon limited staff resources.

Assuming that coalitions have not bitten off more than they can chew by assuming "jurisdiction' over vast areas of the Central Valley, there is nothing to suggest that a functioning coalition, like any other business, cannot maintain an up-to-date membership list. Properly sized coalitions would have to administer memberships of perhaps a few thousand farmers, a task that even a small, under funded non-profit organization is readily capable of implementing.

Without identification of individual farms and individual pollution control plans that are immediately available to Regional Board staff, the proposed conditions make it more likely that problems can only be addressed by the political unpalatable action of revoking the waiver for an entire coalition rather than targeted, generally informal enforcement addressing individual bad actors. Without identification and individual plans available to the board staff, staff will not have the resources to conduct the fieldwork and investigation to independently gather that information. They will not have the immediate benefit of knowing whether a specific operation prepared a plan in good faith and took the steps to implement it. Certainly, no targeted enforcement by Regional Board staff that could address recalcitrant individuals will be practicable if the board is required to do monitoring and prove impairment before acting on possible problems, as the proposed Waiver now appears to contemplate. Of course, those farms that have taken the initiative within a coalition would be up in arms if a few operations were causing problems and, because the coalition itself has no power to control them, the Regional Board dismantles the entire coalition because it lacks specific information about who is doing what and where.

Of course, it is very likely that the Regional Board will not take such a drastic measure, and the potentially violating parties and their polluting discharges will remain unaddressed. If there is going to be sensible enforcement targeting potential wrongdoers, it is absolutely essential to make identification information of all operations and site-specific pollution control plans immediately available to Regional Board staff.

3. Adequate Fees Are Essential To The Success Of Any Sustainable Program Addressing Agricultural Pollution Discharges

As both the State and Regional Board have acknowledged, Senate Bill 923 provides the Boards with clear authority to impose fees for discharges subject to waivers. Fees must be assessed as part of the program's conditions. An annual fee for each discharger is a critical reminder that they are individually responsible for their pollution dischargers. Neither the regulated community, nor the public into whose waters the dischargers release wastes, can simply rely on a coalition to take care of everything; adequately funded state oversight is essential. Indeed, coalitions' fees, for the most part,

will be used for activities that do not provide any immediate benefit to an individual farmer or measurable pollution reductions.

Fees must be assessed to cover the costs, and no more, of the Regional Board's effective implementation of the program, including review, approval and enforcement. Annual fees from each individual discharger also assure that every discharger demands performance from both the Regional Board and the coalitions, including assistance with obtaining available and significant federal funds, such as through the Farm Bill and other vehicles. Without adequate funding, the Regional Board's program will continue to be understaffed, will not be sustainable and will not result in water quality improvements. The Legislative Analyst's assessment of the program in their 2006 budget review clearly shows statewide concern for the lack of sufficient funding and lack of compliance in this program. The coalitions have not incorporated a large percentage of farmers in this region – leaving irrigated lands without any regulations.

Unfortunately, the reality is that the program is neither adequately staffed nor funded. The Regional Board's workplan identifies 34 PYs as minimally necessary to implement the Waiver. However, only 18.5 PYs are authorized, and of that only 12 PYs actually work on the waiver. A mere 5 PYs are funded by waiver fees. Yet, the coalitions assert that the program is too large and that no fee increases are warranted. Furthermore, much of the inadequate funding the Regional Board does receive goes to collect information that should be provided by the coalitions as a condition of the Waiver: information that would be provided pursuant to a general order. For example, since December 2005, Regional Board staff has expended more than 1,800 hours in attempting to identify who is participating in a coalition. This is equivalent to 20% of all the fees collected by the program.

Coalitions are also confronted with a resource quandary. Adequate funding for the coalitions is crucial to any functioning irrigated lands program. Yet, the coalitions have largely been unable to assess sufficient fees to comply the minimal monitoring, reporting and implementation requirements of the Waiver. For example, none of the coalitions are monitoring all of their major drains, 20% of intermediate drains on a rotating basis and minor drains where downstream exceedances are identified. Nor have they been able to comply with follow-up monitoring requirements. None of the coalitions have compiled and reported a list of BMPs that are being implemented in their watersheds. None have evaluated the effectiveness of those BMPs. A major reason for these failures is that coalitions simply haven't been successful in enrolling enough members or persuading enrolled members to voluntarily provide the necessary funds. This is a common problem for voluntary organizations. But, securing adequate resources is crucial to the success of the irrigated lands program. Without it, the program collapses.

It is simply not creditable to claim that the waiver is protective of waterways or will ultimately lead to compliance with water quality standards when there are institutional roadblocks preventing adequate funding for both Regional Board oversight and coalition compliance. If the Regional Board cannot secure the commitments to support the 36 PYs it claims is necessary to manage the program and if it cannot establish

minimal financial requirements for coalitions stringent enough to ensure compliance with Waiver conditions, perhaps by insisting that coalitions transform themselves into special services districts, it should immediately prepare and issue general WDRs.

I. The Board Cannot Assume That A Program That Fails To Reach Out To Individual Dischargers Will Be Effective Because The Boards Have Not Gathered Any Evidence About Who, What, Where Or When Farming Discharges Occur

The conditions proposed by the environmental petitioners to tie individual coalition members to the overall pollution reduction effort are essential to the success of any program given the board's decades-long failure to gather evidence on the dischargers' practices. The only concrete evidence that the Regional Board gathered in the three plus years leading up to the 2003 waiver and the subsequent three years of operation under the waiver is the absence of any reliable information surveying what types of management practices were being applied on farms in the Central Valley and whether any of those practices were sufficient to protect water quality. Although there is compelling information that discharges of waste from irrigated lands have impaired waters of the state, information concerning the specific locations of impairments, specific causes, specific types of waste and specific management practices that mitigate impairments, improve and protect water quality has never been collected nor provided.

Prior to issuing the July 2003 waiver, the Regional Board failed to collect any evidence of the types of management practices available to farms throughout the Central Valley. Despite the Regional Board's admitted ignorance, both the 2003 waiver and the proposed renewed Waiver nevertheless states the program undoubtedly reduces pollution discharges without any information of how this might occur.

There is no evidence upon which the Regional Board can conclude that any management practices that are currently available will be applied throughout the Central Valley in a manner that will assure compliance with water quality objectives at any foreseeable future time.

The absence of evidence is particularly vexing given: 1) the ample time provided by the Legislature in SB 390 for the board to review and revisit the 1982 agricultural waiver; 2) the Regional Board's resolution in 2001 for its staff to conduct monitoring of BMPs and water quality in order to have the information necessary for reviewing the waiver, 3) agricultural interests' repeated assertions in the past that they were actively engaged in gathering in the necessary data and information that would show how capable they were of implementing a program largely free of agency oversight, and 4) the explicit requirements in the 2003 waiver that such information was to be provided as a condition of the waiver. Despite those directives and assertions, no such evidence has been gathered or provided to the Regional Board.

Despite the board's complete failure to gather necessary evidence regarding the current nature of agricultural discharges and the use and effectiveness of BMPs in the

Central Valley, the Regional Board now inexplicably claims that they can draw some kind of conclusion that the conditions established by the Waiver are somehow certain to achieve compliance with standards. *See* Waiver, ¶ 29, 51, 62, etc. This disconnect exists despite the failure of coalitions to comply with existing waiver requirements to identify who is currently implementing specific BMPs or any effort to evaluate the effectiveness of existing and potential BMPs. The coalitions clearly lack adequate funding and it is doubtful that they will ever be able to assure implementation of some unidentified additional BMPs. Or, whether those unidentified BMPs will even work to reduce pollution discharges. Ultimately, any claim that the waiver's conditions will prove effective is not based on any evidence.

By including CSPA/Deltakeeper recommendations requiring individual identification, pollution control plans, and adequate funding, the Regional Board could at the very least begin to create a rational basis for concluding that pollution would be reduced even during the short life of the Waiver. However, that rational basis is not complete without adequate monitoring, specific restrictions on the size of the coalition groups and holding coalitions accountable to the explicit requirements of the Waiver.

J. In Order For Coalitions To Be Successful, They Must Be Subject To Clear Conditions, Goals And Rational Checks & Balances

As it stands, the proposed Waiver affirms conditions that have led to the creation of seven huge, unmanageable coalitions that are impossible for a limited Regional Board staff to oversee and which certainly have less ability than the Regional Board's proven ability to manage numerous dischargers within large areas. These unwieldy coalitions have made numerous important decisions critical to the health of the Central Valley's waters outside of any public process and with no mechanism for participation by the public. The coalitions' plans and programs currently lack timelines and performance goals for achieving water quality standards and, consequently, undermine efforts by both the coalitions and the Regional Board to measure whether sufficient incremental progress is being made by the dischargers to address exceedances of water quality standards.

1. The Agricultural Discharge Program Must Limit The Size Of Coalitions

Several experts with extensive experience in watershed groups submitted evidence during consideration of the 2003 waiver that, in their expert opinion, large coalitions do not work. *See* summary of expert testimony in Environmental Petitioners' 8/21/03 supplemental petition to State Board; testimony from Bond, Dr. Kegley, Dr. Benbrook, Paradies, and Strange, pp.14-16, attached to these comments. Despite that evidence, the Regional Board failed to place any restrictions on the size of coalitions. In fact, the Sacramento Valley Coalition claims it is able to address discharges throughout the entire Sacramento River basin. One might ask, why not simply set up a single coalition for the entire Central Valley?

Obviously, such expansive coalitions do not have any more ability than the Regional Board to efficiently and effectively oversee the numerous discharges in the Central Valley. As events of the last three years establish, the coalitions have failed to implement programs on a scale that assure actual improvements on the ground. These large unwieldy coalitions have infrequent contact with individual farmers and, apparently, a difficult time even determining the identities of their own members. They have failed, and will continue to fail, to comply with the basic monitoring and reporting requirements of the Waiver. Government agencies are accustomed to addressing and maintaining information on numerous business entities but the coalitions are obviously not prepared to do the same.

2. The Agricultural Discharge Program Must Establish A Clear Deadline For All Dischargers To Comply With Water Quality Objectives

As mentioned above, although the Waiver makes vague references to eventual compliance with water quality standards, there are no timelines or performance measures to evaluate or achieve compliance with standards. CSPA/Deltakeeper proposes the Waiver include requirements mandating that all agricultural discharges not cause or contribute to violations of objectives within 10 years, or less if an applicable TMDL sets an earlier deadline.

As discussed above, the date by which agriculture shall comply is open-ended. This is problematic for a number of reasons. The legal concerns are described above, including the Waiver's de facto authorization of violations of objectives during its entire 10-year term and the Regional Boards' failure to include any timelines for compliance in the Waiver. The main environmental problem is, of course, that without a deadline for compliance, it is certain that the current violations of objectives will continue in perpetuity. Neither the coalitions, nor the Regional Board and its staff, have any clear goal by which to measure the progress or success of any coalition's program. Even assuming some incremental progress was made by a coalition, will that bring the area into compliance with objectives in one year? Or a hundred years? By including a requirement that objectives be met within 10 years or less, the coalitions, Regional Board and staff will have a concrete goal by which interim progress can be measured. Thus, for example, if there are no discernable improvements in water quality say in five years, staff would know that a coalition's program would have to be considerably expanded to meet the deadline.

3. Coalitions Must Be Obligated Each Year To Determine Their Existing Loadings And Estimate The Next Year's Reductions

Similarly, given the Regional Board's existing workload and staffing constraints, the coalitions must be required to set forth the past year's estimated pollution loadings and the expected loading reductions anticipated to be implemented in the upcoming year. By requiring at least one objective estimate by each coalition, the Regional Board and its staff would be able to determine whether the coalitions' loading estimates are consistent

with the estimated loadings of its members and whether the programs operated as expected or otherwise missed their goals. The Regional Board could then assure adjustments in the following year.

CSPA/Deltakeeper is not proposing that the loading estimates be enforceable numbers. Loading estimates would be less certain estimates early in the programs existence; become more concrete as monitoring data is collected over time. But they would provide a measure of success or failure in reducing pollution that could be compared to an overall timeline for achieving objectives. Such annual loading estimates would guide the design of the monitoring programs as they attempt to improve on the estimates. The current year's reductions and next year's estimated reductions would require more objective analysis by the coalitions to show how their programs will add up to pollution reductions that would be available for staff and the Regional Board review.

4. Regional Board Review And Approval Of Key Milestones Must Be Included In The Program

Environmental petitioners propose the coalitions submit annual progress reports, noticed to the public and reviewed and considered at a Regional Board meeting, including a decision approving or disapproving the coalitions' programs for the following year. That annual review should include key deliverables of the coalitions, including that year's monitoring program, evaluation of management practices, implementation plans and funding mechanisms. Presumably, staff is already planning on reviewing these programs on a more frequent, indeed, ongoing basis. Providing annual staff reports on each coalition to the Board should not be overly burdensome, especially if appropriate fees have been assessed and staffing is expanded to assure implementation and enforcement of the program.

5. The Current Conditions, Numerous Assertions In The Proposed Waiver Rely on Assumptions And Conjecture Rather Than The Weight Of The Evidence

The proposed Waiver's stated rationales show an unwarranted reliance on misguided instincts and wishful assumptions rather than dedication to the facts at hand.

For example, the proposed order states, "[I]n addition, it is appropriate to regulate discharges of waste from irrigated lands under a Conditional Waiver rather than individual WDRs in order to simplify and streamline the regulatory process." Waiver, ¶ 31. It also states "[t]he Central Valley Water Board supports the approach of allowing Dischargers to be represented by Coalition Groups in that it can provide a more efficient means to comply with many of the conditions contained in the Conditional Waiver." Waiver, ¶ 32. Of course, the standard that the Regional Board must apply is the weight of the evidence, not mere belief or other declarations of faith (*see* legal standard requirement above). There is no empirical evidence in the record that supports the proposed Waiver's general assertion that it is simpler, more efficient or that regulators and the regulated community will benefit from coalition groups.

The Regional Board and its staff are not benefiting from the current waiver conditions. The evidence in the record developed during adoption of the 2003 waiver demonstrates that the staffing resources necessary to implement the Waiver are greater than would be necessary to implement general waste discharge requirements. Without adequate fees, the Regional Board has merely burdened its already limited resources. By not including any criteria limiting the size of coalition groups, the Regional Board has drastically increased the resources needed to review and oversee the sprawling bureaucracies that irrigation districts and others have assembled. By creating new bureaucracies, the Regional Board has hampered staff's ability to deal directly with farmers or more cooperative water districts. By not establishing any concrete requirements for individual dischargers within the coalitions, the waiver merely puts off any substantive requirements and makes their development more complicated by delegating most of the responsibility to these experimental coalitions.

Nothing in the record suggests communication and regulation will be simpler or more efficient with coalitions. The coalitions have made it abundantly clear that they themselves are not regulated entities, having no responsibility for any pollution discharges. Indeed, the proposed Waiver states "[t]he Central Valley Water Board acknowledges that the Coalition Groups are not responsible for enforcing the terms and conditions of this Conditional Waiver or the Water Code." Waiver, ¶ 14.

According to the coalitions, they do not intend to police their purported members. How does that make regulation of the actual dischargers simpler or more efficient when coalitions have engaged in a game of hide and seek with their members? How do efforts of coalitions to stifle information from their purported members directly to the Regional Board make meaningful communication more simple? How can the proposed order claim the coalition monitoring programs will be much greater or more efficient when they have blatantly refused to comply with the adopted monitoring and reporting plan? How do the coalition monitoring programs produce greater information when their existence drastically reduces the quantity of monitoring stations and presumably data from that which would be produced if dischargers could only operate under the Individual Waiver?

The creation of elite groups of dischargers purporting to speak on behalf of dischargers who may or may not have elected to sign on to their program clearly has complicated the Regional Board's efforts to communicate and regulate agricultural discharges. Whenever the coalitions have disagreed with a staff directive, they consistently have banded together to resist staff's instructions and either dare the Regional Board to withdraw the waiver or threaten to walk away. By delegating most of the development of control programs and measures to these loose knit coalitions, the Waiver has substantially blurred the line between the regulated community and the regulators.

Despite the problems with creating discharger coalitions, CSPA/Deltakeeper nevertheless indicated its willingness to agree to try a coalition-based program if

additional conditions CSPA/Deltakeeper proposed were included to ensure that some basic checks and balances, including timelines and performance standards, were in place to improve the program's chances of success. Our recommendations were ignored and our worst fears have materialized; the Waiver has been an utter failure. A coalition approach cannot succeed if the Regional Board remains unwilling or unable to hold coalitions accountable to complying with Waiver conditions.

II. THE PROPOSED WAIVER MUST ADDRESS INCREASING POLLUTION OF GROUNDWATER FROM AGRICULTURAL ACTIVITIES

Although the record includes substantial evidence of agricultural discharges adverse impacts on groundwater resources in the Central Valley, protection of groundwater is not addressed in the Waiver.

The California Department of Water Resources (DWR) has concluded that water from California's groundwater basins "has been the most important single resource contributing to the present development of the state's economy." Between 25% and 40% of California's water supply comes from groundwater. That figure can rise to as much as two-thirds during critically dry years. Fifty percent of California's population depends upon groundwater for all or part of their drinking water. Data from the waterboards, USGS, Department of Health, DPR and others, demonstrate that groundwater has been severely degraded. DWR has stated that three-fourths of the impaired groundwater in California was contaminated by salts, pesticides, and nitrates, primarily from agricultural practices. Thousands of public drinking water wells have been closed because of pollution. Many of California's more than 71,000 agricultural irrigation wells are degraded or polluted. USGS data collected over a ten-year period in Fresno County showed that some 70% of the wells sampled exceeded the secondary MCL and agricultural goal for total dissolved solids. Kings County was even worse, with 87% exceeding criteria. Even the State Board's own data indicates that more than one third of the areal extent of groundwater assessed in California is so polluted that it cannot fully support at least one of its intended uses, and at least 40 percent is either impaired by pollution or threatened with impairment.

For example, a study conducted by the United States Geological Survey documented extensive contamination of groundwater by pesticides applied to rice fields.[9] Pursuant to an existing Basin Plan prohibition, rice growers are required to hold their irrigation waters for up to 30 days in order to facilitate the breakdown of toxic pesticides. Rice fields are typically flooded from April to September with some significant portion also flooded during winter months to help break down leftover straw. Detections of pesticides and nitrites in groundwater beneath rice fields were attributed to pesticide and fertilizer applications to the fields. The study suggests that holding irrigation waters describes the possible effects to ground water of holding irrigation waters on the fields in order to protect surface water may be allowing more recharge containing the pesticides

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[9] Dawson, B., USGS, "Shallow Ground-Water Quality Beneath Rice Areas in the Sacramento Valley, California 1997" (2001).

molinate and thiobencarb to reach shallow groundwater. Another study in the record documents routing of pesticide-contaminated surface runoff from orchards into drainage wells that drain the contaminated runoff into groundwater.[10]

The USGS study and other studies show that one potential negative environmental impact of a management measure that stores polluted water as a means of protecting surface water quality is an acceleration of the pollutants discharged into groundwater through recharge or existing pathways such as wells. Nevertheless, the proposed Waiver includes no requirements mandating an evaluation of potential impacts to groundwater from practices focused on protecting surface water quality. The Central Coast Regional Board's irrigated lands waiver contains explicit requirements to prevent further pollution of groundwater. We believe the Waiver must be revised to address groundwater protection, especially to prohibit redirected impacts from management measures employed to protect surface waters.

III. THE PROPOSED WAIVER IS INCONSISTENT WITH THE REGIONAL BOARD'S BASIN PLAN AND THE STATE AND FEDERAL ANTIDEGRADATION POLICIES

The Proposed Order ignores three fundamental inconsistencies between the Waiver and the Central Valley's Basin Plan. First, the Waiver plainly runs afoul of State Board Resolution No. 68-16, the State's antidegradation policy. By its plain terms, Resolution No. 68-16 mandates the application of WDRs for discharges such as agriculture's that are impairing water quality throughout the Central Valley. The resolution makes clear that the burden to prove that no degradation will occur rests on the dischargers, a burden that the agricultural community made no attempt to meet and, indeed, could not meet had they tried. Second, there is no way to square the Waiver with the Central Valley Basin Plan's Pesticide Control Program. Adoption of the Waiver will render the numerous deadlines and directives of that program a mere nullity for agriculture's harmful pesticide discharges. Lastly, the Regional Board simply ignores the federal antidegradation policy, despite the Basin Plan's requirement that the board's regulation of pesticide discharges comply with that federal mandate.

These inconsistencies are insurmountable and require the Regional Board to direct staff to direct and circulate general WDRs for agriculture.

1. The Regional Board's Finding That The Waiver Is Consistent With State Board Resolution No. 68-16 Is Contrary To Law, Not Supported By The Weight Of The Evidence And Inconsistent With Other Findings

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[10] Troiano, J, et al., Cal. Dept. of Pesticide Regulation, "Movement of Simazine in Runoff water from Citrus Orchard Row Middles as Affected by Mechanical Incorporation" (1998) ("evidence linked contamination [of groundwater] to movement of [pesticide] residues in orchard runoff water that was directed into drainage wells"). *See also* (Ingalls, Charles A., U.C. Davis, pp. 5-10, "Movement of Chemicals to Groundwater," of "Protecting Groundwater Quality in Citrus Production" (1994)).

The Regional Board's assertion that the Waiver is consistent with Resolution 68-16 (Waiver, ¶ 23) ignores the Policy's clear procedural mandates and relies on conjecture, rather than evidence, to claim that the substantive goals of the Policy are met.

Resolution No. 68-16, adopted by the State Board in October 1968, was adopted as a key component of the Central Valley Region's Basin Plan after enactment of Porter-Cologne. The Policy provides that "[w]henever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies. Any activity which produces or may produce a waste or increase volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained." State Board Resolution No. 68-16.

The Basin Plan defines high quality waters as "[m]aintenance of the existing high quality of water means maintenance of 'background' water quality conditions, *i.e.*, the water quality found upstream or upgradient of the discharge, unaffected by other discharges." Basin Plan, at IV-17.00. Consequently, background concentrations of pesticides, which do not occur naturally, is zero for purposes of applying the Policy: The State of California anti-degradation policy requires the maintenance of existing high quality water, except under certain circumstances that are spelled out in the policy. This means that the concentrations of contaminants should not be increased above natural background levels, unless a change in water quality will be consistent with maximum benefit to the people of the state and will not adversely affect beneficial uses. The 'natural background' of chlorpyrifos [sic] and diazinon is 'zero' since chlorpyrifos and diazinon are not naturally occurring substances. Therefore, the lower end of the range of pesticide concentrations that can be considered by the Regional Board as allowable in surface waters should be "zero" or "not detectable."

The Basin Plan also clarifies that dischargers are responsible for demonstrating compliance with its terms and they must submit necessary information before the Regional Board can make a determination that their discharge will comply with the antidegradation policy: Pursuant to [Resolution No. 68-16], a Report of Waste Discharge, or any other similar technical report required by the Board pursuant to Water Code Section 13267, must include information regarding the nature and extent of the discharge and potential for the discharge to affect surface or groundwater quality in the region. This information must be presented as an analysis of the impacts and potential impacts of the discharge on water quality, as measured by background concentrations and applicable water quality objectives. The extent of information necessary will depend on the specific conditions of the discharge. . . . In addition the discharger must identify treatment or control measures to be taken to minimize or prevent water quality degradation. Basin Plan at IV-16.00.

Additionally, the Regional Board applies the Basin Plan's water quality objectives to ensure that beneficial uses are reasonably protected. Basin Plan, p. IV-17.00. Therefore, the antidegradation policy requires that discharges from agriculture must maintain background concentrations of water quality, unaffected by the agricultural discharges themselves or any other discharge, unless 1) the dischargers demonstrate that the change from background will result in maximum benefit to the public, that no unreasonable affect to beneficial uses will occur and that the discharge will be in compliance with water quality objectives, 2) the discharges to high quality waters are subjected to and meet "waste discharge requirements" and 3) those WDRs implement the "best practicable treatment or control" that prevent pollution or nuisance and assures the highest water quality consistent with the maximum public benefit. The Regional Board does not dispute that Resolution No. 68-16 applies to the dischargers governed by the Waiver. However, the Regional Board's findings regarding the antidegradation policy ignore key requirements and are not supported by the weight of the evidence.

a. Neither the Dischargers Nor the Regional Board Have Demonstrated That Agricultural Discharges That Add Concentrations of Pollutants Well Above Natural Background Levels are to the Maximum Benefit of the Public or Will Comply With Objectives

The record never demonstrates the change from natural background levels of various pollutants resulting from waste discharges from thousands of irrigated farms will be to the public's maximum benefit, protective of beneficial uses and in compliance with water quality objectives. In fact, the evidence shows quite the contrary. Neither the Regional Board nor any agricultural discharger has provided the prerequisite information designated by the Basin Plan for determining compliance with the Policy. *See* Basin Plan, p. IV-16.00. Indeed, the Regional Board admits its lack of knowledge regarding the discharges. Waiver, ¶ 30 ("the Regional Board has limited facility specific information, and limited water quality data on facility specific discharges") and Waiver, ¶ 33 ("It is not appropriate at this time to adopt individual WDRs because, although there is information that discharges of waste from irrigated lands have impaired waters of the state, information is not generally available concerning the specific locations of impairments, specific causes, specific types of waste and specific management practices that could reduce impairments, improve and protect water quality").

There also is no doubt that changes to natural background concentrations of the long list of wastes to be discharged from agricultural lands over the next five years are expected to be significant. The Waiver admits "[t]he Regional Board does not expect that all achievable water quality standards will be achieved in all waters of the state in the Central Valley Region within the term of this Resolution." Waiver, ¶ 51. Contrary to ¶ 51, the Waiver attempts to demonstrate compliance with Resolution No. 68-16 by asserting that "[t]he Order requires persons who obtain coverage under the Waivers to comply with applicable water quality standards, protect beneficial uses, and prevent nuisance by MRPs, evaluating the effectiveness of management practices, and where water quality exceeds applicable water quality standards by identifying and implementing

additional management practices to comply with applicable water quality standards." Waiver, ¶ 23.

Of course, those are the very activities that Resolution No. 68-16 and the Basin Plan require dischargers to carry out prior to the Board authorizing discharges. The Regional Board has no evidence about what, if any, management practices might be effective, currently or in the future, in complying with objectives. Moreover, the monitoring program effectively pushes off any new management practices into the future, assuring that the status quo of impairing discharges will continue for a number of years. The Waiver blatantly fails to require any dischargers to comply with water quality objectives by any specific deadline.

The Waiver tries to claim any changes to water quality allowed by the Waiver would be consistent with Resolution No. 68-16. The Board finds that "changes in water quality that may occur as a result of the Conditional Waiver will be to improve, over time, the quality of the waters, not to cause further degradation." Waiver, ¶ 24. However, this finding is not responsive and is irrelevant to the Resolution's prerequisites. The antidegradation policy asks whether any change from high quality waters, that is, natural background, should be allowed. "This means that the concentrations of contaminants should not be increased above natural background levels, unless a change in water quality will be consistent with maximum benefit to the people of the state and will not adversely affect beneficial uses." The Board's self-serving prediction that, over time, agricultural discharges will improve from their current uncontrolled state says nothing about agricultural discharges that likely will still remain well above background concentrations.[11]

The Waiver also attempts to show compliance with the antidegradation policy by finding that, "[n]either the California Water Code nor Resolution 68-16 requires instantaneous compliance with water quality objectives" and "[c]hanges in water quality that may occur over time as a result of the Conditional Waiver will be to improve, over time, the quality of the waters, not to cause further degradation." Waiver, ¶ 24. Of course, this preceding statement essentially admits that it has not been demonstrated to that the agricultural discharges authorized by the Waiver will either protect beneficial uses or meet water quality objectives. Nor does this finding shed any light on whether allowing impairing discharges of agricultural waste until some distant future time provide the maximum public benefit.

b. The Waiver Violates The High Quality Waters Policy That WDRs Be Issued to Discharges Triggering the Policy's Mandates

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[11] In addition, the Board's conclusion that improvements over previous waste discharges by agriculture "may occur" does not comply with the Antidegradation Policy. The Policy does not require steps that may result in adequate protections assuring the highest water quality consistent with maximum public benefit. Rather, the Policy requires that high quality waters will be maintained and that conditions will assure protection of beneficial uses and highest water quality consistent with maximum public benefit.

The Waiver is contrary to Resolution No. 68-16's mandate that any activity that may produce waste or an increased volume or concentration of waste that discharges to high quality waters must be required to meet waste discharge requirements. The Waiver ignores the antidegradation policy's clear call for the use of WDRs where the Policy is triggered. The Regional Board's implicit effort to interpret the Policy as allowing for waivers to implement its conditions is improper and, due to currently degraded waterways, is quite improper. The Policy has been adopted into the Regional Board's Basin Plan through formal rulemaking procedures. Given the Legislature's intent that waivers be reserved for insubstantial discharges of waste, the only reasonable interpretation of the Policy is by reference to its plain language, mandating WDRs where waste discharges degrade high quality waters.

c. The Regional Board Does Not Know What Control Measures Are or May Be Implemented by Agricultural Discharges Now or in the Future and Has No Evidence That "Best Practicable Treatment or Control" is Required by the Waiver

Again resorting to speculation, the Waiver attempts to address the antidegradation policy's "best practicable treatment or control" requirement by assuming that everything will work out over time: "The Conditional Waiver's conditions that require evaluation and implementation of management practices will result over time in best practicable treatment or control to assure that pollution and nuisance will not occur and that the highest water quality is achieved." Waiver, ¶ 24. This Waiver statement is, at best, merely a guess. Given the Regional Board's admitted lack of knowledge regarding current management practices and its obvious lack of information regarding new, unknown practices it hopes may arise in the future, there is absolutely no evidence in the record upon which a conclusion can be based that the Waiver requires agricultural dischargers to meet conditions "which will result in the best practicable treatment or control of the discharge. . . ."

2. The Waiver is Inconsistent with the Basin Plan and Not Supported by the Weight of Evidence

The Waiver conflicts directly with the Basin Plan's existing requirements for "Pesticide Discharges from Nonpoint Sources." Basin Plan at IV-33.00. Once approved by the State Board, basin plans "are binding on all state offices, departments and boards whose activities may affect water quality." *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 964. *See* Water Code § 13247. The Basin Plan sets forth a series of nondiscretionary actions designed to bring agricultural discharges of pesticides into compliance with applicable water quality standards. These include, among others, a mandate that agricultural pesticide discharges "implement management practices that result in full compliance with [water quality] objectives by 1 January 1993, unless required to do so earlier. . . ." Basin Plan at IV-34.00. The Basin Plan also sets forth specific responses where agricultural management practices fail to comply with water quality objectives by the 1993 deadline. The Basin Plan states "[w]here the Board finds that currently used discharge management practices are resulting in violations of

water quality objectives, but the impacts of the discharge are not so severe as to require immediate changes, dischargers will be given three years, with a possibility of three one year time extensions depending on the circumstances involved, to develop and implement practices that will meet the objectives." Basin Plan at IV-35.00. Consequently, the Basin Plan only authorizes compliance schedules for agricultural dischargers of pesticides to comply with water quality objectives until January 1, 1999, *i.e.* six years from the initial deadline of January 1, 1993.

The Basin Plan also provides that, "[t]he Board will conduct reviews of the management practices being followed to verify that they produce discharges that comply with water quality objectives. It is anticipated that practices associated with one or two pesticides can be reviewed each year." Basin Plan at IV-34.00. The Basin Plan then makes waivers contingent on the Regional Board determining that management practices are adequate to meet water quality objectives: "Waste discharge requirements will be waived for irrigation return water per Resolution No. 82-036 if the Board determines that the management practices are adequate to meet water quality objectives and meet the conditions of the waiver policy." Basin Plan at IV-35.00.

The Waiver conflicts with each of these Basin Plan requirements. Rather than the Basin Plan's straightforward mandate that agricultural dischargers implement management practices complying with water quality objectives not later than January 1, 1993, the Waiver allows agricultural pesticide dischargers to discharge pesticides in violation of objectives for the foreseeable future with no specific deadline in mind. Rather than requiring pesticide dischargers with inadequate management measures to develop and implement management practices that will meet objectives within three years, with a possibility of only three additional one year extensions, the Waiver authorizes discharges that will violate objectives without setting forth any particular compliance date. Furthermore, rather than implementing the Basin Plan's requirement that waivers be limited to those situations where the Regional Board had determined that management practices are adequate to meet water quality objectives and the conditions of the previous waiver policy, the Regional Board proposes a Waiver with basically no information about current management practices except that their application to previous dischargers had resulted in widespread, serious violations of water quality objectives throughout the Central Valley Region. The proposed Waiver fails to comply with the Basin Plan. Approval would represent an abuse of discretion because the Waiver is not based upon the findings and the findings are not supported by the evidence in the record.

3. The Regional Board Failed to Consider the Federal Antidegradation Policy

The Basin Plan requires programs addressing pesticide discharges to comply with the federal antidegradation policy. 40 C.F.R. § 131.12. The Waiver totally ignores the federal antidegradation policy.

4. The Waiver is Inconsistent with Nonpoint Source Pollution Control Program Policy (NPS)

The Waiver does not meet the standards of the state NPS policy by not meeting the antidegradation requirements or meeting water quality objectives. In particular, the waiver only requiring storm water monitoring in large storm events (without a definition of "large"), does not address the salinity, pathogen, sediment, pesticide, metals and other contaminants known to be present in storm water runoff from irrigated farm lands. Agriculture, like any other industry, must be required to monitor for a sufficient number of contaminants and in all appropriate weather events.

IV. THE REGIONAL BOARD'S NEGATIVE DECLARATION VIOLATES CEQA AND IS NOT BASED ON SUBSTANTIAL EVIDENCE

The proposed Waiver's handling of CEQA trivializes the thin thread from which the Regional Board's negative declaration hangs. CEQA clearly mandates that a project of this enormous scale with such clear impacts on the environment undergo the careful evaluation of an environmental impact report (an "EIR".) The waiver grants permission for 25,000 farms covering millions of acres of farmland to discharge additional billions of gallons of toxic discharges to already impaired waters. It remains inconceivable that this Board could in good conscience continue an outdated Negative Declaration that claims the project has not even a single potentially significant adverse environmental impact. All available data and information points to the unsurprising reality that the 2003 Waiver did in fact cause enormous adverse impacts to environment and nothing in the proposed order supports a conclusion that this waiver will have any different result. As a consequence of the decision to continue to rely upon an outdated Negative Declaration for the Waiver renewal, a whole host of environmental problems (described elsewhere in this letter) remain unanalyzed and unmitigated. In addition, no thorough analysis of the project alternatives has been conducted.

The CSPA/Deltakeeper believe the renewed waiver is in fact for purposes of CEQA a new project. The new project permits an enormous new multi-billion gallon set of discharges above and beyond those permitted under the 2003 waiver, consequently an entirely new CEQA document is required. However, the board not only failed to prepare an EIR it did not even adopt a new Negative Declaration instead hanging it hopes on the thin thread of the 2003 Negative Declaration. Its justification for failing to prepare a new environmental document is predicated upon fabricated and unsupported claims.

For example, the Waiver states "that when the lead agency has adopted a negative declaration for a project, the agency is not required to prepare a subsequent environmental document unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, that, in summary: 1) substantial changes are proposed in the project that involve new significant environmental impacts; 2) substantial changes occur with respect to the circumstances of the project; or 3) new information of substantial importance which was not previously known shows that the project will have significant effects. None of the circumstances requiring preparation of subsequent environmental document has occurred." Waiver, ¶ 60. However, wishful thinking is not a legal substitute for reality. As we demonstrate below: 1) there have been substantial changes that involve new significant environmental impacts; 2) substantial changes have

occurred with respect to the circumstances; and 3) new information reveals that the project will have significant effects.

Agriculture in the Central Valley is a kaleidoscope of ever changing cropping and chemical application patterns. For example, in the three years since adoption of the Waiver in 2003, the increased use of pyrethroid insecticides has led to widespread sediment toxicity throughout the Central Valley. A critical component of any effective program to address pyrethroid toxicity must include a quick discovery-investigation-response cycle. Despite the toothless language in the Wavier prohibiting the discharge of "new pollutants," new pesticides are continually entering the marketplace and being applied to fields. There is nothing in the proposed Waiver requiring that the Board be promptly notified of the application of potentially harmful new pesticides, identification of sources discharging these new pesticides to surface waters, monitoring to determine the effects these new pesticides on the environment and evaluation and implementation of management measures to mitigate impacts. The proposed Waiver only belated addresses the issue after it has become a widespread, significant environmental problem. A proper environmental analysis would potentially lead to measures requiring: 1) immediate Regional Board notification of new chemical applications, 2) quick implementation of localized monitoring to identify source and evaluate the impacts to surface waters and 3) use of on farm-pollution prevention plans that could be updated and modified to minimize or mitigate potential impacts from application of new chemicals. Unfortunately, the Negative Declaration ignored the impacts of shifting cropping and chemical application patterns. Reliance upon it precludes the kind of analysis that would address the environmental impact of shifting or new chemical applications.

Subsequent to the approval of the 2003 Negative Declaration, additional species have been listed and additional critical habitat identified within the project area pursuant to the federal Endangered Species Act. Discharges of agricultural wastes have been identified as potentially "taking" listed species and their critical habitat. Further, a catastrophic crash of pelagic species in the Delta has occurred over the last three years. Toxicity, attributable to discharges of pesticides, has been identified as one of the three likely causes of this crash. A "[s]ignificant effect on the environment" means "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance." 14 California Administrative Code § 15382. New species and habitat listings and a crash of pelagic organisms in the Delta clearly meet the test of adverse change in the physical conditions within the area affected by the project. The Negative Declaration failed to even consider the program's impacts to listed species and their habitat and certainly could not have anticipated the new listings and accelerating collapse of Central Valley fisheries following its adoption. This significant new information of significant impacts requires preparation of a new environmental document.

The 2003 Negative Declaration was predicated upon the assumption that coalitions would be established and that these coalitions would comply with mandated program requirements. It was expected that coalitions would provide required drainage

schematics and yearly monitor all major drainages, 20% of intermediate drainages on a rotating basis and minor drainages where downstream exceedances are observed. The reality, as we approach the 2006 renewed Waiver, is that every coalition has monitored only a small fraction of the required sites and, with one possible exception, ignored requirements to provide detailed drainage maps. Three of the seven have failed to develop approvable monitoring plans and virtually all have failed to monitor all of the required parameters. In 2003, it was expected that coalitions would promptly report water quality exceedances and conduct follow-up monitoring. It was expected that coalitions would comply with explicit requirements to submit specific information in the Watershed Evaluation Reports, Communication Reports, Exceedance Reports, Evaluation Reports and develop Implementation Plans. It was expected that coalitions would inventory, evaluate and report presently used management practices and propose and evaluate potential new management practices. Regional Board files are pregnant with correspondence documenting the coalitions' egregious failure to do so. Again, in 2003, it was expected that the Executive Officer, upon receipt of an Exceedance Report, would require coalitions to prepare and submit a Management Plan. Despite thousands of identified water quality exceedances, the Executive Officer has never requested that a coalition submit a Management Plan (with the exception of concluding that the Feather River Diazinon TMDL Implementation Plan is also a Management Plan pursuant to the Waiver). And again, in 2003, it was expected that the Regional Board would enforce the conditions of the Waiver. The Regional Board has never initiated a single enforcement action against a coalition or discharger.

The 2006 renewed Waiver must be considered in light of the fact that the coalitions have failed to comply with the specific conditions of the Waiver and the Regional Board has declined to enforce those conditions. This pervasive compliance and enforcement failure has fundamentally changed the nature and circumstances of the project and is, in of itself, a substantial change and significant impact that will have a deleterious effect on the environment. Clearly, compliance has fewer environmental impacts than noncompliance. Nor is there anything to suggest that this situation will change in the foreseeable future. A new environmental document must be prepared that considers reality of the program's dismal track record over the past three years.

The Waiver states "[s]ubstantial changes have not occurred in the project or with respect to the circumstances of the project that would involve new significant environmental effects or a substantial increase in environmental effects. This Order will require additional actions to protect water quality as compared to Resolution No. R5-2003-0105. These actions include annual submittal participant information, development and implementation of Management Plans as requested by the executive Officer, and enhanced reporting and communications with regard to exceedances of applicable water quality standards." Waiver, ¶ 61. What additional actions? If anything, revised conditions in the proposed Waiver are weaker than the ones they replace. Each of the identified actions (i.e., submittal of participant information, development and implementation of management plans and enhanced exceedance communications) were components of the 2003 Waiver and the Monitoring and Reporting Program but were, unfortunately, largely ignored. For example, the 2003 Waiver required coalitions to

submit both a Communication Report and an Evaluation Report within 45 days of the filing of an Exceedance Report. Coalitions have ignored these requirements. A Watershed Evaluation Report was to have been submitted in April 2004 that included, among other things, "[m]aps of watershed area showing irrigated lands (including crop type), **drainage and discharge locations**. Maps or discussion shall provide details of the watershed showing **which fields are served by each drain**." Emphasis added. This required information, crucial for tracking down and identifying sources of pollution, was never provided. As previously noted, the Regional Board's grievous failure to ensure minimal compliance with Waiver conditions is a substantial change in the project that involves significant and substantial environmental effects. Hopes and good intentions cannot substitute for the reality of noncompliance. There is nothing in the record to indicate that the Regional Board has now found the political will to enforce the conditions of the Waiver. Indeed, under enormous pressure from coalitions, the Regional Board is no longer insisting that coalitions submit membership list of participants but will, instead, accept parcel maps. Even the requirement for coalitions to "**maintain** a Membership Document with information concerning each participant who has knowingly elected to be a member of the Coalition Group" has been stricken from the proposed Waiver in the apparent belief that coalitions need not know their members. Under the renewed Waiver scheme, the Regional Board will have to employ its meager resources to track down non-filers. This backsliding is a significant resource, financial and environmental impact. The failure of the coalitions to comply with conditions, the failure of the Regional Board to enforce those conditions and the weaker provisions in the proposed Waiver are significant changes involving significant new and increased environmental impacts.

According to the proposed Waiver, "[s]ince the adoption of Resolution No. R5-2003-0105 and the Negative Declaration, new information has become available to the lead agency. Central Valley Water Board staff has compiled two years of water quality monitoring data from Central Valley Water Board sources, Coalition Groups, Water Districts and others within the Sacramento River, San Joaquin River and Tulare Lake Basins. Water quality monitoring data from Coalition Groups and Individual Dischargers **identified <u>some</u> exceedances of applicable water quality standards**." Waiver, ¶ 62. Emphasis Added. Some exceedances? In 2003, information concerning agricultural pollution was largely limited to a series of pesticide studies and 303(d) listings, primarily focused on mainstem waterways. Indeed, most of the agricultural community denied there were any problems caused by discharges from irrigated lands. Certainly, there was little to indicate the magnitude and pervasiveness of impairment caused by discharges of agricultural wastes. Three years of monitoring by U.C. Davis, under contract to the Regional Board, and coalitions have now established that virtually every agriculturally dominated waterbody is severely polluted. For example, Phase II monitoring of 30 Central Valley agricultural drains in 2004 revealed that 97% of the sites violated water quality standards and 80% were toxic to aquatic life. In a parallel and cooperative effort with Regional Board staff, U.C. Berkeley's Don Weston found acute sediment toxicity in major rivers, 8 of 19 creeks and 7 of 17 irrigation canals. The cause of the toxicity was Pyrethroid insecticides. Monitoring by the Eastside San Joaquin River Coalition during 2005 identified some 229 exceedance of water quality standard in 13 monitored

waterways. Toxicity was found at more than half of the sites. Monitoring by the Westside San Joaquin River Coalition found that 100% of the sites violated water quality standards and almost 60% exhibited toxicity. The discovery that virtually all agriculturally dominated waterbodies are severely polluted is clearly new significant information revealing new significant environmental impacts. The existing Waiver requirements and the coalitions were established to address the impacts of agricultural pollutants, as we understood them to be in 2003. They are clearly inadequate for addressing the far larger problem that we now know exists in 2006.

It is highly inappropriate to rely on a Negative Declaration where the evidence demonstrates that discharges, pursuant to the project, result and will continue to result in violations of state water quality standards. The evidence in the record of this proceeding conclusively establishes that agricultural discharges result in literally thousands of violations of water quality standards. Given the ever changing cropping and chemical application patterns in the Central Valley, the locations and sources of those violations can also change. A waterway harboring sensitive listed species may be unpolluted one season and, depending upon the crops grown and chemicals applied in nearby fields, can be highly toxic the next season. The proposed Waiver, based upon an inadequate and out of date Negative Declaration, fails to acknowledge, analyze, discuss or provide measures to mitigate the likelihood that unpolluted waterway reaches can become seriously polluted within the term and under the conditions of the Waiver.

The proposed Waiver states "[t]he Conditional Waiver establishes an iterative process that requires Dischargers to evaluate and then implement and/or improve management practices where it is determined that discharges from irrigated lands have caused or contributed to exceedances of applicable water quality standards" and "[i]n addition, when it is determined that discharges from irrigated lands have caused or contributed to exceedances of applicable water quality standards, the Executive Officer **may** request a Management Plan…" Emphasis Added. Waiver, ¶ 62. This same iterative process has been in effect since 2003, yet Regional Board staff cannot point to a single source of pollution that has been identified, a single management measure that has been implemented or a single pound reduction in pollutant mass loading. Contrary to the above claims, despite thousands of reported exceedances of water quality standards, the Executive Officer has not required coalitions to prepare Management Plans. Nor, in the face of massive noncompliance with waiver conditions, has a single enforcement action been launched.

In a curious and troubling exercise of intellectual dishonesty, the proposed Waiver then states, "[t]he new data and information were considered in this Order. The new data and information the effects of discharges of waste from irrigated lands on water quality that were previously discussed in the Initial Study and Negative Declaration. The new data and information do not show that there are any new effects of discharges of waste from irrigated lands on water quality that were not discussed in the Initial Study and Negative Declaration nor do they show that the effects discussed would be more severe than discussed in the Initial Study and Negative Declaration. Therefore, no subsequent environmental document is required for this Order." Waiver, ¶ 63. These unsupported

undocumented assertions have no basis in fact and are impeached by reality and the record. The record of the last three years conclusively demonstrates that: 1) there have been substantial changes that involve new significant environmental impacts; 2) substantial changes have occurred with respect to the circumstances; and 3) new information reveals that the project will have significant effects. A new environmental document must be prepared.

The record shows that, over time, the total quantity and toxicity of pesticide discharges from agriculture has increased. It is pure conjecture on the part of the boards to believe that, miraculously, that trend will suddenly reverse itself. *See Sundstrom v. County of Mendicino (1988) 202 Cal.App.3d 296, 311* ("CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record").

On its face, there is nothing in the Waiver that will, in the real world, prevent any particular farm from increasing their discharges of pollutants. No one is asking them to report what they currently discharge or have discharged on average in the past. No one is proposing to monitor farms in a manner that could detect whether any specific farm or groups of farms increase their discharges. Numerous experts have submitted comments stating that the Waiver conditions may result in increases in pollution discharges from agriculture. *See, e.g.*, *City of Livermore v. Local Agency Formation Commission*, 184 Cal.App.3d 531, 541-42 (1st Dist. 1986) ("Under CEQA, expert disputes are treated as per se evidence that a project may have significant impacts"); *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal.App.3d 229, 247- 49 (6th Dist. 1986).

The Regional Board acknowledges that it has no idea what, if any, management practices might be implemented under the Waiver and whether or not they might work to reduce any pollution. Waiver, ¶ 33. On a more macro scale, the unwieldy, experimental entities that the Waiver presumes will be successful in solving all of these problems that the Regional Board has failed to solve over the last two decades – the coalitions of discharges – amount to a grand experiment in delegating the board's responsibilities and is likely to utterly fail. These coalitions are just as likely to obfuscate increased pollution problems in the field, as they are to implement effective programs in good faith.

Several rather obvious points mandate a finding that the Waiver project, which is giving the green light for 25,000 farms covering millions of acres of the Central Valley to discharge billions of gallons of toxic discharges to already impaired waters, may cause significant adverse environmental impacts: 1) the drastic expansion of agricultural discharges from the apparently clean baseline observed in the 1970s and early 1980s to the ever expanding agricultural discharges, both from a volume and a toxicity perspective, being observed today; 2) the highly toxic nature of the discharges, the pollutants they contain being designed to kill biological organisms; 3) the lack of any meaningful controls identified in the Waiver; 4) the lack of any meaningful monitoring during the life of the waiver (which, even if included, will do nothing to reduce farm discharges); 5) the lack of Regional Board staffing; and 6) the reliance on untested

associations of the dischargers causing the problems to oversee almost the entire program.

Even assuming that, in the next two years, pollution from farms is reduced by the Waiver's conditions, if that reduced pollution still violates water quality standards, the Waiver still will have a significant adverse impact on the environment. By authorizing discharges that will continue violations of water quality objectives, in essence approving the prolongation of those violations, the Waiver is allowing discharges that are killing organisms and degrading areas of the Central Valley that are alive and healthy today. These additional burdens to the Central Valley's aquatic ecosystems are over and above the burdens already placed on those ecosystems by past agricultural discharges. Likewise, even assuming that post-waiver discharges stay exactly the same, they may result in more damage than in the past because of the implementation of other mitigation measures in the Central Valley that have improved the health of the Valley's waters. The discharges authorized by the Waiver may offset ecosystem improvements that have been implemented by projects through CalFed or other programs that otherwise would have improved the health of the Central Valley's waters. Hence, continuing the status quo causes more damage now than in the past, when the overall system was even more degraded.

V. THE PROPOSED WAIVER VIOLATES AND/OR FACILITATES THE VIOLATION OF STATE AND FEDERAL ENDANGERED SPECIES ACTS

Numerous wastes discharged by farmers are highly toxic to aquatic life and have been implicated in the decline of pelagic species in the Delta. The proposed Waiver is likely to result and/or facilitate the illegal "take" of listed species and will likely result and/or facilitate the destruction or adverse modification of critical habitat in violation of Section 9 of the federal Endangered Species Act (ESA).

As fees collected pursuant to the irrigated lands program only support 5 PYs, additional funds have had to be diverted from federally funded or federally approved programs; i.e., NPDES, 401 Certifications, etc. There is also the likely commingling of state and federal monies within the Regional Board. Further, many of the programs crucial to any possible success of the program are funded by federal agencies; i.e., EPA 319(h) grants, USDA grants, etc. Additionally, many of the participants in the irrigated lands program receive federal crop or water subsidies. Consequently, there is a clear nexus between federal agencies, federal funding, the Regional Board and the irrigated lands program.

We believe the Regional Board must enter into consultation with both the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) pursuant to Section 7 of the ESA. The discharge of toxic pollutants that cause or contribute to an illegal "take" by participants in the irrigated lands program is a violation of Section 9 of the ESA and requires an incidental take permit pursuant to Section 10 of the ESA. The Regional Board's issuance of a Waiver that authorizes, facilitates and/or

"causes" an illegal "take" is also a violation of Section 9 of the ESA. Consequently, both the Discharger and the Regional Board must secure incidental take permits from NMFS and USFWS.

The Waiver will also likely result in and facilitate an illegal "take" of listed species pursuant to § 2080 of the California Fish and Game Code; i.e., the California Endangered Species Act (CESA). The Discharger must obtain a permit under § 2081 or a consistency determination under § 2080.1 of CESA. Unlike ESA, CESA requires that authorized take be "fully mitigated" and that all required measures be "capable of successful implementation." There are no provisions for time schedules under CESA. We believe agricultural discharger and Regional Board must initiate consultation with the California Department of Fish and Game. There is a process and program, pursuant to § 2086 of the Fish and Game Code, whereby taking species incidental to routine agricultural activities is not prohibited. However, it requires participants in the program to implement management measures to a maximum extent practicable standard based upon best available science and must be renewed every five years.

Conclusion

The waterways of the Central Valley have suffered for decades from lack of sufficient regulations and enforcement of clean water requirements for run-off from irrigated agricultural lands. The Regional Board's 2003 experiment, providing irrigated farmers a conditional waiver under which to discharge toxic wastewater, has failed miserably and caused further suffering to the Delta watershed. Science clearly demonstrates this approach has not curbed widespread toxicity in surface and groundwater from agricultural pollutants—placing native declining species lives and 23 million Californians' drinking water supply at risk.

Continuing the existing waiver ensures polluters will never be held accountable for their actions and sufficient data will never be collected to understand the scope of the problems caused by agricultural pollution. If they should choose to do so, regulators will be violating the public interest and jeopardizing beneficial uses of the agriculturally impacted Central Valley waterways.

CSPA/Deltakeeper strongly opposes the Regional Board's proposed continuance of this even more flawed version of the ineffective waiver policy. Among many notable inadequacies, this new proposal lacks time schedules, does not require for best management practices, does not require legally-mandated CEQA review, and does not require identification lists of individual dischargers. In order to begin to heal the Central Valley's impaired waterways, CSPA/Deltakeeper recommends the Regional Board stand up for the public interest and insist that farmers comply with requirements applicable to virtually every other segment of the community.

For all of the reasons discussed above, we believe the Regional Board should reject the proposed Waiver and, instead, instruct staff to prepare a revised order requiring

the issuance of general waste discharge requirements incorporating the conditions long recommended by the environmental community.

If the Board chooses to proceed with waivers, we insist they at least include the following conditions; many of which have been included in irrigated lands waivers adopted by other regional boards. These include:

1. All dischargers must file "notices of intent to comply" and reports of waste discharge.
2. Enrollees must prepare individual farm-based Pollution Prevention Plans.
3. Coalitions must develop management plans that address all water quality standards violations.
4. Specific timelines, performance measures and yardsticks, critical for measuring compliance and success, must be included as conditions.
5. Enrollees must comply with set requirements for discharges to groundwater, not just surface water.
6. The monitoring component must include independent third party monitoring.
7. A new environmental document must be prepared, circulated and considered for any renewal of the waiver.
8. Any new waiver must sunset upon completion of the EIR that is presently being developed.

Thank you for considering these comments.

Sincerely,

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