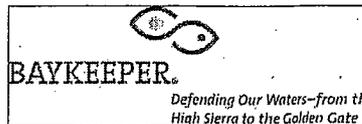




California Sportfishing  
Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"



4 September 2007

Mr. Ryan Maughan  
Division of Water Quality  
State Water Resources Control Board  
1001 I Street, 15<sup>th</sup> Floor  
Sacramento, CA 95814  
rmaughan@waterboards.ca.gov

Via: Electronic Submission  
Hardcopy if Requested

Re: Comment Letter - September 13, 2007 Irrigated Lands Program Joint Workshop

Dear Mr. Maughan:

The California Sportfishing Protection Alliance (CSPA) and Baykeeper (collectively, CSPA/Baykeeper) submit the following comments for the State Water Resources Control Board (State Board) / Central Valley Regional Water Quality Control Board (Regional Board) joint workshop regarding the irrigated lands program.

CSPA/Bay keeper is puzzled as to the purpose of the 13 September joint workshop. The Regional and State Boards already have in their possession an administrative record that answers most of the questions posed by the State Board in its Notice of Public Workshop. The State Board also has draft technical reports prepared by its regulatory compliance, nonpoint source and groundwater units that evaluated the record and the merits of CSPA/Baykeeper's petition. In other words, State Board staff with extensive expertise in agricultural matters has already provided the Board with answers to many of the questions. The denial of the CSPA/Baykeeper petition and the rejection of staff's assessment and recommendations clearly indicate that the State Board has predetermined its course of action. The joint public workshop seems to be little more than a smokescreen to mask the massive, illegal procedural irregularities surrounding this debacle.

Some 9,493 miles of rivers/stream and some 513,130 acres of lakes/reservoirs are listed on the 303(d) list as being impaired by irrigated agriculture. Surface water monitoring data collected by U.C. Davis and the agricultural coalitions over the past three years reveal that: 1) toxicity to aquatic life was present at 63% of the sites monitored for toxicity (50% were toxic to more than one species), 2) pesticide water quality standards were exceeded at 54% of sites (many for multiple pesticides), 3) one or more metals violated criteria at 66% of the sites monitored for metals, 4) human health standards for bacteria were violated at 87% of monitored sites and 5) more than 80% of the locations reported exceedances of general parameters (dissolved oxygen, pH, salt & TSS). The Pelagic Organism Decline Workgroup has identified toxicity and poor water quality, as one of the three principle causes of the catastrophic decline of pelagic species in the

Delta. Recently, the state's Groundwater Ambient Monitoring and Assessment Program monitored 181 private wells in Tulare County and found that 43% of exceeded the drinking water MCL for nitrate and 33% tested positive for coliform bacteria.

The State and Regional Boards have inexplicably elected to regulate discharges from irrigated agriculture, the largest source of pollution to Central Valley waterways, through the honor system; despite the fact that no one has been able to point to a single documented instance of voluntary measures achieving measurable reductions in pollutant mass loading. Under the adopted waiver, the Regional Board cannot know who is actually discharging pollutants, the location of discharges, pollutants discharged, the concentration and volume of discharged pollutants, whether management measures to reduce or eliminate pollution have been implemented or whether the management measures are successful in reducing impacts to surface waters. The absence of this necessary information ensures that the program will fail.

As Regional Board Assistant Executive Director Ken Landau told the Board in a June 2003 presentation, waivers are generally reserved for low threat discharges and permits or general orders are necessary for higher environmental threats. Exhibit 6, slide 3. Mr. Landau also pointed out that, "It is clear from the Water Code that WDRs are intended to be the normal mechanism for regulating waste discharges, with waivers being used in limited circumstances. Normally, waivers are used when little oversight is needed by the Regional Board, either because of the nature of the discharge, or because adequate oversight is provided by another agency." *Id.*, notes, slide 19. With respect to staffing needs, Mr. Landau said, "With everything else being equal, general waivers and general WDRs require similar amounts of staff work to implement. If a report of waste discharge is required to obtain the waiver. There is a tremendous difference in workload, however, when compared to a waiver which does not require a report of waste discharge." *Id.*, notes, slide 19. CSPA/Baykeeper has consistently urged that reports of waste discharge be required as a condition of grower enrollment in the program.

CSPA/Baykeeper have been involved in addressing the unregulated discharges from irrigated lands for more than a decade. In 1998, we devised a two-pronged strategy to bring discharges from irrigated lands under the regulatory umbrella. The administrative prong involved a petition to vacate the 1982 waivers that subsequently led to a lawsuit against the Regional Board. The legislative prong led to the enactment of SB 390 in 1999, which sunset existing waivers as of 1 January 2003.

As SB 390 was chaptered, we urged the Regional Board to immediately initiate preparation of an EIR and not wait until the 11<sup>th</sup> hour to begin the complex, divisive process of issuing a replacement for expiring waivers. Ten weeks before the sunset of the existing waivers, the Board circulated a draft new waiver predicated upon a Negative Declaration. We participated and provided expert testimony throughout the discombobulated process that led to the adoption of renewed waivers in 2003 and litigated the State Board's rejection of our appeal. In rejecting our lawsuit, the judge observed that she was giving a new program the benefit of the doubt but that if the matter again came before her and the program wasn't protecting water quality her decision could

be 180 degrees different. The program is clearly dysfunctional and is back before the courts.

CSPA/Baykeeper has participated in previous State Board/Regional Board joint workshops following the 2003 adoption of the waiver. At those joint meetings, we discussed the failure of agricultural coalitions to comply with minimal waiver requirements. We proposed measures that would better protect water quality. Attached, as Exhibit 1, is our presentation for the 2005 joint workshop. That presentation addresses many of the questions posed for this workshop.

CSPA/Baykeeper was involved in the development and issuance of the 2006 renewal of the waivers. Throughout the process we discussed the failures of the coalitions to comply with waiver requirements. We proposed specific measures to make the program more effective and legally defensible. Our 19 May 2006 comment letter and June 2006 presentation before the Regional Board further address the State Board's questions and are attached as Exhibits 2 & 3.

CSPA/Baykeeper appealed the Regional Board's June 2006 renewal of the waivers to the State Board. On 17 May 2007, the State Board rejected our appeal, saying "After careful consideration, it is concluded that the petition in this matter fails to raise substantial issues that are appropriate for review by the State Water Resources Control Board." CSPA/Baykeeper subsequently filed a lawsuit against the Regional Board.

There is, however, more to the story. The State Board did indeed carefully consider our petition. The State Board's Office of Chief Counsel (OCC) directed the regulatory compliance, groundwater and nonpoint source units to examine the administrative record and merits of our appeal, with respect to nine specific technical issues. The three units did so and in a series of draft technical reports (2 - 4), concluded that:

1. Discharges from irrigated lands have violated water quality objectives.
2. Coalitions have failed to comply with conditions of the waiver.
3. The Regional Board has failed to enforce waiver conditions.
4. Elements of the MRP are deficient.
5. The waivers lack specific time schedules for key elements of the program.
6. Waiver conditions do not ensure pollution reductions by individual farms.
7. The size of the coalitions is unmanageable and should be limited to specific subwatersheds.
8. The waiver should address groundwater protection.
9. The waivers are not consistent with the States NPS policy.

Staff's joint recommendation was that the waivers be remanded back to the Regional Board for specific recommended program amendments.

OCC reserved for itself the evaluation of the petition's merits with respect to issues related to the Basin Plan and antidegradation. With respect to these issues, we note:

1. There is no antidegradation analysis in the adopted waivers.

2. There was no new CEQA documentation in the adopted waiver. The 2003 Negative Declaration was again used for the 2006 waiver. However, as Petitioner's pointed out, numerous changes have occurred since 2003 that require CEQA review, including:
  - i. The pelagic fish decline in the Delta became known after 2003.
  - ii. New species and critical habitat have been listed pursuant to endangered species acts.
  - iii. The rise of pyrethroid toxicity throughout the Central Valley was documented post 2003.
  - iv. Changing cropping and chemical usage patterns.
  - v. The documented failure of coalitions to comply with fundamental conditions of the 2003 waiver and monitoring plan.
3. There is a fundamental inconsistency between waiver requirements and explicit language in the Basin Plan related to:
  - i. Implementation Policy for Pesticide Discharges from Non-point Sources
  - ii. Controllable Factors Policy
  - iii. Water Quality Limited Segment Policy
  - iv. Anti-degradation Implementation Policy

Unfortunately, upper management became aware that the staff investigation was headed in a direction that was politically unacceptable. We have been informed that staff was told that State Board Member Art Baggett did not want the Board to conduct a hearing in the matter and that State Board Chair Tam Dudoc and acting Executive Director Tom Howard did not want the waivers remanded. Staff was instructed to rewrite the report to uphold the Regional Board's adoption of the waivers. Subsequently, Johnny Gonzales drafted a fifth version of technical report that recommended the waivers be upheld.

An OCC attorney then directed staff to destroy all previous drafts of the technical report, destroy all emails discussing staff's review of the petition and to avoid future electronic communication when discussing the issue.

However, CSPA/Baykeeper has been anonymously provided with multiple versions of all five technical reports and a number of internal emails, memos and reports. To illustrate staff's evaluation, we have attached two variations of the Fourth Draft Technical Report as Exhibits 4 and 5. The conclusions and recommendations in the technical reports go to the heart of the questions posed for this workshop.

The State Board's handling of Petitioner's appeal can only be characterized as an illegal denial of fundamental due process, a subversion of democratic principles and a poster child for backroom politics. It is a searing indictment of the State Board's ethical and legal bankruptcy.

Due process, compliance with regulatory requirements and consideration of issues based upon their merits are the cornerstones of an equitable and effective regulatory process. By regulation and prudence, CSPA/Baykeeper was entitled to an:

1. Unbiased staff evaluation based upon the administrative record.
2. Impartial tentative decision based upon evidence and law.
3. Open public workshops and/or hearings providing parties of record and the interested public the opportunity to address the proposed action.

Indeed, crucial issues like the irrigated lands waiver are so important and carry such potentially ominous consequences that they are more properly resolved through a full evidentiary proceeding with rules of evidence, cross-examination and rebuttal.

Here the administrative process was short-circuited when the State Board became aware that the evidence and staff investigation overwhelmingly dictated a result that was politically unacceptable to the Schwarzenegger administration. Due process, the law and any concern for the environment were discarded. As a result, agricultural pollution continues unabated, the biological tapestry of our waterways is hemorrhaging and the Delta ecosystem is imploding.

A byproduct of ignoring CSPA/Baykeeper's due process rights is the damage done to the Board's public credibility. The public cannot be expected to have faith in administrative processes or participate in regulatory proceedings before the State and Regional Boards when it becomes apparent that Board decisions are made in the back room and not based upon the merits, facts or law.

Since adoption of the 2006 waivers, coalition intransigence has continued. We note that:

1. Coalitions have generally been submitting Exceedance Reports.
2. However, they have not been submitting;
  - a. Evaluation Reports, or
  - b. Communication Reports – as required by the existing MRP.
  - c. And, no enforcement actions have been taken for these failures (the only enforcement has been related to coalition membership).
3. Nor have the coalitions provided Board staff with the mandated information with respect to:
  - a. Drainage and discharge locations.
  - b. Fields served by each drain.
  - c. Implemented and potential BMPs, etc.

Subsequent to our petition, the Regional Board has begun to require Management Plans and several coalitions have submitted draft Plans. However, all of the Management Plans submitted by coalitions to date are little more than seriously deficient boilerplates. None of them contain the required elements mandated by the state's Nonpoint Source Policy, including:

1. Specific BMPs to be implemented.
2. Verification
3. BMP effectiveness quantification.

4. Timelines.
5. Milestones.
6. Feedback mechanisms.
7. Clear consequences for failure.

Without the required nonpoint source control policy elements, Management Plans will likely provide little reduction in pollutant loading from irrigated agriculture is likely.

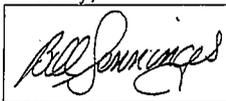
The record of the irrigated lands waiver over the last six years is pregnant with workshops, hearings and expert testimony. Unfortunately, virtually all of the testimony and exhibits submitted by the environmental community have been disregarded. We have included several herein that we believe meaningfully address the questions posed by the State Board.

In the event the new Board Members are interested in previously submitted expert recommendations, we are attaching a summation of expert testimony that was presented to the State Board in 2003 (Exhibit 7) and the chillingly prophetic testimony submitted by Dr. Charles Benbrook. Exhibit 8. Dr. Benbrook was the former staff expert for the White House Council for Environmental Quality, Executive Director of the Subcommittee of the House Committee on Agriculture and Executive Director of the Board on Agriculture of the National Academy of Sciences. He is an acknowledged expert in agricultural issues and prepared a detailed assessment of the California Department of Pesticide Regulation's programs at the request of then Governor Pete Wilson. His comments graphically illustrate why a waiver approach to regulating discharges from irrigated lands is doomed to failure.

The bottom line is that the State and Regional Boards have exempted irrigated agriculture from routine regulations applicable to virtually every other segment of society: from municipalities, industry, construction to mom-and-pop businesses. In doing so, the Boards have condemned our waterways to increasing degradation. We can only wish that Board Members would somehow find as much sympathy for the victims of agricultural pollution as they do for the polluters.

If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,



Bill Jennings, Executive Director  
California Sportfishing Protection Alliance



Sejal Choksi, Baykeeper and Program Director  
San Francisco Baykeeper