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10 WATER IMPACT NETWORK

11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12 IN RE: CERTIFICATION OF THE FINAL) PETITION TO REVIEW OR,
13 PROGRAM ENVIRONMENTAL IMPACT) ALTERNATIVELY, REQUEST FOR
14 REPORT FOR THE LONG-TERM IRRIGATED) OWN MOTION REVIEW OF
15 LANDS REGULATORY PROGRAM,) CALIFORNIA REGIONAL WATER
16 CALIFORNIA REGIONAL WATER QUALITY) QUALITY CONTROL BOARD,
17 CONTROL BOARD, CENTRAL VALLEY) CENTRAL VALLEY REGION’S
18 REGION.) RESOLUTION NO. R5-2011-0017
19) CERTIFYING THE FINAL PROGRAM
20) ENVIRONMENTAL IMPACT REPORT
21) FOR THE LONG-TERM IRRIGATED
22) LANDS REGULATORY PROGRAM
23) DATED APRIL 7, 2011

24 Pursuant to Water Code § 13320, California Sportfishing Protection Alliance and the
25 California Water Impact Network (collectively “CSPA”) hereby petitions the State Water
26 Resources Control Board (“State Board”) to review the California Regional Water Quality
27 Control Board, Central Valley Region’s (“Regional Board”) certification of the final “Irrigated
28 Lands Regulatory Program – Program Environmental Impact Report” (“EIR”) prepared for the
anticipated regulatory approvals implementing the Regional Board’s irrigated lands regulatory
program. Although it does not appear from Water Code § 13320 that the Regional Board’s
certification of the EIR is one of the enumerated actions requiring State Board review in order
for an interested person to exhaust their administrative challenges, CSPA files this petition in an
abundance of caution and, to the extent the action is not subject to such a petition, to request that
the State Board review the certification on its own motion. As pointed out in CSPA’s and many

1 others' lengthy comments to the Regional Board on the draft and final EIR, the EIR is patently
2 deficient under the California Environmental Quality Act ("CEQA"), failing to even identify the
3 project being analyzed amongst many other shortcomings, outlined below and set forth in the
4 accompanying exhibit. *See* CSPA's Full Comment Letter, attached hereto as Exhibit 1. CSPA
5 requests that (1) the State Board immediately order the Regional Board to refrain from issuing a
6 notice of determination pursuant to CEQA, Pub. Resources Code § 21108(a) in order to assure
7 that the State Board has time to review the Resolution¹; (2) the State Board expedite review of
8 Resolution No. R5-2011-0017 given the impending termination of the existing conditional
9 waiver on June 30, 2011 and the short statute of limitations under CEQA,² and (3) upon review
10 of the record, vacate Resolution No. R5-2011-0017 and order the Regional Board, by a specific
11 and prompt deadline, to prepare a new EIR addressing each of the shortcomings identified by
12 CSPA.

13 **I. NAME AND CONTACT INFORMATION OF PETITIONERS.**

14 California Sportfishing Protection Alliance
15 3536 Rainier Avenue
16 Stockton, California 95204
17 Attention: Bill Jennings, Executive Director

18 **II. REGIONAL BOARD AND STATE BOARD ACTIONS BEING PETITIONED.**

19 This petition seeks review of the Regional Board's Resolution No. R5-2011-0017
20 certifying the final EIR. A true and correct copy of Resolution No. R5-2011-0017 is attached
21 hereto as Exhibit 2.

22 ¹ If the Regional Board issues a notice of determination, interested persons only have 30
23 days in which to file a petition for writ of mandate in Superior Court. Pub. Resources Code §
24 21167(c).

25 ² Where no notice of determination is filed, interested persons must file any court
26 challenge within 180 days of the public agency's decision to carry out or approve the project. 14
27 Cal. Admin., Code § 15112(c)(5)(A). Although the Regional Board has not yet approved a
28 renewal or modification of the existing conditional waivers, CSPA anticipates that a project will
be approved prior to June 30, 2011. *See* Coalition Group Conditional Waiver of Waste
Discharge Requirements For Discharges From Irrigated Lands, Order No. R5-2006-0053 and
Individual Discharger Conditional Waiver of Waste Discharge Requirements For Discharges
From Irrigated Lands, Order No. R5-2006-0054.

1 **III. THE DATE THE REGIONAL BOARD ACTED.**

2 April 7, 2011.

3 **IV. STATEMENT OF REASONS THE REGIONAL BOARD'S ACTION WAS**
4 **INAPPROPRIATE OR IMPROPER.**

5 The Regional Board's certification of the EIR is inconsistent with CEQA and an abuse of
6 discretion for the following numerous reasons.

7 **A. THE PEIR FAILS TO COMPLY WITH CEQA'S PROCEDURAL AND**
8 **SUBSTANTIVE REQUIREMENTS.**

9 The PEIR fails as an analytical document under CEQA. Arguably, rather than assist the
10 Regional Board with making the tough decisions required to properly regulate the irrigated farm
11 dischargers and ensure compliance with the high quality waters policy and water quality
12 standards, the PEIR erects a barrier to objective evaluation. Several flaws are worth noting right
13 up front. First is the PEIR's failure to identify a proposed project or an environmentally superior
14 alternative. These omissions make the PEIR unrecognizable as an EIR under CEQA.

15 The second most egregious flaw stems from the PEIR's premise that the current waiver
16 (Alternative 1) will lead to implementation of the same best practicable control technologies as,
17 for example, Alternative 5. This is entirely baseless given the fact that seven years into
18 implementing Alternative 1, the Regional Board's staff cannot point to a single piece of evidence
19 documenting the implementation of any management practices. Even the much touted
20 management plans that already have been approved by staff under the existing waiver each
21 address management practices by bobbing and weaving – replacing BPTC implementation and
22 effectiveness monitoring with informal office meetings with groups of growers. Occasional
23 meetings cannot verify the implementation or effectiveness of a management practice on a
24 specific farm.

25 Similarly, the PEIR assumes that the four alternatives that rely on regional monitoring,
26 rather than farm specific monitoring, will be able to evaluate the implementation of BPTC
27 equally as well as Alternative 5, the one alternative that requires edge of field monitoring.
28 Although as explained above, CSPA does not believe the universal and expansive monitoring
proposed by Alternative 5 is necessary to take the program to its next effective level, CSPA

1 believes it is obvious that only by monitoring the effectiveness of a claimed BPTC at its point of
2 discharge can the Regional Board or its staff claim to ensure it is in fact BPTC and know what
3 effect the discharge is having on compliance with water quality objectives. It also is even more
4 evident that a regional monitoring location 10, 20, or 30 miles downstream of a specific farm
5 tells neither the agency, the farm nor the general public about the presence or effectiveness of
6 any management measures that may be installed there and whether they amount to BPTC.

7 These few concerns are only the highlights of a long list of deficiencies in the PEIR. The
8 following addresses each of CSPA's concerns in turn.

9 **A. General Purposes and Standards Under CEQA.**

10 CEQA requires that an agency analyze the potential environmental impacts of its
11 proposed actions in an environmental impact report ("EIR") (except in certain limited
12 circumstances). *See, e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-*
13 *Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting
14 CEQA is that the Legislature intended the act to be read so as to afford the fullest possible
15 protection to the environment within the reasonable scope of the statutory language."
16 *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98,
17 109.

18 CEQA has two primary purposes. First, CEQA is designed to inform decision makers
19 and the public about the potential, significant environmental effects of a project. 14 Cal. Code
20 Regs. ("CEQA Guidelines") § 15002(a)(1). "Its purpose is to inform the public and its
21 responsible officials of the environmental consequences of their decisions before they are made.
22 Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens*
23 *of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been
24 described as "an environmental 'alarm bell' whose purpose it is to alert the public and its
25 responsible officials to environmental changes before they have reached ecological points of no
26 return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344,
27 1354 ("Berkeley Jets"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

1 Second, CEQA requires public agencies to avoid or reduce environmental damage when
2 “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation
3 measures. CEQA Guidelines § 15002(a)(2) and (3); *See also Berkeley Jets*, 91 Cal.App.4th
4 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and
5 the public with information about the environmental impacts of a proposed project and to
6 “identify ways that environmental damage can be avoided or significantly reduced.” Guidelines
7 §15002(a)(2). If the project will have a significant effect on the environment, the agency may
8 approve the project only if it finds that it has “eliminated or substantially lessened all significant
9 effects on the environment where feasible” and that any unavoidable significant effects on the
10 environment are “acceptable due to overriding concerns.” Pub.Res.Code § 21081; CEQA
11 Guidelines § 15092(b)(2)(A) & (B).

12 While the courts review an EIR using an “abuse of discretion” standard, “the reviewing
13 court is not to ‘uncritically rely on every study or analysis presented by a project proponent in
14 support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial
15 deference.’” *Berkeley Jets*, 91 Cal.App.4th at 1355 (emphasis added), quoting, *Laurel Heights*
16 *Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn. 12
17 (1988). As the court stated in *Berkeley Jets*, 91 Cal.App.4th at 1355:

18 A prejudicial abuse of discretion occurs “if the failure to include relevant information
19 precludes informed decisionmaking and informed public participation, thereby thwarting
20 the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v.*
21 *County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey*
Peninsula Water Management Dist. (1997) 60 Cal. App. 4th 1109, 1117; *County of*
Amador v. El Dorado County Water Agency (1999) 76 Cal. App. 4th 931, 946).

22 **B. The PEIR fails to include a stable project description - indeed, no proposed**
23 **project is included.**

24 The PEIR does not evaluate a proposed project. The PEIR attempts to portray this
25 omission as a benefit: “Rather than the typical EIR approach of starting with a project and then
26 looking at alternatives to that project, this draft PEIR will be used as a tool to inform decision
27 makers during the selection process.” PEIR, p. 2-1. *See also* p. 2-5 (“In this document, ... no
28 preferred project has been identified by the Lead Agency from among the considered

1 alternatives”). The drafters overlook, however, that CEQA sets forth the necessary contents of
2 an EIR that can properly serve as a tool to inform the Regional Board. The drafters, staff and the
3 Regional Board do not have any authority to omit a description of the proposed project from the
4 PEIR.

5 “An accurate, stable and finite project description is the *sine qua non* of an informative
6 and legally adequate EIR.” *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185,
7 192; **Berkeley Jets**, 91 Cal.App.4th at 1354; **Sacramento Old City Assn. v. City Council**
8 (1991) 229 Cal. App. 3d 1011, 1023; **Stanislaus Natural Heritage Project v. County of**
9 **Stanislaus** (1996) 48 Cal. App. 4th 182, 201. “[A] curtailed or distorted project description,” on
10 the other hand, “may stultify the objectives of the reporting process. Only through an accurate
11 view of the project may affected outsiders and public decision-makers balance the proposal’s
12 benefit against its environmental costs, consider mitigation measures, assess the advantage of
13 terminating the proposal (*i.e.*, the “no project” alternative) and weigh other alternatives in the
14 balance.” *Id.* See also, CEQA section 15124; *City of Santee v. County of San Diego*, 263
15 Cal.Rptr 340 (1989). As one commenter has noted:

16 The adequacy of an EIR’s project description is closely linked to the adequacy of the
17 EIR’s analysis of the project’s environmental effects. If the description is inadequate
18 because it fails to discuss the complete project, the environmental analysis will probably
19 reflect the same mistake. (Kostka and Zischke, “Practice Under the California
20 Environmental Quality Act,” p. 474 (8/99 update).)

21 A “rigorous analysis” is required to dispose of an impact as insignificant. *Kings County Farm*
22 *Bureau v. City of Hanford*, 221 Cal.App.3d 692 (1990). Such a rigorous analysis is not possible
23 if the project description is inaccurate, inconsistent, misleading or, in the case of the PEIR,
24 completely absent.

25 **C. The Objectives Borrowed From The Stakeholder Process Attempt To Lend**
26 **Support To Purported Benefits of Elements of Alternative 1 – Including Its**
27 **Regional Planning Basis And Lack Of Farm Specific Information of Any**
28 **Sort – Which Are Its Main Faults.**

29 The PEIR’s objectives rely heavily on objectives formulated through the stakeholder
30 process coordinated by the Regional Board’s staff. The stakeholder process was dominated by
31 agricultural interests. <http://www.swrcb.ca.gov/>

1 centralvalley/water_issues/irrigated_lands/long_term_program_development/advisory_wrkgrp_
2 member_lst.pdf; *See, e.g.* 11 May 2010 Long-term ILRP Meeting Attendees
3 (http://www.swrcb.ca.gov/centralvalley/water_issues/irrigated_lands/long_term_program_develo
4 [pment/11may10_stakeholder_mtg/11may10_sum.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/irrigated_lands/long_term_program_develo)). Although CSPA, for example, nominally
5 is identified as one of the stakeholders involved in the process, CSPA was one of many groups
6 that did not have the resources to attend numerous meetings, conduct multiple reviews of
7 numerous documents, and participate actively in the stakeholder process. Possibly as a result of
8 the lack of representation from a broader spectrum of stakeholders, CSPA is concerned with
9 language included in the objectives that biases the selection of an alternative in favor of those
10 that do not address compliance with all water quality objectives throughout the region, that water
11 down the high quality waters policy requirement that implementation of BPTC be ensured, and
12 that include only regional monitoring.

13 An overly narrow definition of project objectives renders the alternatives analysis
14 inadequate. To narrowly define the primary “objective” of the proposed project itself constitutes
15 a violation of CEQA since such a restrictive formulation would improperly foreclose
16 consideration of alternatives. *See City of Santee v. County of San Diego* (1989) 214 Cal.App.3d
17 1438 (holding that when project objectives are defined too narrowly an EIR’s treatment of
18 analysis may also be inadequate). As a leading treatise on CEQA compliance cautions, “[t]he
19 case law makes clear that...overly narrow objectives may unduly circumscribe the agency’s
20 consideration of project alternatives.” (Remy, Thomas, Moose & Manley, *Guide to CEQA*
21 (Solano Books, 2007), p. 589).

22 **1. The project’s objective to restore or maintain “appropriate”**
23 **beneficial uses qualifies the Regional Board’s duty to maintain all**
24 **existing or designated beneficial uses.**

25 The first objective identified for the ILRP is to “[r]estore and/or maintain appropriate
26 beneficial uses established in Central Valley Water Board water quality control plans by
27 ensuring that all state waters meet applicable water quality objectives.” PEIR, p. 1-2. CSPA is
28 concerned with the PEIR’s inclusion of the term “appropriate.” Neither the Water Code nor the

1 Basin Plan qualify the Regional Boards’ or dischargers’ obligation to assure attainment of water
2 quality standards by deeming some designated beneficial uses as inappropriate. This language
3 should be revised to clarify that all designated or existing uses must be protected, including those
4 designated by way of the Basin Plan’s tributary rule.

5 **2. The objective to encourage implementation of BMPs is inconsistent**
6 **with Resolution No. 86-16’s duty that the Regional Board ensure**
7 **implementation of all best practicable control technologies.**

8 The second objective is to “[e]ncourage implementation of management practices. . .”
9 PEIR, p. 1-2. The notion that the Regional Board should limit its authority to “encouraging” the
10 implementation of BMPs appears inconsistent with its duties under Porter-Cologne. The
11 Regional Board must establish requirements that implement the water quality objectives. Water
12 Code § 13263(a) (“[t]he requirements shall implement any relevant water quality control plans. .
13 . . .”); § 13269(a) (waivers must be “consistent with any applicable state or regional water quality
14 control plan . . .”). Merely encouraging BMPs will not achieve objectives.

15 **3. The objective to provide incentives to minimize waste discharges**
16 **cannot be construed to allow less monitoring without any proof that**
17 **waste discharges have been minimized.**

18 The third objective includes to “[p]rovide incentives (i.e., financial assistance, monitoring
19 reductions, certification, or technical help) for agricultural operations to minimize waste
20 discharge to state waters from their operations.” PEIR, p. 1-2. By specifying the incentives,
21 CSPA believes this objective greases the skids for an alternative that trades away important
22 components of any successful program. In particular, by specifically trading away monitoring of
23 specific discharges, the objective directly undermines the Regional Board’s ability to implement
24 the high quality waters policy’s BPTC requirement as well as the Nonpoint Source Plan’s
25 monitoring requirements. CSPA believes an order with clear requirements is incentive enough
26 and this objective merely opens the door to alternatives that violate relevant law and will once
27 again prove ineffective. Any incentives should be based on encouraging growers to pollute less,
28 not, for example, agreeing to give up essential site specific monitoring for participation in a less
effective regional monitoring program.

1 **4. If the objective to coordinate with other regional programs means to**
2 **mimic the regional scope of other ineffective pollution control**
3 **programs, then this objective is inconsistent with the other three**
4 **objectives.**

5 The fifth objective is to “[p]romote coordination with other regulatory and non-regulatory
6 programs associated with agricultural operations . . . to minimize duplicative regulatory
7 oversight while ensuring program effectiveness.” PEIR, p. 1-2. This objective, although
8 sounding innocuous, is interpreted by staff as favoring alternatives that take a regional
9 perspective like other programs referenced in the objective. *See* Staff Report, p. 103
10 (Alternatives 1 and 2, “[r]egional configuration for water quality plans and monitoring would
11 facilitate efficient coordination with other programs operating at the regional level” and
12 Alternatives 3-5, “. . .the farm-level management would not promote this coordination.”)
13 Unfortunately, the record is clear that none of the other regional efforts have been successful at
14 preventing the widespread surface water pollution and toxicity from irrigated lands. If
15 coordination with regional programs means that the program must replicate the regional scales of
16 other unsuccessful programs and thus replicate their inability to protect water quality since their
17 inception, then this objective is inappropriate and inconsistent with the objective to restore water
18 quality and meet water quality standards. The objective should be clarified to promote
19 coordination without necessarily copying the ineffective regional programs already in place.

20 **D. The PEIR fails to identify the superior alternative.**

21 By choosing not to propose a project, it is hardly surprising that the PEIR does not
22 identify the superior environmental alternative. One of CEQA’s fundamental requirements is
23 that the DEIR must identify the “environmentally superior alternative.” CEQA Guidelines
24 §1526.6(e)(2); Kostka & Zischke, *Practice Under the California Environmental Quality Act*
25 §15.37 (Cont. Educ. Of the Bar, 2008). Typically, a DEIR identifies the environmentally
26 superior alternative, which is analyzed in detail, while other project alternatives receive more
27 cursory review.

28 The lead agency is required to select the environmentally preferable alternative unless it
is infeasible. A “feasible” alternative is one that is capable of being accomplished in a successful

1 manner within a reasonable period of time, taking into account economic, environmental, legal,
2 social and technological factors. Pub. Res. Code § 21061.1; CEQA Guidelines § 15364.
3 California courts provide guidance on how to apply these factors in determining whether an
4 alternative or mitigation measure is economically feasible.

5 Since the PEIR fails to identify the environmentally superior alternative, there is not
6 adequate analysis of its impacts or feasibility. *See Burger v. County of Mendocino* (1975) 45
7 Cal.App.3d 322 (county's approval of an 80 unit hotel project over a smaller 64 unit alternative
8 was not supported by substantial evidence); *County of El Dorado v. Dept. of Transp.* (2005) 133
9 Cal.App.4th 1376 (agency must consider small alternative to casino project). Here, although
10 suffering from its own defects (*see infra*, Section IV), the economic analysis prepared for the
11 Regional Board indicates that all of the alternatives identified in the PEIR are economically
12 feasible. Indeed, the alternatives with the most regulatory oversight expand the overall economy
13 of the Central Valley. Because the alternatives are all feasible, the PEIR needed to select an
14 environmentally preferable alternative.

15 **E. The PEIR Does Not Provide Meaningful Comparative Analysis of the**
16 **Selected Alternatives Because the Assumption That All Five Alternatives**
17 **Would Be Equally Effective at Implementing BPTC and Achieving**
18 **Standards is Unsupported by Any Evidence**

19 As noted above, the PEIR fails to facilitate the Regional Board's selection of a new ILRP
20 because the PEIR is based on a fiction that any program – no matter how far removed from the
21 discharge locations and no matter how hard it may avoid documenting and measuring the
22 implementation and effectiveness of BMPs – will result in the same level of pollution control.
23 That core fiction does not allow for a meaningful comparative analysis by the Regional Board of
24 the various alternatives.

25 CEQA requires that an EIR provide a discussion of project alternatives that allows
26 meaningful analysis. *Laurel Heights I*, 47 Cal.3d at 403. The analysis of project alternatives
27 must contain an accurate quantitative assessment of the impacts of the alternatives. In *Kings*
28 *County Farm Bureau*, 221 Cal.App.3d at 733-735, the court found the EIR's discussion of a

1 natural gas alternative to a coal-fired power plant project to be inadequate because it lacked
2 necessary “quantitative, comparative analysis” of air emissions and water use.

3 The PEIR does not attempt to estimate the relative effectiveness of the five alternatives.
4 It generally assumes that they will all lead to sufficient pollution reductions. For example, the
5 PEIR “assume[s] that continuation of the program would result in implementation of a greater
6 number of surface water management practices than are present under baseline conditions, due to
7 continued use of the program’s monitoring feedback loops.” PEIR, p. 5.7-45. Given the current
8 absence of information about any BMPs actually installed, never mind whether they amount to
9 BPTC, after seven years of implementing Alternative 1, the PEIR’s assumption is entirely
10 unsupported. The PEIR also asserts that “[u]nder all program alternatives, when a constituent of
11 concern is identified through monitoring, management practices would be used to reduce the
12 level of that constituent in surface water or groundwater.” PEIR, p. 5.7-43. The PEIR repeats
13 that, for each alternative, the “[p]otential impacts related to vegetation and wildlife under
14 Alternative 3 are expected to be as described for Alternative 2. Like Alternative 2, Alternative 3
15 would implement water quality management plans that would result in a beneficial impact on
16 surface water quality and groundwater quality, which would ultimately benefit both vegetation
17 and wildlife communities.” PEIR, p. 5.7-48. By making believe that all of the alternatives will
18 have a beneficial effect on water quality – despite their obvious differences – the PEIR makes no
19 effort to compare the relative effectiveness and certainty of each alternative in meeting standards
20 or reducing pollution.

21 Obviously, of the flawed alternatives included in the PEIR, some have more certainty of
22 achieving pollution reductions than others. Nothing in the record demonstrates that Alternative
23 1, seven years after its enactment, has reduced the volume or toxicity of pollution discharges
24 from irrigated lands. There is no evidence in the Regional Board’s files or discussed in the PEIR
25 of what, if any, management practices have been or will be installed under the existing program.
26 There is no discussion of evidence of any observable trends in ambient water quality conditions
27 related to the existing program. There is certainly no evidence of any data showing any trends in
28 pollution reductions at the edge of fields based on management measures applied to those fields.

1 As a result, all of the evidence is that implementation of Alternative 1 and the even weaker
2 Alternative 2 will most likely allow increases in pollution.

3 Contrary to the claims that all of the alternatives are interchangeable from a water quality
4 perspective, one section of the PEIR discussing impacts to fish acknowledges that some
5 alternatives (Alternatives 4 and 5) will “probably be greater.” PEIR, pp. 5.8-52-53. Although
6 still sorely lacking in providing the “quantitative, comparative analysis” required by CEQA, the
7 fisheries section does at least acknowledge that additional monitoring and additional
8 management practices will result in less pollution being discharged.

9 given the probability of increased monitoring of individual farms, and especially
10 those at higher risk of generating significant impacts—in addition to wellhead
11 protection, nutrient management plans, tracking of nutrient and pesticide
12 application, and monitoring of individual wells—the positive benefit of Impact
FISH1 (improved water quality) would probably be greater under Alternative 4
than under Alternative 2 or Alternative 3.

13 PEIR, p. 5.8-52. Likewise, contrary to the discussion of water quality, the PEIR does
14 acknowledge in the fisheries discussion that “the positive benefit of Impact FISH1 (improved
15 water quality) probably would be greater under Alternative 5 than under any other alternative.”
16 PEIR, p. 5.8-53. These acknowledgements contradict the PEIR’s earlier unreasonable assertions
17 that the water quality benefits of each of the alternatives are similar despite their drastic
18 differences in monitoring requirements and management practices oversight. The PEIR’s
19 refusal to acknowledge the failure of the existing program to document any BMP
20 implementation or water quality improvements frustrates rather than facilitates the Regional
21 Board’s decision-making. A true quantitative comparison of alternatives 2, 3, and 4
22 incorporating one or more of the main flaws of Alternative 1, including for example reliance
23 solely on regional monitoring to detect and evaluate BMPs, would demonstrate they will prove
24 equally ineffective. CSPA believes the PEIR should be rewritten to include the required
25 comparative analysis on staff’s proposed alternative.
26
27
28

1 **F. The Regional Board May Not May Not Approve Four Out Of Five Of The**
2 **Proffered Alternatives Because They Would Conflict With Other Laws, i.e.**
3 **Porter-Cologne.**

4 A lead agency may not approve a project with significant unavoidable impacts unless it
5 is “otherwise permissible under applicable laws and regulations.” CEQA §21002.1(c).

6 Likewise, as the PEIR acknowledges, “[t]o be considered as an alternative under CEQA, ILRP
7 alternatives . . . must . . . meet statutory requirements established in applicable state policy and
8 regulations (e.g., . . . , the State Water Resources Control Board *Policy for Implementation and*
9 *Enforcement of the Nonpoint Source Pollution Control Program* [State Water Board 2004], and
10 the State Antidegradation Policy [State Water Board 1968]).” PEIR, p. 2-8.

11 The PEIR states that all of the alternatives will have a significant unavoidable impact on
12 prime agricultural lands. PEIR, Summary, p. 1-13. CSPA also believes that every alternative
13 considered in the PEIR will have unavoidable impacts to water quality and fisheries, at least in
14 the near term and for several of the alternatives for the indefinite future. As discussed below,
15 Alternatives 1 through 4 all violate the State’s antidegradation policy and the Nonpoint Source
16 Control program. Therefore, only one of the alternatives considered by the Regional Board (at
17 least as currently formulated) can be approved despite any significant unavoidable impacts –
18 Alternative 5.

19 **1. The first four alternatives all violate the state’s antidegradation**
20 **policy.**

21 The State Board’s “Statement of Policy With Respect to Maintaining High Quality of
22 Waters in California” provides, in relevant part, that:

23 Any activity which produces or may produce a waste or increased volume or
24 concentration of waste and which discharges or proposes to discharge to existing
25 high quality waters will be required to meet waste discharge requirements which
26 will result in the best practicable treatment or control of the discharge necessary
27 to assure that (a) a pollution or nuisance will not occur and (b) the highest water
28 quality consistent with maximum benefit to the people of the State will be
maintained.

Resolution No. 68-16 (Oct. 28, 1968) (emphasis added). As Regional Board staff explains, “In
determining BPTC, the discharger should compare the proposed method to existing proven

1 technology; evaluate performance data (through treatability studies), compare alternative
2 methods of treatment or control, and consider the method currently used by the discharger or
3 similarly situated dischargers.” Staff Report, p. 62 (citing SWRCB Order Nos. WQ 81-5, WQ
4 82-5, WQ 90-6, and WQ 2000-07).” To comply with Resolution No. 68-16’s BPTC mandate,
5 the Regional Board “must require the discharger to demonstrate that the proposed manner of
6 compliance constitutes BPTC.” *Id.* (citing SWRCB Order No. WQ 2000-7) (emphasis added).
7 *See also id.* p. 67 (“where degradation is occurring, irrigated agricultural operators must
8 *demonstrate* that any set of practices proposed for implementation represents BPTC and will be
9 required to consider existing water quality data or conduct monitoring in support of this
10 demonstration”).

11 Under the existing program, not one irrigated lands discharger has complied with
12 Resolution No. 68-16’s BPTC requirement. The Regional Board is entirely in the dark regarding
13 what, if any, measures have been implemented never mind whether they amount to BPTC.
14 Given that the existing management plans’ only map out a series of meetings between coalitions
15 and groups of dischargers to discuss measures the dischargers may have planned, there is nothing
16 in Alternative 1 or its mirror proposal, Alternative 2, that would cure these universal violations
17 of the BPTC requirement. *See* Staff Report, p. 115 (“Alternative 1 would not implement the
18 iterative BPTC and monitoring process for addressing degradation to groundwater”).

19 Alternatives 3 and 4 also succumb to the absurd notion that downstream regional
20 monitoring alone can somehow implement Resolution No. 68-16’s BPTC requirement.
21 Although these alternatives both close some of the gap in implementing the BPTC requirement
22 by requiring irrigated lands dischargers to prepare farm-specific Farm Water Quality
23 Management Plans (“FWQMPs”), the omission of monitoring to determine the effectiveness of
24 those measures means the Regional Board will not know whether the measures are BPTC.
25 Alternative 3 omits any surface or groundwater quality monitoring, essentially erasing the BPTC
26 requirement. *See* Staff Report, p. 116 (“Surface and/or groundwater quality monitoring would
27 not be required under Alternative 3 to determine effectiveness of BPTC and whether degradation
28 is occurring”). Alternative 4, to the extent it allows dischargers to forego farm specific

1 monitoring in exchange for participating in regional monitoring, cannot reasonably be claimed to
2 identify BPTC many miles upstream of the monitoring location. Nor would measurements of
3 pollution downstream at levels below applicable criteria indicate whether or not waters upstream
4 – shallower and perhaps closer to various pollution discharges – were being degraded by
5 irrigated lands discharges. Any resort to regional monitoring without a farm-specific monitoring
6 component cannot meet Resolution No. 68-16’s requirement. The Staff Report does not explain
7 how regional monitoring would suffice to determine whether upstream measures are BPTC or
8 the presence and extent of upstream degradation. *See* Staff Report, p. 116.

9 Of the five alternatives considered in the PEIR, only Alternative 5 is consistent with
10 Resolution No. 68-16. That alternative requires discharges to identify the measures they are
11 installing or implementing and it requires monitoring of the measure’s effectiveness (though as
12 CSPA notes below, Alternative 5 is weighted down with too much monitoring).

13 As the staff acknowledges, “With regard to selection of measures and practices, the
14 Central Valley Water Board and USEPA recognize that there is often site-specific, crop-specific,
15 and regional variability that affects the selection of appropriate management measures, as well as
16 design constraints and pollution-control effectiveness of various practices.” Staff Report, p. 66-
17 67. Because BPTC and compliance with the state’s antidegradation policy is ultimately a farm
18 specific question, there is no getting around the fact that to implement the policy, one must
19 identify and measure BPTC at the farm level. *See PEIR, p. 3-9* (“The appropriate management
20 practice is typically selected on a site-specific or property-specific basis”). It is simply
21 ridiculous to claim that one can determine that a discharger has installed BPTC by measuring
22 ambient water quality many miles downstream. If that were the case, the regional monitoring
23 that has occurred under Alternative 1 for the last seven years would already allow the Regional
24 Board to evaluate BPTC throughout the region. Of course, the opposite is true. The Regional
25 Board has no idea what, if any, measures have been installed and whether they amount to BPTC.
26 Alternatives that continue the current failure to apply Resolution No. 68-16 to tens of thousands
27 of dischargers of toxic and impairing pollutants and vast swaths of the State’s inland waters
28 amount to licenses to degrade water. CSPA agrees that farmers can have flexibility but they

1 have to tell the Boards and the public what they decided to implement and then measure its
2 effectiveness to comply with the BPTC requirement.

3 **2. Alternatives 1 through 4 violate the NPS Policy**

4 Alternatives 1 through 4 also are inconsistent with the State Board’s Policy for
5 Implementation and Enforcement of the Nonpoint Source Pollution Control Program (May 20,
6 2004) (“NPS Policy”). Any NPS program must be consistent with five key elements of the NPS
7 Policy. Alternatives 1 through 4 are all inconsistent the NPS Policy’s element requiring
8 compliance with Resolution No. 86-16. Alternatives 1 and 2, as well as the staff’s recommended
9 program, fail to comply with second and fourth key elements as well. Alternatives 3 and 4 also
10 fall short of the second and fourth elements to the extent they call for no water quality
11 monitoring or only regional water quality monitoring. Each of the four relevant elements is
12 discussed in turn.

13 Key element 1 states that “[a]n NPS control implementation program’s ultimate purpose
14 shall be explicitly stated. Implementation programs must, at a minimum, address NPS pollution
15 in a manner that achieves and maintains water quality objectives and beneficial uses, including
16 any applicable antidegradation requirements.” NPS Policy, pp. 11-12. As discussed above,
17 Alternatives 1 through 4 do not comply with Resolution No. 68-16. Hence, they also cannot
18 comply with Key Element 1 of the NPS.

19 Key element 2 provides that: “[a] nonpoint-source control implementation program must
20 include a description of the management practices and other program elements that are expected
21 to be implemented to ensure attainment of the implementation program’s stated purpose, the
22 process to be used to select or develop management practices, and the process to be used to
23 ensure and verify proper management practice implementation.” NPS Policy, p. 12. “A
24 RWQCB must be convinced there is a high likelihood the MP will be successful.” *Id.* In regard
25 to discharges from irrigated lands, this element of the NPS Policy effectively requires farm-based
26 water quality management plans, or their equivalent. “MPs must be tailored to a specific site and
27 circumstances, and justification for the use of a particular category or type of MP must show that
28

1 the MP has been successfully used in comparable circumstances. If an MP has not previously
2 been used, documentation to substantiate its efficacy must be provided by the discharger.” *Id.*, p.
3 12. In this case, the dischargers are the individual farms and the only way to document the
4 efficacy of a specific management practices for their particular lands is for them to tell the
5 Regional Board what they are doing and why. Likewise, in order “to ensure and verify proper
6 management practice implementation” for irrigated lands, the farms must report on their
7 implementation, including pollutant specific monitoring of the BMP’s resulting effluent.
8 Because Alternatives 1 and 2 do not include FWQMPs, they cannot comply with key element 2.
9 Likewise, Alternatives 1 and 2 and Alternative 4’s reliance on regional monitoring also cannot
10 comply with key element 2’s verification requirement. Alternative 3 has no water quality
11 monitoring at all and, thus, in the context of irrigated lands management practices, cannot verify
12 the effectiveness of any management practice.

13 Key element 3 of the NPS Policy provides that “[w]here the Regional Water Board
14 determines it is necessary to allow time to achieve water quality objectives, the nonpoint-source
15 pollution control implementation program must include a specific time schedule and
16 corresponding quantifiable milestones designed to measure progress toward reaching the
17 specified requirements.” NPS Policy, p. 13. Although CSPA may not be opposed to reasonable
18 time frames for irrigated lands dischargers to come into compliance with the requirements of a
19 revised program, the PEIR and staff report need to be clarified to acknowledge that the Regional
20 Board may not have authority to include schedules of compliance in either WDRs or conditional
21 waivers because the Central Valley Basin Plan fails to include any such authority in its program to
22 achieve the applicable water quality standards. *See* Water Code § 13242(b) (program to achieve
23 standards must include “[a] time schedule for actions to be taken” – if no time schedule provided
24 in Basin Plan, no authority); Basin Plan, p. IV-16 (compliance schedules only authorized for
25 NPDES permits). The Board’s authority appears to be limited to adopting time schedules
26 through enforcement orders. The documents also should be careful to emphasize the NPS
27 Policy’s requirement that, assuming such schedules are authorized in the Basin Plan, the
28

1 schedules “may not be longer than that which is reasonably necessary to achieve an NPS
2 implementation program’s water quality objectives.”

3 Key element 4 requires that “[a]n NPS pollution control implementation program must
4 include sufficient feedback mechanisms so that the Regional Water Board, dischargers, and the
5 public can determine whether the program is achieving its stated purpose, or whether additional
6 or different management practices or other actions are required.” NPS Policy, p. 13. “In all
7 cases the NPS control implementation program should describe the measures, protocols, and
8 associated frequencies that will be used to verify the degree to which the MPs are being properly
9 implemented and are achieving the program’s objectives, and/or to provide feedback for use in
10 adaptive management.” *Id.* “[I]f the program relies upon dischargers’ use of MPs, there should
11 be a strong correlation between the specific MPs implemented and the relevant water quality
12 requirements.” *Id.*, p. 12. In the context of irrigated lands, this key element requires reporting
13 and monitoring. It is impossible to describe the management practices that were used and a
14 “strong correlation” between the management practices and water quality standards without
15 FWQMPs and annual reporting. And it is impossible to determine that the management
16 practices are effective without reports from the discharger that they have been properly
17 implemented and monitored to confirm they have reduced pollution. Alternatives 1 through 4 do
18 not achieve this level of comprehensible feedback.

19 Key element 5 requires that “[t]he Regional Water Board must make clear, in advance,
20 the potential consequences for failure to achieve a nonpoint-source pollution control
21 implementation program’s stated objectives.” Neither Alternative 1 nor 2 make clear the
22 consequences of any failures by coalitions. No coalition or discharger takes seriously the notion
23 that a coalition will be dissolved for failing to comply with the program’s requirements. In
24 essence, the coalition-based alternatives require the Regional Board to dissolve an entire
25 watershed program – with nothing in place to back it up once it is gone. The Regional Board
26 would appear to punish itself as much as the dischargers under these scenarios. Likewise, as for
27 Alternatives 3 and 4, the consequences of failure also are not clear because the proposals do not
28 include monitoring of the individual dischargers. Although these alternatives have the Regional

1 Board involved (CSPA believes unrealistically) in the development of the FWQMPs, without
2 management practice effluent data and only sporadic site inspections by staff, there are no clear
3 consequences for noncompliance by individual dischargers.

4 **G. The PEIR Fails To Consider a Reasonable Range of Alternatives Because**
5 **Most of the Alternatives are Weighted Down With Components That Render**
6 **Them Ineffective.**

7 Because four out of the five alternatives considered in the PEIR are not viable because
8 they violate some of the elemental water quality regulations, the Regional Board is left with only
9 a single feasible alternative – Alternative 5. *See* PEIR, p. 2-8 (“Alternatives must ... meet
10 statutory requirements established in applicable state policy and regulations”). This is not a
11 reasonable range of alternatives. Even assuming one additional alternative – Alternative 4 –
12 comes close to being legal and thus feasible, the Board is still left with only two options. The
13 Regional Board should redraft the PEIR to focus on feasible alternatives. These would include
14 in addition to Alternative 5, staff’s proposed program (although as discussed below, staff’s
15 proposal is also inconsistent with the PS Policy and Resolution No. 68-16), CSPA’s proposed
16 alternative above, and at least one other variation that includes FWQMPs and farm-specific
17 monitoring for at least some portion of the discharging farms.

18 An EIR must describe a range of reasonable alternatives to the Project, or to the location
19 of the Project, which would feasibly attain most of the basic objectives of the project but would
20 avoid or substantially lessen any of the significant effects of the project, and evaluate the
21 comparative merits of the alternatives. “An EIR’s discussion of alternatives must contain
22 analysis sufficient to allow informed decision making.” *Laurel Heights I*, 47 Cal.3d at 404. An
23 EIR must also include “detail sufficient to enable those who did not participate in its preparation
24 to understand and to consider meaningfully the issues raised by the proposed project.” *Id.* at
25 405.

26 In addition to their failure to comply with Resolution No. 68-16 and the NPS Policy,
27 CSPA also believes the alternatives considered in the PEIR suffer from the following defects.
28

1 **1. The ILRP Should Not Rely on Coalitions to Implement or Comply**
2 **with Irrigated Lands Program.**

3 What, if any, value the existing coalitions may have brought to the program to facilitate
4 some of the regional monitoring and performing outreach to growers, has now passed. The
5 ILRP, to be effective, must now concentrate on getting individual farmers to take actions
6 necessary to control their pollution discharges and document implementation of BPTC. CSPA’s
7 review of the coalitions’ management plans approved by the Regional Board under the existing
8 program shows that the coalitions have no intention of documenting each farm’s management
9 measures or their effectiveness. Instead, as their management plans make clear, the coalitions
10 propose to replace various office meetings with groups of growers as a surrogate for
11 documenting each farm’s BMPs and their effectiveness. Of course, to confirm the selection,
12 implementation and monitoring of BPTC on each farm, each farm must provide that information.
13 Adding a layer of unofficial bureaucracy with an interest in obscuring information from both the
14 Board and the public does not add any efficiency to the program. In 2003, CSPA pointed out
15 that:

16 If one thing is clear, the existing Coalition program has managed to mask from
17 the Regional Board what is going on on-the-ground at most of the farms around
18 the Valley. As several Board members commented and as is painfully evidenced
19 from reviewing the available documents, we still do not have the most basic
20 information about what, if any, BMPs are being applied in the fields, where
21 they’re being applied, whether they are working or improving the quality of
22 discharges and what other BMPs might be tried in the future.

23 Letter from Law Office of Michael R. Lozeau on behalf of Deltakeeper, pp. 5-6 (Nov. 4, 2005).
24 Remarkably, seven years later, the mask erected by the coalitions remains in place. Neither the
25 Board nor the public has any idea what if any management practices have been proposed or
26 implemented by any of the estimated 30,000 farms in the Central Valley. *See e.g.*, Technical
27 Memo, p. 1-2 (“Although Alternative 1 represents the continued implementation of current
28 Central Valley Water Board policies, limited information was available to determine the extent
of management practice implementation to date”); *Id.*, p. 2-2 (“Conceptually, the best source of
this type of information would be growers or grower coalitions. Because this information was

1 not widely available, other sources were used to estimate the existing conditions (NRCS 2005;
2 DWR 2001)"); Staff Report, p. 117 (explaining that only effort to date by coalitions to "track the
3 progress of management practice implementation through the results of periodic surveys sent to
4 growers"). Nor does the informal effort of the coalitions to collect the farm-specific data appear
5 to have changed since the Regional Board's approval of management plans. *See, e.g.* East San
6 Joaquin Water Quality Coalition Web Site ("Properties adjacent to or in close proximity to each
7 waterway sampled by the Coalition are the primary focus of mailings and notices for local
8 workshops that cover BMPs to solve the water quality problem"); San Joaquin County and Delta
9 Water Quality Coalition, 2010 Annual Monitoring Report, p. 4 (March 1, 2010) (focused
10 outreach in three subwatersheds consists of asking growers to complete surveys and then
11 conducting unspecified follow-up with growers). The next phase of the ILRP cannot allow
12 coalitions to continue and further obstruct the Board's collection of discharger information.

13 The use of coalitions also will continue to undermine the Regional Board's enforcement
14 discretion. As the staff acknowledges, by relying on coalitions, the Board effectively limits the
15 availability of all of its enforcement tools. "The Central Valley
16 Water Board does not have any direct enforcement authority over a third-party group that is not
17 responsible for the waste discharge (i.e., the Board cannot take enforcement against the
18 coalition." Staff Report, p. 117. The only option available to the Regional Board to address
19 coalitions' noncompliance is not to enforce the requirements, but to eliminate the entire program
20 within large areas of the Central Valley. Rather than a readily available and precise tool
21 available to the Regional Board, like a notice of violation or an administrative civil liability, a
22 decision to dismantle the ILRP for an entire area would be the least likely response the Board
23 would want to take and would not be commensurate with the scope and seriousness of most of
24 the violations the Board was trying to address. The coalitions also undermine the Board's ability
25 to effectively enforce against individual dischargers as well by failing to collect the necessary
26 data regarding management practices on individual farms and otherwise obstructing or slowing
27 down the review and analysis of that information. *See* Staff Report, p. 140 (discussing
28 Alternative 1, "the Board . . . would not have information regarding the method(s) and practices

1 the operation has or plans to implement to work toward solving identified water quality
2 concerns”).

3 Staff’s proposal argues that the presence of coalitions will “take advantage of local
4 knowledge and administrative/cost efficiencies in dealing with a few groups versus thousands of
5 individual operations.” Staff Report p. 3. The only administrative/cost efficiencies visible from
6 the record are those realized by the coalitions’ successful effort to date to avoid gathering the key
7 information and data that is necessary to implement a successful program – farm-specific
8 management practices and monitoring data to prove they have been implemented and are
9 effective at reducing the pollutants of concern. It makes no sense that establishing an
10 intermediate layer of bureaucracy between the dischargers who have the information and the
11 agency that needs to know the information makes that process more efficient.

12 Nor do the coalitions bring the local knowledge necessary for a successful ILRP. If
13 anything, the coalitions are preventing local knowledge of each farm from reaching the Board.
14 As far as CSPA can tell, staffing by the coalitions consists of a few staff for each coalition.
15 There is no reason that the Regional Board itself could not provide the same local presence by
16 modestly expanding its staff and gain efficiencies by cutting out the middleman. To the extent
17 any alternative proposes to rely on coalitions who are not themselves dischargers to conduct
18 sampling, gather information, and prepare plans and reports pursuant to a conditional waiver or
19 WDRs, the program will continue to fail to measurably reduce any pollution discharges and
20 perpetuate or worsen the existing pollution discharges from irrigated lands.

21 **2. Alternatives that rely solely on regional monitoring to determine the**
22 **adequacy of BPTC or enforcement of individual farms are destined to**
23 **fail and do not meet CEQA’s duty to mitigate impacts.**

24 The four alternatives that rely on regional monitoring to determine that the program is
25 reducing, rather than increasing, pollution discharges and that management practices are installed
26 and equal to BPTC, do not provide for the mitigation of impacts required by CEQA. CEQA
27 requires public agencies to avoid or reduce environmental damage when “feasible” by requiring
28 “environmentally superior” alternatives and mitigation measures. CEQA Guidelines §

1 15002(a)(2) and (3); *See also, Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta*
2 *Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information
3 about the environmental impacts of a proposed project and to “identify ways that environmental
4 damage can be avoided or significantly reduced.” CEQA Guidelines §15002(a)(2). If the
5 project will have a significant effect on the environment, the agency may approve the project
6 only if it finds that it has “eliminated or substantially lessened all significant effects on the
7 environment where feasible” and that any unavoidable significant effects on the environment are
8 “acceptable due to overriding concerns.” Pub. Res. Code § 21081; CEQA Guidelines §
9 15092(b)(2)(A) & (B).

10 In general, mitigation measures must be designed to minimize, reduce or avoid an
11 identified environmental impact or to rectify or compensate for that impact. CEQA Guidelines §
12 15370. Where several mitigation measures are available to mitigate an impact, each should be
13 discussed and the basis for selecting a particular measure should be identified. *Id.* at §
14 15126.4(a)(1)(B). A lead agency may not make the required CEQA findings unless the
15 administrative record clearly shows that all uncertainties regarding the mitigation of significant
16 environmental impacts have been resolved. A public agency may not rely on mitigation
17 measures of uncertain efficacy or feasibility. *Kings County Farm Bureau*, 221 Cal.App.3d at
18 727 (finding groundwater purchase agreement inadequate mitigation measure because no record
19 evidence existed that replacement water was available). “Feasible” means capable of being
20 accomplished in a successful manner within a reasonable period of time, taking into account
21 economic, environmental, legal, social and technological factors. CEQA Guidelines § 15364.
22 Mitigation measures must be fully enforceable through permit conditions, agreements or other
23 legally binding instruments. *Id.* at § 15126.4(a)(2).

24 By not requiring any farm-specific mitigation measures, Alternatives 1 and 2 fail to meet
25 CEQA’s mitigation requirements. These two alternatives make no effort to resolve the vast
26 uncertainties surrounding the selection and implementation of management practices on irrigated
27 lands throughout the Central Valley, the very mitigation measures relied upon by the PEIR to
28 find that impacts to water quality will be less than significant. Despite the PEIR’s

1 acknowledgement that “[t]he appropriate management practice is typically selected on a
2 site-specific or property-specific basis[.]” Alternatives 1 and 2 do not include any site-specific
3 BPTC requirements that are or will be fully enforceable.

4 Similarly, Alternatives 3 and 4, although requiring FWQMPs that would require, in the
5 future, individual farms to describe their management practices, the absence of any farm specific
6 and BMP-specific monitoring to confirm their implementation and effectiveness also fails to
7 eliminate the rampant uncertainty regarding BMP implementation and their effectiveness at
8 reducing pollution from specific farms. And, again, making believe that one can monitor for the
9 implementation and effectiveness of management practices on a specific farm from several miles
10 downstream makes any management practice mitigation unenforceable, never mind fully
11 enforceable.

12 **3. Alternative 3 includes components that begin to address the**
13 **shortcomings of the current program but is weighed down with**
14 **odious requirements and illegal delegation of Board responsibilities.**

15 Although flawed, some of the alternatives described in the PEIR include components that
16 CSPA believes are necessary to an effective ILRP. However, in each instance, the PEIR weighs
17 down the effective components with various poison pills and odious requirements that stifle any
18 serious consideration of alternatives that substantially change the current program. Additional
19 comments and flaws in Alternative 3, in addition to the absence of any effluent quality
20 monitoring discussed above, include the following.

21 Alternative 3 does include the important requirement that all irrigated land dischargers
22 prepare a FWQMP. CSPA believes this requirement is fundamental to a program that will
23 achieve BPTC, achieve water quality standards and allow proper oversight by the Regional
24 Board. However, the 2-year time period for developing a FWQMP should be shortened to 6
25 months for surface water discharges and one year for groundwater discharges.

26 Alternative 3’s proposal that the Regional Board review and approve every FWQMP is
27 unrealistic and unnecessary. *See* PEIR, p. 3-14 (“Review applications and determine priorities
28 for FWQMP review and approval”); p. 3-16 (“Submit the FWQMP for review and approval by

1 the Central Valley Water Board”). As proposed, the task of reviewing in advance each and every
2 FWQMP is unrealistic. Moreover, such review and approval would be a desk top review of
3 whatever information is included in the FWQMP without the benefit of any field observations.
4 This process would simply repeat the currently inadequate surveys and informal meetings which
5 the coalitions claim can accurately evaluate management practice implementation and
6 effectiveness. Rather than requiring review of and approval of all FWQMPs, the program should
7 specify in sufficient detail the contents of the FWQMP and require them to be submitted under
8 penalty of perjury. CSPA also believes there is a role for an iterative process. The requirements
9 for the FWQMP should include requiring additional management practices wherever effluent
10 data indicates that pollutant discharges are not decreasing or standards are being violated. Any
11 review by the Board staff would be in the context of reviewing for compliance and prioritizing
12 any inspections and enforcement investigations. Staff also could, of course, require additional
13 measures or monitoring for specific problem farms.

14 Similarly, because such up front review and approval is unnecessary, any resources
15 expended to review proposals by third-parties to take over such review and approval of
16 FWQMPs is also unnecessary. To the extent the Board thought it was possible to review and
17 approve every FWQMP, farming that task out to third parties would be an illegal delegation of
18 discharge requirements. Water Code § 13223.

19 CSPA certainly agrees that the Regional Board should prioritize and conduct a significant
20 number of site inspections every year. It is through this oversight and enforcement process that
21 CSPA believes the Regional Board can realistically and accurately review a specific farm’s
22 FWQMP to determine its compliance with the program requirements. Likewise, to the extent the
23 Board staff wanted to “coordinate” with a specific farmer or even a group of farmers, such an
24 inspection would be the opportunity for coordination. By including effluent monitoring, the
25 Regional Board would have a better means of prioritizing its inspections and evaluating whether
26 management practices are BPTC. By publicizing through Board meetings and the web site the
27 outcome of these inspections including any “certifications” issued or, equally important,
28 enforcement responses by the Board or staff, CSPA believes that the Regional Board would be

1 taken seriously by a much larger percentage of individual dischargers who would then seek to
2 comply with BPTC and water quality standards.

3 As discussed in various sections of these comments above, Alternative 3's failure to
4 require any farm-specific water quality monitoring is a fatal flaw. *See* PEIR, p. 3-16 ("unless
5 specifically required in response to water quality problems, owners/operators would not be
6 required to conduct water quality monitoring of adjacent receiving waters or underlying
7 groundwater"). CSPA believes that monitoring of discharged effluent is what needs to be
8 required to determine compliance with both the BPTC requirement and applicable water quality
9 standards. As outlined in CSPA's proposed alternative, such monitoring should be limited to
10 Tier 2 and Tier 3 dischargers within areas covered by management plans and limited to basic
11 parameters plus any pollutants triggering the management plan. CSPA agrees that visual
12 monitoring does have a role but cannot be the only monitoring. CSPA has many years of
13 experience reviewing annual reports and initiating enforcement actions under the Statewide
14 General Industrial Storm Water Permit. The visual monitoring conducted under that permit is of
15 limited value to documenting pollution discharges or BMP effectiveness (though with
16 appropriate photographs, visual monitoring can document the installation of BMPs and their
17 condition).

18 **4. Alternative 4 includes fewer poison pills but its failure to require**
19 **BMP and effluent monitoring means that it would not achieve water**
20 **quality objectives or ensure implementation of BPTC.**

21 Alternative 4 also includes a number of components that CSPA believes are key
22 components to a successful ILRP, including FWQMPs and a tiering component to guide both
23 BMP implementation and different levels of monitoring. Alternative 4 proposes the same
24 procedures for preparing, reviewing and approving FWQMPs. CSPA agrees with requiring all
25 dischargers to prepare and implement FWQMPs but CSPA has the same concerns with the
26 FWQMP procedures discussed for Alternative 3 above.

27 The key difference proposed in Alternative 4 would be the inclusion of a tiering system
28 to guide dischargers on the proper levels of BMPs they should be considering as well as the

1 intensity of monitoring that is required. PEIR, p. 3-17 (“The tiers represent fields with minimal
2 (Tier 1), low (Tier 2), and high (Tier 3) potential threat to water quality. Requirements to avoid
3 or minimize discharge of waste would be the least stringent for Tier 1 fields and the most
4 stringent for Tier 3 fields”). CSPA agrees that a tiering system is important to controlling the
5 costs of implementing and overseeing the program and assuring that limited resources are aimed
6 at potentially significant pollution dischargers. CSPA believes that the three tiers proposed in
7 the PEIR for both surface and groundwater make sense in providing some initial guidance on the
8 selection and implementation of BMPs. However, CSPA believes both Tier 2 and 3 should
9 conduct similar levels of farm-specific water quality monitoring, albeit not as extensive as that
10 proposed for Alternative 5 and, at least theoretically, for Alternative 4. In addition, CSPA also
11 would use the information gleaned from the ambient monitoring and water quality management
12 plans to further prioritize the farms that must conduct effluent water quality monitoring.

13 Alternative 4’s monitoring requirements for both Tier 2 and 3 dischargers fail to
14 implement Resolution 68-16, evaluate management practice effectiveness and assure compliance
15 with water quality standards by allowing regional monitoring by discharger coalitions to replace
16 the outlined farm-specific monitoring. *See* PEIR, p. 3-19. The inclusion of farm specific
17 monitoring is an illusion as every discharger obviously will opt for the cheaper monitoring far
18 away from their activities and effluent. Monitoring required by the ILRP should be focused on
19 effluent monitoring and BMP effectiveness.

20 Likewise, for groundwater monitoring the Alternative should focus on onsite wells and
21 leave the regional monitoring to the Regional Board and its consultants. Regional monitoring
22 could also be supplemented by use of the California Department of Public Health public drinking
23 water supply database. Use of the database, in selecting for pesticide and nitrate concentrations
24 in Central Valley wells, would allow for an analysis of the effectiveness of the Alternative as
25 implemented. CSPA believes the monitoring of existing wells is a reasonable proposal and
26 should be implemented by both Tier 2 and 3 groundwater dischargers. Most farms will have one
27 or more functional wells already in place. It is a simple step to require nutrient and pathogen
28 monitoring of those existing wells. The data also would be much more relevant (though perhaps

1 initially not sufficient to define the scope of any water quality exceedances) to that particular
2 discharger. Any regional groundwater problem would simply measure in that locale and say
3 little if anything about dischargers several miles away.

4 The proposed monitoring frequency for Tier 2 dischargers of once every five years is also
5 woefully inadequate, whether considered on a farm-specific or regional basis. It is already
6 difficult enough to make determinations about compliance with standards or implementation of
7 BPTC based on edge of field monitoring four times in a single year. To then wait five more
8 years before the next set of samples would prevent any determination of trends and any
9 improvements to BMPs for that amount of time or longer. Sampling needs to occur every year,
10 whether a discharger is in Tier 2 or Tier 3.

11 Although not ideal, CSPA believes the proposed number of sampling events in any given
12 year strikes a proper balance. PEIR, p. 3-24 (“Tailwater discharges during the first discharge of
13 the irrigation season and once mid-season. Storm water discharges during the first event of the
14 wet season (between October 1 and May 31) and once during the peak storm season (typically
15 February). Discharges of subsurface (tile) drainage systems annually”).

16 Alternative 4 again discloses staff’s penchant for encouraging the formation of
17 intermediate bureaucracies and entities over whom they have no enforcement authority by
18 inviting groups of dischargers to form “legal entities that could serve a group of growers who
19 discharge to the same general location and share monitoring locations.” PEIR, p. 3-20. CSPA
20 agrees that there exist opportunities for neighboring farms to work together to monitor shared
21 irrigation ditches and implement joint control measures. CSPA does not see any reason for the
22 individual dischargers to have to form a separate entity to accomplish this goal. Each of them
23 could incorporate the measure into their respective FWQMPs and each would simply be jointly
24 and severally responsible for its implementation and effectiveness. The Regional Board could
25 respond to one or all, though obviously any inspection and follow-up would want to be with all
26 of the cooperating farms.

1 **5. Alternative 5's aggressive agency reviews and approvals and**
2 **expensive monitoring proposals go beyond the reasonable next step**
3 **but it is the one alternative reviewed in the PEIR that, if implemented**
4 **would dramatically reduce irrigated lands pollution discharges.**

5 Of the five alternatives described in the PEIR, Alternative 5 is the only one that proposes
6 an effective framework that (1) would comply with Resolution 68-16's requirement that each
7 discharger demonstrate BPTC and prevent degradation, (2) assure the attainment of water quality
8 standards not only miles downstream but in the immediate area of a discharger's effluent, and (3)
9 provide information sufficient for the Regional Board staff to properly prioritize its inspections
10 and enforcement. Alternative 5 is modeled on the successful industrial and construction site
11 storm water permit programs, with a few important exceptions. Unfortunately, in their apparent
12 excitement, the PEIR drafters could not refrain themselves from layering in too many
13 requirements the sole purpose of which appears to be to make the alternative so expensive that it
14 would never be selected. CSPA believes that, although the regulatory framework of Alternative
15 5 is sound, the monitoring frequency and constituents (at least as defined in the accompanying
16 economic analysis) are excessive and the absence of any tiering that would prioritize the riskier
17 dischargers also misses a reasonable method of reducing costs.

18 Alternative 5 proposes monitoring that goes well beyond, for example, the storm water
19 general permits' focus on basic parameters and representative metals monitoring. Technical
20 Memo, pp. 2-17 – 2-19. *See Kings River Coalition Annual Monitoring Report (2010)* (according
21 to the Technical Memo, the monitoring constituents are based on the regional samples taken by
22 the Kings River Coalition). This is overkill for site specific monitoring. The frequency of
23 monitoring also is dramatically increased in this Alternative for tailwater discharges. For
24 example, Alternative 5 would require monthly sampling of tailwater as compared to Alternative
25 4's proposal of twice per irrigation season (albeit with its regional monitoring exception). CSPA
26 believes the extensive and costly monitoring parameters proposed for Alternative 5 go well
27 beyond what is necessary for the Board and a discharger to determine whether they have
28 installed BPTC and are protecting water quality objectives.

1 The most obvious poison pill in Alternative 5 is the proposal that every farmer drill and
2 install groundwater monitoring wells. Focusing on existing wells would be much more
3 reasonable. Additionally, use of the California Department of Public Health public drinking
4 water supply database would allow for an analysis of the effectiveness of Alternative 5 as
5 implemented. The database could be queried for pesticide and nitrate concentrations in wells in
6 the Central Valley to determine if concentrations are increasing or decreasing. The database
7 could also be used for analysis to determine the role of the Alternative in contributing to trends
8 (*i.e.* what role the Alternative plays in increases or decreases).

9 As for the FWQMPs, CSPA does not believe there is any basis for allowing dischargers
10 two-years to prepare and implement FWQMPs. PEIR, p. 3-27. They have been on notice for the
11 last seven years that they need to implement management measures. In many areas, management
12 plans that supposedly will not lead to implementation of BMPs have been in place for some time.
13 CSPA believes that all dischargers should prepare and implement FWQMPs within 6 months.

14 Alternative 5 does drop the proposal to have the Regional Board coordinate with
15 dischargers regarding their FWQMPs and review and approve each plan as well. CSPA believes
16 this is a reasonable omission. However, the FWQMPs need to be submitted to the Regional
17 Board, ideally as pdfs that could be posted on-line. The proposal to have them on-site and
18 available upon the Regional Board's request would eliminate their utility for staff to rely upon
19 them to make decisions about enforcement priorities, undercuts the public's ability to review
20 FWQMPs, precludes other dischargers from reviewing similar dischargers' plans, and sends a
21 message to dischargers that they need not worry until the Board shows up.

22 Alternative 5 states that Board staff will "[f]ollow up and coordinate with growers to
23 ensure that FWQMPs and implemented management practices are addressing identified water
24 quality problems." PEIR, p. 3-26. The economic analysis presumes that by merely interacting
25 directly with growers, Board staff will have to provide them technical assistance on their
26 FWQMPs. *See* Technical Memo, p. 2-24 ("Board staff will be required to interact directly with
27 growers and provide technical assistance when requested"). In so presuming, the economic
28 analysis comes up with an estimated staffing level of 356 staff. *Id.* This number completely

1 exaggerates the level of staff necessary to implement this alternative. Indeed, the industrial and
2 construction storm water program covers more than 7,500 facilities throughout the Central
3 Valley. Currently, the Regional Board assigns fewer than a dozen staff to implement and
4 enforce that entire program, which also includes overseeing the 93 Phase I and II municipal
5 stormwater permits. More staff is clearly necessary to more effectively implement that program.
6 Even with those few staff however, it is clear that almost all of the 7,500 facilities have
7 implemented some level of management measures.

8 Alternative 5 itself does not suggest that Board staff are obliged to act as dischargers'
9 consultants. That notion, expressed in the economic analysis, is entirely improper. Any follow-
10 up by staff should be pursuant to its oversight and enforcement authority. The Regional Board
11 need not add 356 staff to effectively implement this alternative. As CSPA also proposed for
12 Alternatives 3 and 4, the Board should focus its limited resources by using the monitoring data
13 and FWQMPs to prioritize site inspections and distribute the results – providing examples of
14 good compliance and issuing enforcement orders and penalties where compliance falls short.

15 **6. The PEIR fails to consider the true no project alternative – automatic**
16 **termination of the waiver and implementation of individual WDRs**

17 The PEIR's formulation of the no project alternative is wrong because the PEIR
18 incorrectly treats the existing general waivers as continuing in perpetuity. PEIR, p. 3-4 (“no
19 project alternative” identified as future renewal of existing program and continued
20 implementation) (emphasis added). The PEIR claims that a future extension or renewal of the
21 existing waiver is of a “ministerial nature.” *Id.* Both of these assertions are incorrect as a matter
22 of law. If the Board takes no action, the existing waiver terminates on June 30, 2011. Order No.
23 R5-2006-0053, p. 17; Water Code § 13269(a)(2). Any renewal of the existing waiver is not
24 ministerial but discretionary, requiring the Regional Board to hold a hearing and exercise its
25 discretion to determine whether renewing an existing waiver complies with the Basin plan, is in
26 the public interest and includes adequate monitoring. Water Code §§ 13269(a)(2), (f). Hence,
27 the no project alternative is allowing the existing waiver to automatically terminate on June 30,
28 2011 and what would reasonably be expected to occur once that happens.

1 The PEIR cites out-of-context a single sentence from the CEQA Guidelines relating to
2 revising a regulatory plan. The PEIR quotes the following sentence from CEQA Guideline §
3 15126.6(e)(3)(A) – “When the project is the revision of an existing land use or regulatory plan,
4 policy or ongoing operation, the ‘No Project’ Alternative will be the continuation of the existing
5 plan, policy, or operation into the future.” PEIR, p. 1-3. The PEIR suggests that guidance
6 allows the Regional Board to make believe that doing nothing somehow magically renews the
7 existing waivers come June 20, 2011. That, of course, is not a “no action” or “no project”
8 alternative. Renewing the waivers would be selecting a discretionary action.

9 CEQA requires that an EIR consider a no project alternative. CEQA Guidelines §
10 15126.6(e)(1) (“The specific alternative of "no project" shall also be evaluated along with its
11 impact”). “The purpose of describing and analyzing a no project alternative is to allow
12 decisionmakers to compare the impacts of approving the proposed project with the impacts of
13 not approving the proposed project.” *Id.* “The "no project" analysis shall discuss the existing
14 conditions at the time the notice of preparation is published, or if no notice of preparation is
15 published, at the time environmental analysis is commenced, as well as what would be
16 reasonably expected to occur in the foreseeable future if the project were not approved, based on
17 current plans and consistent with available infrastructure and community services. CEQA
18 Guidelines § 15126.6(e)(2). “The [no project] description must be straightforward and
19 intelligible, assisting the decision maker and the public in ascertaining the environmental
20 consequences of doing nothing; requiring the reader to painstakingly ferret out the information
21 from the reports is not enough.” *Planning & Conservation league v. Dept. of Water Resources*
22 (2000) 83 Cal.App.4th 892, 911 (emphasis added).

23 The Guidelines note that “[a] discussion of the "no project" alternative will usually
24 proceed along one of two lines . . . CEQA Guidelines § 15126.6(e)(3). The PEIR attempts to
25 rely on the first category, which states in full that:

26 When the project is the revision of an existing land use or regulatory plan, policy
27 or ongoing operation, the "no project" alternative will be the continuation of the
28 existing plan, policy or operation into the future. Typically this is a situation
where other projects initiated under the existing plan will continue while the new

1 plan is developed. Thus, the projected impacts of the proposed plan or alternative
2 plans would be compared to the impacts that would occur under the existing plan.

3 CEQA Guidelines § 15126.6(e)(3)(A) (emphasis added). However, the existing waiver, unlike a
4 typical land use or general plan (or for example the Regional Board’s Basin Plan) that does not
5 expire by a date certain, expires as a matter of law on a date certain, June 30, 2011. The
6 Guidelines make clear that the Regional Board cannot treat one of its alternatives to a proposed
7 project (assuming the PEIR included a proposed project) as a no project alternative:

8 After defining the no project alternative . . . , the lead agency should proceed to
9 analyze the impacts of the no project alternative by projecting what would
10 reasonably be expected to occur in the foreseeable future if the project were not
11 approved, based on current plans and consistent with available infrastructure and
12 community services.

13 CEQA Guidelines § 15126.6(e)(3)(C). The current relevant plans germane to the PEIR are the
14 existing waivers. If the Regional Board were to do nothing by June 30, 2011, *i.e.*, a true no
15 project alternative, the waivers will automatically expire. The Board cannot assume it will
16 select one of the project’s alternatives and pretend it is not approving the project. This
17 methodology was firmly rejected by the Court in *Planning & Conservation League*:

18 A no project description is nonevaluative. It provides the decision makers and the
19 public with specific information about the environment if the project is not
20 approved. It is a factually based forecast of the environmental impacts of
21 preserving the status quo. It thus provides the decision makers with a base line
22 against which they can measure the environmental advantages and disadvantages
23 of the project and alternatives to the project. By contrast, the discussion of
24 alternatives is evaluative.

25 *Planning & Conservation League*, 83 Cal.App.4th at 917-918. The PEIR fails to project out an
26 actual no project alternative, incorporating the reality that the existing waivers are temporary
27 with only two months to live.

28 The PEIR’s assertion that the existing waivers can be ministerially extended or renewed
is blatantly incorrect. *See* PEIR, p. 3-29 (“If the Central Valley Water Board fails to take the
ministerial action to extend or renew the waiver program, regulation of irrigated agriculture
would not cease”); *id.*, p. 1-3 (“Given the ministerial nature of the extension or renewal of the

1 ongoing waiver, which would allow continuation of the existing program, Alternative 1 is best
2 characterized as the “No Project” Alternative”). Pursuant to Water Code § 13269, the Regional
3 Board must apply its discretion to adopt or renew a conditional waiver. Water Code §§
4 13269(a)(2), (f). *See* CEQA Guidelines §§ 15002(i)(2) (“[w]hether an agency has discretionary
5 or ministerial controls over a project depends on the authority granted by the law providing the
6 controls over the activity”). The initial decision as to whether to renew a waiver or adopt waste
7 discharge requirements or a prohibition are highly discretionary. Assuming the Regional Board
8 chooses to pursue issuance of a conditional waiver, the Regional Board wields considerable
9 discretion in adopting the necessary conditions of the waiver. The Regional Board must employ
10 its discretion to make the fundamental determinations that the conditional waiver will be
11 consistent with the Basin Plan and in the public interest. Lastly, Section 13269 precludes the
12 Regional Board from renewing any waiver without holding a public hearing where it must
13 review the terms of the waiver.

14 Porter-Cologne’s waiver renewal process cannot be equated even remotely with a
15 ministerial action. “‘Ministerial’ describes a governmental decision involving little or no
16 personal judgment by the public official as to the wisdom or manner of carrying out the project.
17 The public official merely applies the law to the facts as presented but uses no special discretion
18 or judgment in reaching a decision.” CEQA Guidelines, 14 CCR § 15369. “A ministerial
19 decision involves only the use of fixed standards or objective measurements, and the public
20 official cannot use personal, subjective judgment in deciding whether or how the project should
21 be carried out.” *Id.* As we are all well aware, having gone through this waiver process several
22 times now, the decisions to be made by the regional Board are loaded with subjective, personal
23 judgment. *See* CEQA Guidelines § 15357 (“‘Discretionary project’ means a project which
24 requires the exercise of judgment or deliberation when the public agency or body decides to
25 approve or disapprove a particular activity, as distinguished from situations where the public
26 agency or body merely has to determine whether there has been conformity with applicable
27 statutes, ordinances, or regulations”); § 15002(i) (“[a] project subject to . . . judgmental controls
28 is called a ‘discretionary project’”). *See also* CEQA Guidelines § 15268(d) (“Where a project

1 involves an approval that contains elements of both a ministerial action and a discretionary
2 action, the project will be deemed to be discretionary and will be subject to the requirements of
3 CEQA”).

4 The PEIR must be revised and recirculated with a properly defined and evaluated no
5 project alternative.

6 **H. The PEIR Ignored CSPA’s and Others Scoping Comments.**

7 As the PEIR recognizes, “[i]n accordance with State CEQA Guidelines Section
8 15123(b)(2), the areas of controversy known to the lead agency, including issues raised by
9 agencies and the public, shall be identified in the EIR.” PEIR, p. 1-8. *See* CEQA Guidelines §
10 15123 (“(a) An EIR shall contain a brief summary of the proposed actions and its consequences.
11 . . . (b) The summary shall identify: . . . (2) Areas of controversy known to the lead agency
12 including issues raised by agencies and the public. . .).

13 CSPA and others have participated in the development of the EIR from its inception,
14 submitting detailed scoping comments that fully advised the Regional Board of CSPA’s long-
15 standing criticisms of the existing ILRP and the need for FWQMPs, farm-specific monitoring
16 and compliance with antidegradation requirements. *See* CSPA/Baykeeper Scoping Comments
17 (May 30, 2008); CSPA et al. Scoping Comments (March 12, 2003). In those comments, CSPA
18 emphasized the main controversies surrounding the ILRP – embellished further by these PEIR
19 comments – that the ILRP and EIR “must directly address and eliminate . . . violations of water
20 quality standards in light of the fact that, under the present program, the Regional Board cannot
21 know who is actually discharging pollutants, what specific pollutants are being discharged, what
22 are the localized water quality impacts in the vicinity of the discharge, who has or has not
23 implemented best management practices (BMPs) and whether any reductions in pollutant
24 loading or improvements in water quality have occurred.” CSPA/Baykeeper Scoping, p. 3 (May
25 30, 2008). CSPA also reiterated the ongoing controversy “that Reports of Waste Discharge and
26 individual farm-based management plans (similar to pollution prevention plans under the
27 industrial or construction stormwater permits) are fundamentally necessary for any meaningful
28 program addressing discharges from irrigated lands.” *Id.*, p. 4. The scoping comments also

1 highlighted the ongoing controversy that the ILRP, to be successful and comply with Resolution
2 No. 68-16, must include farm specific water quality monitoring. *See id.*, p. 2 (“[EIR] cannot rely
3 on information collected far downstream to adequately address and mitigate upstream adverse
4 impacts to sensitive biological resources, *i.e.*, it must identify localized impacts in the vicinity of
5 actual discharge locations”). Many of these same issues have been raised by CSPA and others in
6 their comments on the previous waivers as well, debated by the Regional and State Boards, and
7 been the subject of previous litigation. *See, e.g.* CSPA et al. Comments (May 23, 2003);
8 Deltakeeper et al. Comments (November 4, 2005).

9 Despite these well-known areas of controversy, the PEIR fails to include them in the
10 summary as required by CEQA. This blatant omission underscores the bias built-into the PEIR
11 and ultimately informing staff’s separate recommendation in its staff report. Indeed, the few
12 controversies listed in the summary are for the most part restricted to those articulated by the
13 coalitions. PEIR, p. 2-9. The PEIR’s summary needs to be rewritten to comply with the CEQA
14 Guidelines.

15 **I. The PEIR Overlooks a Number of Important Significant Impacts.**

16 The PEIR opts not to discuss any impacts on at least three issue categories – recreation,
17 aesthetics, public health and cultural impacts – which common sense would indicate will be
18 adversely affected by the Regional Board’s selection of an ILRP that is ineffective and fails to
19 significantly reduce pollution discharges from irrigated lands. PEIR, p. 1-8. Since the EIR fails
20 entirely to analyze the impact of the alternatives on these issues, these impacts are subject to the
21 fair argument, rather than the substantial evidence standard. Fair argument standard applies even
22 to EIRs if the EIR fails entirely to analyze a particular impact. *Bakersfield Citizens For Local*
23 *Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208.

24 Under the “fair argument” standard, an EIR must analyze an impact if *any* substantial
25 evidence in the record indicates that a project may have an adverse environmental effect – even
26 if contrary evidence exists to support the agency’s decision. CEQA Guidelines § 15064(f)(1);
27 *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon v. Stanislaus* (1995) 33
28 Cal.App.4th 144, 150-151 (1995); *Quail Botanical Gardens Found., Inc. v. City of Encinitas*

1 (1994) 29 Cal. App. 4th 1597, 1602. The “fair argument” standard creates a “low threshold”
2 favoring environmental review through analysis in an EIR. *Pocket Protectors*, 124 Cal.App.4th
3 at 928.

4 **1. The PEIR fails to address impacts to Recreation and Aesthetics.**

5 In its scoping comments, CSPA pointed out the need to evaluate the ILRP’s alternatives
6 on recreational uses in the Central Valley. *See* CSPA et al. Scoping Comments (March 12,
7 2003) (EIR should analyze impacts on “recreational, tourism and beneficial uses”). There is
8 clearly a “fair argument” that any version of the ILRP may have significant impacts on both
9 recreation and aesthetics in the Central Valley, especially within the Delta. By authorizing
10 irrigated lands discharges without FWQMPs or “edge-of-field” effluent quality monitoring, any
11 new ILRP could further exacerbate pollution discharges from irrigated lands. Discharges of both
12 nutrients and pesticides likely would have adverse affects on recreational and aesthetics by
13 continuing to support the growth of nuisance aquatic species, including for example water
14 hyacinth. The growth of water hyacinth in turn results in further water quality impacts to the
15 Delta, including depressed dissolved oxygen levels, increased herbicide spraying, including toxic
16 surfactants, and other pollution concerns. None of these potential impacts were discussed in the
17 PEIR. *See* PEIR, p. 5-11-2 (“It is not anticipated that the program alternatives would
18 substantially increase or decrease the use of recreational facilities, create the need for such
19 facilities, or result in any other foreseeable significant impact on recreational opportunities in the
20 program area”); p. 5.11-1 (no review of impacts to aesthetics).

21 Discharges of nutrients from farms contribute to the explosive growth of water hyacinth
22 (*Eichhornia crassipes*) and Brazilian elodea (*Egeria densa*) in the Sacramento-San Joaquin River
23 Delta. Both Brazilian elodea *Egeria densa* and water hyacinth *Eichhornia crassipes* “form dense
24 growths that block waterways and destroy natural habitat by slowing water flow and drastically
25 changing water quality. <http://www.dbw.ca.gov/PDF/Egeria/WHSciProbsExcerpts.pdf>. As the
26 San Francisco Estuary Institute reports, “[d]ense contiguous mats” of water hyacinth “create
27 navigation and safety concerns in waterways, harbors, and marinas.”

28 <http://legacy.sfei.org/nis/hyacinth.html>. Hyacinths “[i]nterfere[] with irrigation and power

1 generation by clogging pumps and siphons.” *Id.* Hyacinth “[c]an completely exclude native
2 floating and submerged vegetation, shade habitat, change water temperature [and] ... deplete
3 dissolved oxygen.” *Id.* As Dr. G. Fred Lee has summarized,

4 Delta waters experience excessive growths of aquatic plants such as water
5 hyacinth and *Egeria densa*. These water weeds interfere with recreational use of
6 Delta waters for boating, swimming, water skiing, fishing, etc. The water weeds
7 develop on nutrients added to Delta tributaries from urban, agricultural and
8 wetlands sources in the Delta watershed, and from Delta island discharges. The
9 California Department of Boating and Waterways spends several hundred
thousand dollars per year to apply chemicals for controlling water weeds. There is
concern about the potential toxic and other impacts of these chemicals on non-
target organisms, such as fish food organisms, in the water column and sediments.

10 Lee, G. Fred and Anne Jones Lee, “Overview of Sacramento-San Joaquin River Delta
11 Water Quality Issues,” p. v (June 24, 2004). Because of the significant contribution of nutrients
12 from irrigated lands, there is plainly a fair argument that the Regional Board’s authorization of
13 irrigated lands discharges may have a significant impact on recreational boaters and persons
14 recreating in the Delta and observing vast areas of water hyacinth.

15 Because of the navigational, recreational and aesthetic impacts resulting from excessive
16 water hyacinth growth, the State of California expends resources every year spraying herbicides
17 into Delta waterways. *See* Lee, p. 19 (“large amounts of aquatic herbicides are used in the Delta
18 to control excessive growths of water hyacinth this could be an important issue impacting Delta
19 water quality”). *See* Dept. of Fish & Game, “Acute Toxicities of Herbicides Used to Control
20 Water Hyacinth and Brazilian Elodea on Larval Delta Smelt and Sacramento Splittail (June 8,
21 2004).

22 In addition to increasing herbicide discharges to the Delta, water hyacinths also provide
23 habitat for other nonnative crabs and parasites, which ultimately may affect endangered salmon
24 in the Central Valley. As one recent study reports,

25 [t]he newfound presence of these crustaceans could have significant
26 ramifications apart from just adding their names to the already lengthy list of
27 non-indigenous species in the Delta. Amphipods and isopods are known to be
28 intermediate hosts of a number of parasites, including acanthocephalan parasites
of fish (Nagasawa et al. 1983, Yasumoto and Nagasawa 1996). *Asellus*

1 *hilgendorfii* has specifically been shown to serve as an intermediate host for
2 numerous species of acanthocephalans that parasitize salmonids and other fish in
3 waters of Japan (Nagasawa and Egusa 1981, Nagasawa et al. 1983, Mayama
4 1989). Infection occurs when fish prey upon *A. hilgendorfii* that contain
5 acanthocephalan larvae. Adult acanthocephalans parasitize the intestinal tract of
6 the definitive host fish (Nagasawa et al. 1983). Studies have shown that
7 salmonids can have infection levels of 83-100% depending on the season, when
8 *A. hilgendorfii* is only 2.1 % of the total wet weight of food items in the fish diet
(Nagasawa et al. 1983). Thus, even though *A. hilgendorfii* occurs in low
abundance in the diets of fish in the Sacramento/San Joaquin Delta, it could still
potentially infect the entire population of salmonids with acanthocephalan
parasites.”

9 Toft, Jason David, “Community Effects of the Non-Indigenous Aquatic Plant Water Hyacinth
10 (*Eichhornia crassipes*) in the Sacramento/San Joaquin Delta, California” (2000). All of these
11 direct and indirect effects must be discussed and analyzed in the PEIR.

12 In addition, the presence of bacteria in samples collected by the existing ILRP obviates
13 the need to address the affect of PEIR’s alternatives and their ability to reduce fecal discharges
14 on recreation, especially swimming, and human health. In CSPA’s experience, it is not possible
15 to keep kids from playing in water. As the staff report summarizes:

16 The fecal pathogen indicator *E. coli* is the most common parameter with surface
17 water exceedances of water quality objectives in the ILRP; it was detected in 99
18 percent of all samples. Fecal contamination is a concern because certain
pathogenic bacteria found in feces can cause gastrointestinal illness.

19 Staff Report, p. 33. Indeed, 24 and 55 management plans in the Sacramento River and San
20 Joaquin, respectively, have been triggered because of exceedances of *E. coli* standards in those
21 rivers. Staff Report, p. 26, Table 3. The PEIR makes a passing reference to the fecal coliform
22 problem, noting that “[t]oxicity, and bacteria are also known water quality problems in the
23 Sacrament River Basin.” PEIR, p. 5.9-6. The obvious impacts of fecal coliform discharges on
24 recreational uses like swimming and boating in the Delta and other waters of the Central Valley
25 must be addressed in the PEIR.

26 Lastly, CSPA is aware of numerous individuals who once recreated in and on the Delta
27 and other Central Valley waters who have stopped or reduced such recreation because of fears of
28

1 contaminants and experiencing health effects that were associated with exposure to Central
2 Valley waters. For example, one of CSPA’s members, Linda Forbes, reports:

3 I was a frequent visitor to the Delta region for five years, enjoying water skiing,
4 camping, boating and swimming. I experienced several strange skin rashes after
5 weekends of recreation at the Delta, with the severity increasing over time. Two
6 summers ago I began to feel more and more uncomfortable about the risks of
pursuing my water sports passion there; I have not gone swimming or skiing in
Delta waters for over a year.

7 E-mail from Linda Forbes to Bill Jennings, CSPA (Sept. 23, 2010). Another example is from
8 Barbara Barrigan-Parrilla, a CSPA member and the Director of Restore the Delta. She tells of
9 her daughter’s first swim in the Delta as an infant resulting in an emergency room visit and her
10 refusal to swim in the Delta since that day. E-mail from Barbara Barrigan-Parrilla to Bill
11 Jennings, CSPA (Sept. 25, 2010). Kari Burr, a fisheries biologist, also describes the adverse
12 impacts of agricultural discharges on her professional and recreational activities. E-mail from
13 Kari Burr to Bill Jennings, CSPA (Sept. 26, 2010). *See also* E-mail from Frank T. Rauzi to Bill
14 Jennings (Sept. 26, 2010) (Mr. Rauzi, a lifelong resident and fisherman of the Delta, recounts his
15 refusal to eat fish and concerns about swimming in the Delta). Based on conversations between
16 Bill Jennings and other CSPA members over the years, CSPA does not believe Ms. Forbes,’ Ms.
17 Barrigan-Parilla’s, Ms. Burr’s or Mr. Rauzi’s experiences are isolated incidents but unfortunately
18 are shared by numerous people who would recreate in waters of the Central Valley but for the
19 incredible levels of toxic and health-threatening pollution that is discharged from irrigated lands.

20 **2. PEIR fails to analyze cultural impacts re: traditional uses of salmon**
21 **or other fish.**

22 The PEIR opts not to evaluate any cultural impacts of the various ILRP alternatives.
23 PEIR, p. 5.3-9. Contaminants affecting Central Valley salmon and contributing to their decline
24 have adverse impacts on Native American culture and religious practices. It is widely
25 acknowledged by scientists and government agencies that agricultural runoff is one of the factors
26 adversely affecting Chinook salmon. *See* PEIR, p. 5.8-22 (“Other factors affecting the
27 fall-run/late fall–run Chinook salmon include . . . pollution (*e.g.*, municipal discharges and
28 agricultural runoff), (Moyle et al. 2008:141–143)”). *Id.* at 5.8-39 (“NMFS (2008)

1 concluded that EPA registration of chlorpyrifos, diazinon, and malathion would jeopardize the
2 continued existence of, and destroy or adversely modify critical habitat for, the Central Valley
3 spring-run Chinook salmon ESU, the Sacramento River winter-run Chinook salmon ESU, and
4 the California Central Valley steelhead DPS”); National Academy of Sciences, “A Scientific
5 Assessment of Alternatives for Reducing Water Management Effects on Threatened and
6 Endangered Fishes in California’s Bay–Delta,” p. 42 (2010) (“It has long been recognized that
7 contaminants are present in the delta, have had impacts on the fishes, and may be increasing
8 (Linville et al., 2002; Davis et al., 2003; Edmunds et al., 1999).

9 Native American traditional uses and religious ceremonies involving salmon continue on
10 the Sacramento River and, to a lesser degree, the San Joaquin River, and their tributaries. As the
11 United States District Court for the Eastern District of California recently ruled, “salmon have
12 sustained the Winnemem Wintu and have formed the foundation of the Tribe’s cultural and
13 spiritual ceremonies and beliefs.” Order, p. 88. (May 18, 2010). Judge Wanger specifically
14 recognized the “significant cultural and spiritual interests of the Winnemem Wintu” tied to the
15 health of salmon. *Id.*, pp. 88-89. The District Court relied upon the declaration of Gary
16 Hayward Slaughter Mulcahy, the Governmental Liaison and a Tribe member of the Winnemem
17 Wintu Tribe. As Mr. Mulcahy testified to the Court,

18 For centuries, the Winnemem Wintu have had a deep cultural and spiritual
19 relationship with the salmon that utilize the Sacramento River and its tributaries.
20 We sing to the salmon and the waters that sustain them. Our history, traditions,
21 ceremonies, and culture are filled with respect, reverence, appreciation, and
22 dependence on the salmon and these waters. Salmon were the staple of the
23 Winnemem Wintu. Salmon are the food necessary to complete and fulfill many
24 of the Winnemem Wintu’s very special sacred ceremonies. Salmon are the
25 sustainer of health and life of the Winnemem Wintu. We believe that when the
26 first spirits were choosing what form they would take (i.e., Salmon, Eagle, Bear,
27 Human, etc.), when Human chose to be human, the Grandfather spirit said that
28 these Humans will need lots of help, and each of the other spirits gave something
to Humans to help them through life. We believe that Salmon gave us speech and
in return we promised to always speak for them. This is remembered and
celebrated in ceremonies on the McCloud River, Sacramento River, Squaw Creek
and at Mt. Shasta several times a year. We believe that if the salmon go, the
Winnemem Wintu will also disappear.

1 Declaration of Gary Hayward Slaughter Mulcahy, ¶ 3 (March 12, 2010). The Tsi-Akim Maidu
2 Tribe conducts a “calling back the salmon” ceremony on the Yuba River.
3 <http://www.callingbackthesalmon.com/ceremony.php>. The PEIR must gather in and discuss
4 relevant information regarding Native American cultural and religious uses of salmon that may
5 be affected by the Regional Board’s proposal to authorize contaminants affecting salmon in the
6 Central Valley.

7 **3. The PEIR fails to address public health impacts of authorizing**
8 **continued discharges of pesticides and other pollutants from irrigated**
9 **lands effluent to groundwater.**

10 As early as March 2003, CSPA and others urged the Regional Board to consider human
11 health impacts of authorizing irrigated land discharges in its EIR. CSPA et al. Scoping
12 Comments (March 12, 2003) (EIR must consider “human health throughout the Central Valley
13 and California in terms of both acute and chronic impacts including, but not limited to: -
14 children, including residents and school children - laborers, including farmworkers, farmers,
15 pesticide applicators, etc. – residents – anglers - pregnant women - newborn infants”). Despite that
16 request, the PEIR has opted to ignore potential human health impacts of the various ILRP
17 alternatives approval of continuing irrigated land discharges.

18 More than two million Californians have been exposed to harmful levels of nitrates in
19 drinking water over the past 15 years and the population of those exposed keeps growing. The
20 PEIR acknowledges the extent of nitrate contamination and includes, as Figure 5.9-17, a map
21 that shows nitrate contamination to be concentrated in the Central Valley. Incredibly, however,
22 the PEIR makes no attempt to analyze how nitrogen-based fertilizer application in the Central
23 Valley results in the exposure of the public to contaminated groundwater, the health impacts of
24 that exposure, or how implementation of any of the five alternatives would reduce exposure,
25 other than to say, for Alternative 1:

26 Nutrient management would improve both surface water quality and groundwater
27 quality by improving the use of chemicals and using improved application
28 techniques, and by limiting the use of nutrients as fertilizer that could potentially
seep to groundwater and add nitrate to the groundwater table.

1 PEIR, p. 5.9-14.

2 The assertion that ongoing nutrient management efforts would somehow improve
3 water quality is not borne out by recent data. In fact, the status quo, as proposed in
4 Alternative 1, has resulted in an increase, statewide, in the number of wells that exceeded
5 the health limit for nitrates, from nine in 1980 to 648 by 2007.

6 [http://articles.sfgate.com/2010-05-17/news/20901575_1_nitrate-contamination-water-](http://articles.sfgate.com/2010-05-17/news/20901575_1_nitrate-contamination-water-supply-water-systems)
7 [supply-water-systems](http://articles.sfgate.com/2010-05-17/news/20901575_1_nitrate-contamination-water-supply-water-systems). In Tulare County, more than 40% of private domestic water wells
8 exceed the drinking water standard for nitrate. [http://www.swrcb.ca.gov/](http://www.swrcb.ca.gov/gama/docs/ekdahl_gra2009.pdf)
9 [gama/docs/ekdahl_gra2009.pdf](http://www.swrcb.ca.gov/gama/docs/ekdahl_gra2009.pdf). On the basis of more than 25 years of data, the number
10 of wells that exceed the drinking water standard for nitrate is growing as a percentage of
11 all nitrate detections. http://www.swrcb.ca.gov/gama/docs/ekdahl_gra2009.pdf Clearly
12 the status quo is not working.

13 Health effects of exposure to nitrates most notably results in methemoglobinemia or
14 “blue baby syndrome.” Toxic effects of methemoglobinemia occur when bacteria in the infant
15 stomach convert nitrate to more toxic nitrite, a process that interferes with the body’s ability to
16 carry oxygen to body tissues. Infants with these symptoms need immediate medical care since
17 the condition can lead to coma and eventually death. Pregnant women are susceptible to
18 methemoglobinemia and should be sure that the nitrate concentrations in their drinking water are
19 at safe levels. Additionally, some scientific studies suggest a linkage between high nitrate levels
20 in drinking water with birth defects and certain types of cancer.

21 http://www.swrcb.ca.gov/water_issues/programs/gama/docs/coc_nitrate.pdf.

22 The PEIR should be rewritten to include an assessment of the potential for the public to
23 be exposed to nitrates in drinking water from agricultural practices in the Central Valley and
24 measures implemented as a result of the ILRP. This is especially important to the extent the
25 Regional Board anticipates the installation of numerous tailwater recovery systems. *See*
26 Technical Memo, p. A-2. The assessment of each alternative should include an estimate of
27 nitrogen loading to fields; nitrogen fate and transport in soil, surface water, and groundwater;
28 nitrogen monitoring; and a summary nitrogen impacts to water supplies. Linking monitoring to

1 measurement of each of the alternatives is critical. An annual assessment of the performance of
2 the alternative that is selected should be required and use of the 10,000-well California
3 Department of Public Health database should be required as a tool for evaluation.

4 Another potential health impact unaddressed by the PEIR is the potential threats from
5 fecal contamination of wells and surface waters. As the Existing Conditions Report tells us:

6 The presence of pathogen indicators, such as fecal coliform and *E. coli*, are
7 ubiquitous in water samples collected throughout the Central Valley and are
8 frequently measured at levels higher than the EPA recommended criterion for *E.*
9 *coli*. Not all strains of *E. coli* are pathogenic, but the presence of *E. coli* or fecal
10 coliform is an indicator of fecal contamination. Several coalitions funded a study
11 to determine the sources of *E. coli* contamination.

12 Existing Conditions Report, p. 3-11. See also U.S. EPA, “Conceptual Model For Pathogens and
13 Pathogen Indicators in The Central Valley and Sacramento-San Joaquin Delta - Final Report, ” p.
14 ES-1 (Aug. 24, 2007) (highest concentrations of *E. coli* data “were observed for waters affected
15 by urban environments and intensive agriculture in the San Joaquin Valley”)

16 ([http://www.swrcb.ca.gov/rwqcb5/water_issues/drinking_water_policy/concept_path_indicators/](http://www.swrcb.ca.gov/rwqcb5/water_issues/drinking_water_policy/concept_path_indicators/cover_toc_es.pdf)
17 [cover_toc_es.pdf](http://www.swrcb.ca.gov/rwqcb5/water_issues/drinking_water_policy/concept_path_indicators/cover_toc_es.pdf)). As the California Department of Public Health’s health notices explain:

18 Fecal coliforms and *E. coli* are bacteria whose presence indicates that the water
19 may be contaminated with human or animal wastes. Microbes in these wastes can
20 cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other
21 symptoms. They may pose a special health risk for infants, young children, some
22 of the elderly, and people with severely compromised immune systems.

23 DPH, Tier 1 Fecal Coliform or *E. coli* Notice Template ([http://www.cdph.ca.gov/](http://www.cdph.ca.gov/certlic/drinkingwater/Documents/Notices/Tier%201%20Fecal%20Coliform%20or%20E%20coli%20Notice.doc)
24 [certlic/drinkingwater/Documents/Notices/Tier%201%20Fecal%20Coliform%20or%20E%20coli%20Notice.doc](http://www.cdph.ca.gov/certlic/drinkingwater/Documents/Notices/Tier%201%20Fecal%20Coliform%20or%20E%20coli%20Notice.doc)). Despite its ubiquitous presence and clear connection to irrigated land
25 discharges, the only mention of pathogens in the PEIR is a passing reference in the Fisheries
26 section. PEIR, p. 5.8-49 (“Pathogens are monitored for potential exceedance of trigger limits in
27 relation to human health. Pathogens of concern to fish may affect fish populations in the
28 program area, but data are insufficient to draw any conclusions about existing effects”). Like
nitrates, no effort is made in the PEIR to discuss the obvious human health and recreational
impacts that are adversely affected by an ILRP that authorizes coliform discharges from farms.

1 Lastly, the PEIR fails to consider any human health impacts PEIR associated with
2 discharges of other pollutants, including certain metals, that will be authorized through the ILRP.
3 The Existing Conditions Report acknowledges that irrigated land discharges authorized by the
4 ILRP will mobilize various metals that can pose serious human health risks, including lead and
5 arsenic. Existing Conditions Report, p. 3-55 (“elevated levels of naturally occurring metals that
6 are mobilized and suspended in agricultural return flows are common in these watersheds—such
7 as copper, arsenic, cadmium, boron, nickel, lead, and selenium”). The PEIR also should explore
8 the human health impacts of ILRP-authorized discharges of metals.

9 **J. PEIR’s Analysis of Many Key Potential Impacts and the Alternatives’**
10 **Proposed Mitigations Are Not Supported by Substantial Evidence.**

11 The alternatives, at their core, are projects by which the Regional Board proposes to
12 authorize discharges of polluted effluent from irrigated lands to surface and groundwater
13 throughout the Central Valley. Each alternative includes various program elements which are
14 the mitigations proposed to purportedly reduce the effect of the Regional Board authorizing the
15 discharge of hundreds of millions of gallons of polluted effluent. The PEIR’s discussion of
16 impacts boils down to a discussion of the alternatives’ proposed mitigation measures. In
17 addition to those proposed mitigations, the actual dischargers would have to implement site-
18 specific mitigation measures, *i.e.* BPTC, in order to address the impacts of discharging to the
19 State’s waters.

20 The PEIR fails to substantiate or properly analyze the alternatives’ programmatic-level
21 mitigation measures, including for example the effectiveness of any FWQMPs and reporting
22 requirements, monitoring requirements, and third party actions. Nor does the PEIR adequately
23 discuss the effectiveness in reducing pollution of any of the BMPs that are listed and which
24 might achieve BPTC. The PEIR leaves out any discussion of numerous management measures
25 that likely will be applied on irrigated lands. Lastly, the PEIR fails to analyze cumulative
26 impacts of the alternatives when considered with numerous other projects in the Central Valley
27 relating to water diversions, dam operations, proposed development, pending pesticide
28

1 registration proceedings, dredging projects and others that are and will affect water quality,
2 fisheries, and other impacts.

3 Mitigation measures must be designed to minimize, reduce or avoid an identified
4 environmental impact or to rectify or compensate for that impact. CEQA Guidelines § 15370.
5 Mitigations may be proposed as part of the project but must still be fully discussed and analyzed.
6 “The discussion of mitigation measures shall distinguish between the measures which are
7 proposed by project proponents to be included in the project and other measures proposed by the
8 lead, responsible or trustee agency or other persons which are not included but the lead agency
9 determines could reasonably be expected to reduce adverse impacts if required as conditions of
10 approving the project.” CEQA Guidelines § 151126.4(a)(1)(A)

11 Where several mitigation measures are available to mitigate an impact, each should be
12 discussed and the basis for selecting a particular measure should be identified. *Id.*, §
13 15126.4(a)(1)(B). A lead agency may not make the required CEQA findings unless the
14 administrative record clearly shows that all uncertainties regarding the mitigation of significant
15 environmental impacts have been resolved. A public agency may not rely on mitigation
16 measures of uncertain efficacy or feasibility. *Kings County Farm Bureau*, 221 Cal.App.3d at
17 727 (finding groundwater purchase agreement inadequate mitigation measure because no record
18 evidence existed that replacement water was available). “Feasible” means capable of being
19 accomplished in a successful manner within a reasonable period of time, taking into account
20 economic, environmental, legal, social and technological factors. CEQA Guidelines § 15364.

21 CEQA requires the lead agency to adopt feasible mitigation measures that will
22 substantially lessen or avoid the Project’s potentially significant environmental impacts and
23 describe those mitigation measures in the CEQA document. Pub. Res. Code §§ 21002, 21081(a),
24 21100(b)(3); CEQA Guidelines § 15126.4. Mitigation measures must be fully enforceable
25 through permit conditions, agreements or other legally binding instruments. *Id.* at §
26 15126.4(a)(2). If a mitigation measure would cause one or more significant effects in addition to
27 those that would be caused by the project as proposed, the effects of the mitigation measure shall
28

1 be discussed but in less detail than the significant effects of the project as proposed. CEQA
2 Guidelines § 151126.4(a)(1)(D).

3 **1. The analysis of impacts to water quality is flawed because there is no**
4 **evidentiary support for the assumption that mitigation measures**
5 **proposed by each alternative would be equally effective.**

6 The most obvious impact of the Regional Board authorizing discharges of waste from
7 irrigated lands to surface or groundwater is impaired water quality. The PEIR, however, takes an
8 entirely cavalier approach to evaluating this obvious impact. No effort is made in the PEIR to
9 discuss the efficacy and uncertainty of the various monitoring and management plans proposed
10 by each alternative. The PEIR makes no effort to quantify or compare the actual pollution
11 reductions that would be likely to occur under each alternative. Nor does the PEIR discuss
12 whether the monitoring proposed or omitted by each alternative would be effective in informing
13 the Regional Board and public about whether irrigated lands pollution in specific areas is
14 increasing or decreasing. Nor does the PEIR compare how long it would take to figure out
15 pollution trends based on the level of monitoring proposed or omitted in each alternative.

16 As mentioned above, a fundamental flaw in the PEIR is its failure to estimate the relative
17 effectiveness of the five alternatives. It generally assumes that they will all lead to sufficient
18 pollution reductions. This flaw is magnified in the discussion of impacts to water quality. In
19 addressing water quality impacts, the PEIR assumes that surface water quality improvements
20 under Alternative 1 would be the same as all of the other alternatives, including Alternative 5.
21 As for groundwater, the PEIR makes a similar assumption – that Alternatives 2 through 5 will be
22 equally effective at reducing pollution to groundwater (the PEIR does acknowledge that not
23 addressing groundwater at all would be less effective).

24 Thus, for Alternative 1, the PEIR states that “[i]t is expected that existing water quality
25 conditions, such as the surface water quality impairments detailed in the environmental setting
26 section above and in the ECR, would improve over time as the program would continue to
27 implement surface water management practices and management plans.” PEIR, p. 5.9-14. The
28 same is said for Alternatives 2 and 3, even though the former reduces water quality monitoring

1 and the latter eliminates water quality monitoring. *Id.*, pp. 5.9-16 (“Under Alternative 2, existing
2 water quality impairments are expected to improve over time as third parties develop and
3 implement surface water and groundwater quality management plans”), 5.9-17 (“Alternative 3,
4 existing surface water quality and groundwater quality impairments are expected to improve over
5 time as the FWQMPs are developed and implemented”). The same unexplained expectation is
6 stated for Alternatives 4 and 5, simply incorporating the assertion made for Alternative 2. *Id.*, p.
7 5.9-18 (Alternative 4) (“Potential impacts to water quality and hydrology under Alternative 4
8 would be similar to those described for Alternative 2”); p. 5.9-18 (“Potential impacts to water
9 quality and hydrology under Alternative 5 would be similar to those described for Alternative
10 2”).

11 These expectations are unsupported by any evidence in the record. The Regional Board
12 cannot point to anything in its current record that “clearly shows that all uncertainties” of the
13 mitigations set forth in each alternative will eliminate the well-documented significant
14 environmental impacts of allowing irrigated lands to discharge waste to surface and ground
15 water.

16 The PEIR’s simplistic and conclusory assertions fail to assist the Regional Board or the
17 public in discerning the real life differences in pollution discharge rates that the different
18 mitigations incorporated into each of the proposed alternatives will have. For example, in regard
19 to FWQMPs, it is simply not realistic to assume that the two alternatives that do not require
20 FWQMPs – Alternatives 1 and 2 – will be as effective at identifying and implementing measures
21 as the alternatives that do require dischargers to prepare FWQMPs and, at least for two of them,
22 require them to be submitted to the Regional Board. Likewise, for the alternatives that require
23 FWQMPs, there would have to be some difference in effectiveness and pollution reductions
24 between the two alternatives (3 and 4) that would have the Regional Board review and approve
25 FWQMPs and Alternative 5’s provision that FWQMPs not be reviewed or approved.
26 Conversely, if the proposal to have the Regional Board approve every FWQMP before they go
27 into effect slows down their implementation, then there would undoubtedly be an impact during
28 the term the Board did not act on any FWQMPs. Until the PEIR can remove the uncertainty of

1 how the Regional Board can assure BPTC is implemented without requiring FWQMPs, the
2 Regional Board may not rely on alternatives that do not propose FWQMPs.

3 In terms of monitoring, no evidence could support the PEIR's assumption that
4 Alternative 3's omission of any water quality monitoring for surface or groundwater discharges
5 could somehow be as effective as any of the alternatives that do provide some water quality
6 monitoring. And as between Alternative 5's farm-specific monitoring requirement and
7 Alternatives 1, 2 and in effect 4's proposal to rely on regional monitoring, no evidence could
8 support the PEIR's assertion that the regional monitoring measures will tell the Board or anyone
9 whether a particular dischargers' management measures in fact reduce any pollution discharges
10 and would address specific dischargers' pollution problems as promptly as a measure that
11 required them to monitor their discharges. Until the PEIR sufficiently discusses and eliminates
12 the obvious uncertainty of a regional monitoring mitigation measure to evaluate the effectiveness
13 of an on-site management measure miles upstream, the Regional Board cannot rely on
14 alternatives relying on such regional monitoring.

15 As noted above, the PEIR's assumption that the monitoring required by each of the
16 proposed alternatives is equally effective, is inconsistent with the PEIR's acknowledgment in its
17 discussion of fisheries that more farm-specific monitoring results in more pollution reductions
18 and fewer impacts. PEIR, p. 5.8-52 ("given the probability of increased monitoring of individual
19 farms, and especially those at higher risk of generating significant impacts—in addition to
20 wellhead protection, nutrient management plans, tracking of nutrient and pesticide application,
21 and monitoring of individual wells—the positive benefit of Impact FISH1 (improved water
22 quality) would probably be greater under Alternative 4 than under Alternative 2 or Alternative
23 3"); *Id.*, p. 5.8-53 (Alternative 5) ("Given the emphasis on monitoring of individual farms,
24 wellhead protection, nutrient management plans, tracking of nutrient and pesticide application,
25 monitoring of individual wells, and potential installation of monitoring wells, the positive benefit
26 of Impact FISH1 (improved water quality) probably would be greater under Alternative 5 than
27 under any other alternative"). Although as discussed below, these analyses also must be better
28

1 analyzed, the general observation is obvious and the PEIR's failure to discuss these differences
2 in the water quality section renders it inadequate.

3 Nor is there any attempt in the water quality discussion to quantify the effectiveness of
4 management measures that will likely be employed by individual farms. The PEIR lists a
5 handful of likely measures. This list is incomplete, omitting numerous measures that one can
6 find by reviewing some of the management plans that have been developed. Of particular note is
7 the complete omission in the PEIR of any discussion of integrated pest management options to
8 reduce the use or rate of pesticide applications. Until the Regional Board can sufficiently discuss
9 the available management measures and whether any of them, alone or in combination will
10 effectively eliminate the significant impacts of the Board authorizing waste discharges from
11 irrigated lands, then the Board cannot rely on them.

12 **2. The analysis of impacts to fisheries is flawed because there is no**
13 **evidentiary support for the assumption that all alternatives would be**
14 **equally effective at protecting fisheries**

15 The PEIR's handling of impacts to fisheries suffers from flaws similar to those described
16 in the discussion of water quality above. The PEIR's discussion of fisheries impacts, again
17 without any evidence or common sense, simply assumes that the same level of management
18 measures and surface water pollution control effectiveness will result with implementation of
19 any of the alternatives, with or without FWQMPs and without regard to how far away some
20 water quality monitoring may (or may not) be occurring. PEIR, p. 5.8-50 ("Under this
21 alternative, management practices would be implemented to reduce the levels of identified
22 constituents of concern below the baseline conditions. Monitoring and management plan
23 requirements of Alternative 1 are expected to result in further implementation of management
24 practices by growers") As for groundwater, the same is true with the exception of Alternative 1.

25 The PEIR's assertion that Alternative 1 will improve surface water quality is entirely
26 unsupported by any evidence. Alternative 1, now in its seventh year of implementation, has
27 failed to result in the Regional Board documenting the installation of a single management
28 measure anywhere in the Central Valley. Nor is there any evidence of a trend that the rampant

1 violations of water quality standards throughout the Central Valley resulting from irrigated lands
2 discharges are on the mend. Nevertheless, the PEIR asserts that “[i]mprovements to surface
3 water quality from implementation of management practices [under Alternatives 1] in impaired
4 water bodies receiving inputs from lands in the program area are likely to benefit fish (e.g., by
5 reducing contaminant loads and decreasing sedimentation and total suspended solids).” PEIR, p.
6 5.8-50. The PEIR makes the same assertion for Alternative 2. *Id.*, p. 5.8-52. As discussed
7 above, the coalitions’ current plans are to have informal meetings with some farms to discuss
8 BMPs. *See supra*, Section F.1. The coalitions have no legal authority to require implementation
9 of any BMPs by any of their members. What, if any, BMPs may result from the proposed
10 meetings is anybody’s guess. And, without FWQMPs, whether or not the Regional Board would
11 even be aware of a specific farmer’s installation of measures is not clear. The PEIR’s cavalier
12 assertion that Alternatives 1 and 2, despite omitting any FWQMPs or farm-specific monitoring
13 could somehow lead to the certain implementation of pollution reduction measures, does not
14 resolve the uncertainties that coalitions and regional monitoring will resolve irrigated land’s
15 water pollution impacts.

16 Although the PEIR does acknowledge some relevant benefit from the mitigations
17 included in Alternatives 4 and 5 farm-specific monitoring proposals, coupled with the farm-
18 specific plan requirements, the discussion is still insufficient to remove uncertainties about the
19 efficacy of Alternative 4’s proposal. *See* PEIR, pp. 5.8-52; 5.8-53. Specifically, because a
20 discharger may opt out of farm-specific monitoring in exchange for participation in regional
21 monitoring, it is uncertain whether any discharger will conduct farm-specific water quality
22 monitoring. As a result, and as discussed above, there is no certainty that the Regional Board
23 will be able to determine that any measures installed on that farm will amount to BPTC or assure
24 compliance with water quality standards. In addition, the PEIR’s discussion of the relative
25 benefit to water and additional pollution reductions one should expect from requiring FWQMPs
26 coupled with farm-specific monitoring is not specific enough for the Regional Board to compare
27 those benefits to the other alternatives.

1 Even assuming all of the alternatives may have some benefit on water quality, the PEIR
2 also makes no effort to determine the time frames within which any such improvements would
3 be realized under the various alternatives. Given the frames of reference in each alternative, it
4 appears clear that some, for example, Alternative 5, would result in measures being installed
5 faster and hence pollution reductions being achieved more quickly, as compared to any other
6 alternative.

7 The PEIR cannot succeed in achieving the goals of CEQA if it shies away from frankly
8 addressing the mitigations proposed in each alternative and comparing their ability or inability to
9 reduce pollution that will be discharged to surface and groundwater from irrigated lands.

10 **3. The PEIR fails to discuss numerous cumulative impacts to water**
11 **quality and fisheries habitat currently plaguing the Delta and other**
12 **areas of the Central Valley.**

13 The PEIR attempts to pass on evaluating the cumulative impacts of the ILRP. PEIR, p.
14 6-1 (“Because of the unidentified location of potential impacts, the Lead Agency has not
15 identified any projects or programs adequately similar in nature, location, and type to result in a
16 meaningful comparative analysis”). The notion that either the geographic area or obvious water
17 quality and fisheries impacts of allowing discharges of irrigated lands waste is unknown is
18 patently incorrect, as the preceding sections of the PEIR make clear despite their obvious flaws.
19 The PEIR recognizes a number of specific categories of actions in the Central Valley that are
20 contributing to impacts to fisheries and water quality, in addition to discharges from agricultural
21 lands. Of particular note is the operation of the massive state and federal water projects, which
22 are having obvious cumulative impacts to fish in the Central Valley by killing massive numbers
23 of fish at their respective pumping facilities. See [http://www.swr.noaa.gov/](http://www.swr.noaa.gov/ocap/Executive_summary_to_NMFS'_CVP-SWP_operations_BO_RPA.pdf)
24 [ocap/Executive_summary_to_NMFS'_CVP-SWP_operations_BO_RPA.pdf](http://www.swr.noaa.gov/ocap/Executive_summary_to_NMFS'_CVP-SWP_operations_BO_RPA.pdf); 5.8-17 (“water
25 projects have adversely modified [longfin smelt’s] habitat, distribution, food supply, and
26 probably abundance”); See NMFS Biological Opinion Regarding Proposed Long-Term
27 Operations of the Central Valley Project And State Water Project (June 4, 2009)
28 (http://www.swr.noaa.gov/ocap/NMFS_Biological_and_Conference_Opinion_on_the_Long-

1 Term_Operations_of_the_CVP_and_SWP.pdf). Both EPA's registration of various pesticides
2 that the National Marine Fisheries Service has determined will jeopardize the continued
3 existence of listed salmon must be considered, especially considering NMFS's proposed
4 mitigation requirements prohibiting pesticide application on irrigated lands within 1000 feet of
5 water. PEIR, p. 5.8-39 ("NMFS (2008) concluded that EPA registration of chlorpyrifos,
6 diazinon, and malathion would jeopardize the continued existence of, and destroy or adversely
7 modify critical habitat for, the Central Valley spring-run Chinook salmon ESU, the Sacramento
8 River winter-run Chinook salmon ESU, and the California Central Valley steelhead DPS");
9 NMFS Biological Opinion on the Effects of the U.S. Environmental Protection Agency's
10 Proposed Registration of Pesticide Products (Nov. 18, 2008) ([http://www.nmfs.noaa.gov/pr/pdfs/
11 pesticide_biop.pdf](http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biop.pdf)).

12 The proposed Peripheral Canal being pursued by various agencies also is a reasonably
13 foreseeable project that will enormously exacerbate water quality and fisheries impacts within
14 the Delta. See Bay Delta Conservation Plan, Status Update 3 (June 2010). Likewise, the
15 Regional Board is in the best position to evaluate the cumulative impacts of the hundreds of
16 discharge permits it has issued to dischargers throughout the Central Valley. See Central Valley
17 Regional Board Web Site, Adopted Orders
18 (http://www.swrcb.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml). The
19 PEIR also should evaluate, for example, cumulative bacterial issues resulting from rampant
20 sewage overflows from municipalities throughout the Valley in combination with the bacteria
21 coming from farms. [http://www.waterboards.ca.gov/
22 water_issues/programs/sso/sso_map/sso_pub.shtml](http://www.waterboards.ca.gov/water_issues/programs/sso/sso_map/sso_pub.shtml) (accessed September 27, 2010).

23 These and other cumulative impacts must be addressed in the PEIR. Recognizing that
24 several projects may together have a considerable impact, CEQA requires an agency to consider
25 the "cumulative impacts" of a project along with other projects in the area. Pub. Resources Code
26 §21083(b); CEQA Guidelines §15355(b). It is vital that an agency assess "the environmental
27 damage [that] often occurs incrementally from a variety of small sources . . ." *Bakersfield
28 Citizens*, 124 Cal.App.4th at 1214. This requirement flows from CEQA section 21083, which

1 requires a finding that a project may have a significant effect on the environment if “the possible
2 effects of a project are individually limited but cumulatively considerable. . . . ‘Cumulatively
3 considerable’ means that the incremental effects of an individual project are considerable when
4 viewed in connection with the effects of past projects, the effects of other current projects, and
5 the effects of probable future projects.” “Cumulative impacts” are defined as “two or more
6 individual effects which, when considered together, are considerable or which compound or
7 increase other environmental impacts.” CEQA Guidelines §15355(a). “[I]ndividual effects may
8 be changes resulting from a single project or a number of separate projects.” CEQA Guidelines
9 § 15355(a).

10 “The cumulative impact from several projects is the change in the environment which
11 results from the incremental impact of the project when added to other closely related past,
12 present, and reasonably foreseeable probable future projects. Cumulative impacts can result
13 from individually minor but collectively significant projects taking place over a period of time.”
14 *Communities for a Better Environment v. Cal. Resources Agency* (“*CBE v. CRA*”) (2002) 103
15 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project
16 over time and in conjunction with other related past, present, and reasonably foreseeable
17 probable future projects whose impacts might compound or interrelate with those of the project
18 at hand.

19 As the court recently stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

20 Cumulative impact analysis is necessary because the full environmental impact of
21 a proposed project cannot be gauged in a vacuum. One of the most important
22 environmental lessons that has been learned is that environmental damage often
23 occurs incrementally from a variety of small sources. These sources appear
24 insignificant when considered individually, but assume threatening dimensions
25 when considered collectively with other sources with which they interact.

26 In *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court
27 concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The
28 court said: “The [] EIR concludes the project’s contributions to ozone levels in the area would
be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit

1 relatively minor amounts of [ozone] precursors compared to the total volume of [ozone]
2 precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone
3 problem in the air basin in order to trivialize the project's impact." The court concluded: "The
4 relevant question to be addressed in the EIR is not the relative amount of precursors emitted by
5 the project when compared with preexisting emissions, but whether any additional amount of
6 precursor emissions should be considered significant in light of the serious nature of the ozone
7 problems in this air basin."³ The *Kings County* case was recently reaffirmed in *CBE v. CRA*, 103
8 Cal.App.4th at 116, where the court rejected cases with a narrower construction of "cumulative
9 impacts."

10 Similarly, in *Friends of Eel River v. Sonoma County Water Agency*, (2003) 108 Cal. App.
11 4th 859, the court held that the EIR for a project that would divert water from the Eel River had
12 to consider the cumulative impacts of the project together with other past, present and reasonably
13 foreseeable future projects that also divert water from the same river system. The court held that
14 the EIR even had to disclose and analyze projects that were merely proposed, but not yet
15 approved. The court stated, CEQA requires "the Agency to consider 'past, present, and probable
16 future projects producing related or cumulative impacts' (Guidelines, § 15130, subd.
17 (b)(1)(A).) The Agency must interpret this requirement in such a way as to 'afford the fullest
18 possible protection of the environment.'" *Id.*, at 867, 869. The court held that the failure of the
19 EIR to analyze the impacts of the project together with other proposed projects rendered the
20 document invalid. "The absence of this analysis makes the EIR an inadequate informational
21 document." *Id.*, at 872.

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23
24 ³ *Los Angeles Unified v. City of Los Angeles*, 58 Cal.App.4th at 1024-1026 found an EIR
25 inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3
26 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the
27 regulatory recommended maximum of 70 dBA. The court concluded that this "ratio theory"
28 trivialized the project's noise impact by focusing on individual inputs rather than their collective
significance. The relevant issue was not the relative amount of traffic noise resulting from the
project when compared to existing traffic noise, but whether any additional amount of traffic
noise should be considered significant given the nature of the existing traffic noise problem.

1 The court in *Citizens to Preserve the Ojai v. Bd. of Supervisors* (1985) 176 Cal.App.3d
2 421, held that an EIR prepared to consider the expansion and modification of an oil refinery was
3 inadequate because it failed to consider the cumulative air quality impacts of other oil refining
4 and extraction activities combined with the project. The court held that the EIR's use of an Air
5 District Air Emissions Inventory did not constitute an adequate cumulative impacts analysis.
6 The court ordered the agency to prepare a new EIR analyzing the combined impacts of the
7 proposed refinery expansion together with the other oil extraction projects.

8 As the PEIR notes, water quality standards already are not being met in locations
9 throughout the Delta. As the National Academy of Sciences report and a plethora of other
10 reports and agency decisions make clear, fisheries and water quality already are adversely
11 affected by the massive water diversions of the State and Federal water projects and flow
12 reductions caused by dams throughout the Valley. As NMFS makes clear, pesticide use
13 currently approved by EPA registrations throughout the Valley is threatening salmon with
14 extinction throughout the Central Valley. In short, the need for a cumulative impact analysis of
15 water quality, fisheries, and other related impacts like human health, cultural, recreational, air
16 quality, and aesthetic cannot be seriously questioned. It is plain that massive cumulative impacts
17 from water diversions, pesticide use approvals and, with the ILRP, massive pollution from
18 irrigated lands are occurring throughout the Central Valley and particularly in the Delta.

19 **4. The PEIR's discussion of possible agricultural impacts is inadequate**
20 **because it relies on a flawed economic analysis.**

21 CSPA retained the economic consulting firm ECONorthwest to evaluate and comment on
22 the economic analysis accompanying the PEIR. The PEIR's consideration of agricultural
23 impacts relies almost exclusively on the economic analysis. PEIR, p. 5.10-1 ("The catalyst for
24 these impacts is the cost of achieving and maintaining compliance with the alternatives as
25 discussed in *Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands*
26 *Regulatory Program* (ICF International 2010) (Draft ILRP Economics Report), incorporated
27 herein by reference"). Because the economic analysis is not reliable, as is discussed in detail
28

1 below, the PEIR's discussion of asserted impacts to agricultural production is unsupported by
2 substantial evidence.

3 **B. THE ECONOMIC ANALYSIS RELIED UPON BY THE PEIR AND**
4 **STAFF REPORT IS SUBSTANTIALLY DEFICIENT AND BIASED**
5 **TOWARD THE LEAST EFFECTIVE AND COALITION-PREFERRED**
6 **ALTERNATIVES.**

7 Both the PEIR, especially in its discussion of potential agricultural impacts, and the Staff
8 Report rely extensively on ICF International's Technical Memo. A review of that analysis by
9 ECONorthwest, a firm exclusively dedicated to expert economic consulting, reveals fundamental
10 errors and biases. Because of the following errors, any reliance on the Technical Memo by the
11 Regional Board and its staff would be an abuse of discretion. The Regional Board cannot
12 substantiate a finding under Resolution No. 68-16 or the federal antidegradation policy that
13 under a newly adopted ILRP, "the highest water quality consistent with maximum benefit to the
14 people of the State will be maintained." Resolution No. 68-16 (emphasis added). Similarly, to
15 the extent the Board intends to rely on any conditional waivers to implement the next version of
16 the ILRP, a finding by the Regional Board pursuant to Water Code § 13269 that such waiver is
17 in the public interest also would not be supported by substantial evidence.

18 The ECONorthwest Review discloses the following fundamental errors in the preparation
19 of the Technical Memo.

- 20 1. **The Analytical Objectives and Approach:** ECONorthwest demonstrates that the
21 Technical Memo ignores generally accepted guidelines for this type of analysis, including
22 for example guidelines prepared by the California Department of Water Resources, an
23 agency with, of course, considerable experience interfacing with California's agricultural
24 community. Because of this failure, ECONorthwest concludes that the Technical Memo
25 "provides decision-makers and stakeholders with biased and unreliable descriptions of
26 the economic outcomes likely to materialize if the Board were to implement any of the
27 alternatives in the EIR." ECONorthwest Review, pp. 1, 2-5.
- 28 2. **Baseline:** ECONorthwest's review establishes that ICF International's analysis "does not
compare the alternatives against an appropriate baseline that describes potential future
conditions absent implementation of each alternative" further biasing its conclusions.
Hence, it provides an incomplete, biased representation of the alternatives' economic
consequences. ECONorthwest Review, pp. 1, 5-7.

- 1 3. **Management Practices:** ECONorthwest’s review discloses that ICF International only
2 considered a truncated range of the more expensive management practices in determining
3 projected costs of the various alternatives and excluding the less expensive and more
4 efficient practices. ECONorthwest Review, pp. 1, 7-9. As a result, “the EIR and
5 *Technical Memo* provide an incomplete and biased representation of the choices that
6 realistically are available to the [Regional] Board.” *Id.*, p. 1.
- 7 4. **Costs and Benefits:** ECONorthwest’s review shows that the Technical Memo
8 incorrectly calculates the costs of adopting practices that improve water quality and
9 completely overlooks major categories of economic costs and benefits, once again
10 skewing its conclusions to support the less rigorous and coalition-preferred alternatives.
11 See ECONorthwest Review, pp. 1, 9-11.
- 12 5. **Risk and Uncertainty:** ECONorthwest also criticizes the Technical Memo for failing to
13 provide information and analysis of the risks and uncertainty facing irrigators and others
14 from each proposed alternative. The omission of this standard component of any
15 complete economic analysis of a program such as the IRLP is a fatal flaw in the
16 Technical Memo. See ECONorthwest Review, pp. 1, 11.
- 17 6. **Regional Impacts:** Lastly, ECONorthwest’s review demonstrates that the Technical
18 Memo’s discussion of regional impacts “emphasize[s] negative outcomes and ignore[s]
19 the analytical assumptions that overstate costs and the resulting negative outcomes.”
20 ECONorthwest Review, p. 1. Even with this built-in bias, the Technical Memo still must
21 acknowledge the improvement to the Central Valley’s economy by implementation of
22 Alternatives 3 through 5. An accurate economic analysis likely would further support the
23 economic benefit of the alternatives that incorporate farm specific measures.

24 Because of these fundamental flaws, the Technical Memo, as well as the portions of the
25 PEIR and Staff Report that rely upon it, must be redone and recirculated in order to provide the
26 Regional Board with substantial evidence upon which it may rely.

27 **V. STATEMENT OF POINTS AND AUTHORITIES.**

28 CSPA’s arguments and points of authority are adequately detailed in the above comments
and CSPA’s attached September 27, 2010 comment letter. Should the State Board have
additional questions regarding the issues raised in this petition, CSPA will provide additional
briefing on any such questions. The petitioners believe that an evidentiary hearing before the
State Board will not be necessary to resolve the issues raised in this petition. However, CSPA
welcomes the opportunity to present oral argument and respond to any questions the State Board
may have regarding this petition.

1 **VI. PETITIONERS ARE AGGRIEVED.**

2 Petitioners CSPA and C-WIN are non-profit, environmental organizations that have a
3 direct interest in reducing pollution to the waters of the Central Valley. CSPA’s and C-WIN’s
4 members benefit directly from the waters in the form of recreational hiking, photography,
5 fishing, swimming, hunting, bird watching, boating, consumption of drinking water and
6 scientific investigation. Additionally, these waters are an important resource for recreational and
7 commercial fisheries. Central Valley waterways also provide significant wildlife values
8 important to the mission and purpose of the Petitioners. This wildlife value includes critical
9 nesting and feeding grounds for resident water birds, essential habitat for endangered species and
10 other plants and animals, nursery areas for fish and shellfish and their aquatic food organisms,
11 and numerous city and county parks and open space areas. CSPA’s and C-WIN’s members
12 reside in communities whose economic prosperity depends, in part, upon the quality of water.
13 CSPA and C-WIN have actively promoted the protection of fisheries and water quality
14 throughout California before state and federal agencies, the State Legislature and Congress and
15 regularly participates in administrative and judicial proceedings on behalf of its members to
16 protect, enhance, and restore declining aquatic resources. CSPA and C-WIN member’s health,
17 interests and pocketbooks are directly harmed by the failure of the Regional Board to develop an
18 effective and legally defensible program addressing discharges of gross amounts of pollution
19 from the Central Valley’s irrigated lands to waters of the state and nation.

20 **VII. REQUESTED STATE BOARD ACTION.**

21 Petitioners request the State Board to issue an order 1) immediately ordering the Regional
22 Board to refrain from issuing a Notice of Determination pursuant to CEQA, Public Resources
23 Code § 21108(a); 2) mandating that the Regional Board vacate Resolution No. R5-2011-0017;
24 3) ordering the Regional Board to issue by not later than 6 months from the date of this petition,
25 or as soon thereafter as the State Board may find appropriate, a new environmental impact report
26 curing each of the above flaws in the existing EIR.
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1 **VIII. STATEMENT OF COPIES SENT TO THE REGIONAL BOARD AND**
2 **DISCHARGERS.**

3 Copies of this petition and the accompanying attachments are being sent to the Regional
4 Board at the following e-mail address. Although they are not dischargers, copies of the petition
5 and attachments also are being sent via e-mail to representatives of each of the coalition groups
6 currently operating under the Central Valley's existing irrigated lands waiver, as set forth in
7 Exhibit 3 attached hereto. Petitioners are unaware of the existence of any list of the current
8 contacts and e-mail addresses of actual dischargers under the existing waivers.

9 Pamela Creedon, Executive Officer
10 Regional Water Quality Control Board, Central Valley Region
11 11020 Sun Center Drive, #200
12 Rancho Cordova, CA 95670
13 pcreedon@waterboards.ca.gov

14 **IX. ISSUES RAISED BEFORE REGIONAL BOARD.**

15 CSPA presented the issues addressed in this petition to the Regional Board in its
16 September 27, 2010 comment letter as well as orally to the Board at the Regional Board hearing
17 held on April 7, 2011.

18 Dated: May 6, 2011

19 Respectfully submitted,



20 Michael R. Lozeau
21 Lozeau Drury LLP
22 Attorneys for Petitioner California
23 Sportfishing Protection Alliance
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EXHIBIT 1



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September 27, 2010

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Adam Laputz
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Re: California Sportfishing Protection Alliance Comments on Draft Irrigated Lands
Regulatory Program - Program Environmental Impact Report

Dear Ms. Smith, Ms. Creedon and Mr. Laputz,

On behalf of the California Sportfishing Protection Alliance and California Water Impact Network (collectively "CSPA"), thank you for this opportunity to provide comments on the "Draft Program Environmental Impact Report for the Long-term Irrigated Lands Regulatory Program ("ILRP") within the Central Valley Region" (July 28, 2010) ("PEIR") and the accompanying "Irrigated Lands Regulatory Program Long-Term Program Development Staff Report (July 2010) ("Staff Report") and the "Draft Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program" (July 2010) ("Technical Memo") prepared by ICF International. On 26 May, 2006, CSPA previously submitted comments on the Draft Central Valley Existing Conditions Report released in February 2006 and finalized in December 2008 and on 30 May, 2008 CSPA submitted scoping comments on the Long-term Irrigated Lands Regulatory Program and Associated Programmatic Environmental Impact Report, which are hereby incorporated by reference.

We have prepared these comments with the assistance of EcoNorthwest, SWAPE (Soil/Water/Air Protection Enterprise) and Steven Bond & Associates, Inc. ECONorthwest has reviewed and prepared a critique of the Technical Memo prepared

by ICF International. See ECONorthwest, "An Economic Review of the Draft Irrigated Lands Regulatory Program Environmental Impact Report" ("ECONorthwest Review") (Sept. 27, 2010). SWAPE and Steven Bond & Associates have reviewed and prepared comments regarding the proposed monitoring and management practice implementation. Their comments are attached hereto as Exhibits A through C and are incorporated herein in their entirety. The experts' comments require separate responses in the Final EIR.

I. INTRODUCTION.

As the Staff Report acknowledges, "a regulatory program that is lax or allows too much time for compliance can lead to an exacerbation of water quality problems and prolonged impacts on beneficial uses." Staff Report, p. 2. This is in fact the result of the first seven years of the current ILRP. Impacts have been prolonged while staff spends all of its time wrangling with informal coalitions over which the Regional Board has no enforcement authority and which have cornered a vast majority of the fees thus far provided for the ILRP from the regulated dischargers. No improving trend in water quality impacts has been reported. Instead, for seven years, the coalitions have managed to steer the program to focus exclusively regional monitoring while avoiding farm-specific monitoring or information collection. The regional monitoring has further documented the extensive pollution already apparent in November 2000 when CSPA first petitioned the Regional Board to terminate the obsolete and water quality-damaging agricultural waiver from 1982.

Since the inception of the ILRP in 2003, staff and the Regional Board have been reticent in mandating that best practicable controls and technology ("BPTC") be installed and implemented by individual farms, reported to the Board and monitored for their effectiveness. Since 2003, CSPA and numerous experts have stated the obvious – any program that refuses to require dischargers to implement BPTC and confirm its effectiveness is bound to fail or at least delay for a very long time compliance with the Central Valley's water quality standards and antidegradation requirement.

CSPA has now stood by for seven years and observed each of its concerns coming true. After seven years, the Regional Board does not have any idea whether any farms have implemented any specific management measures. Assuming some measures are in place, the Board does not know whether they are working to reduce pollution, comply with applicable water quality standards or qualify as BPTC. And the current program's exclusive reliance on regional monitoring will never inform the Regional Board about the presence or effectiveness of management measures miles upstream.

The various coalitions have produced watershed management plans but, invariably, each of those plans fizzles in its follow-up to enforce implementation of management measures by specific farms. The plans indicate the coalitions will coordinate various meetings with a subset of farms and perhaps do some follow-up visits on site. However, because the coalitions exist in some extra-legal realm, none of their members need to do anything they say. The Board may or may not know about

which farms failed to implement any effective management measures. And it is virtually certain that the Regional Board, having based its entire program on coalitions, would not likely eliminate a coalition for an entire section of the Central Valley.

According to staff, after seven years, the Board is preparing to proceed with a single enforcement action including proposed civil penalties for one recalcitrant discharger. It is CSPA's understanding that enforcement action apparently is based on a tip from a water district and the violations could not have been discovered by the Regional Board based on the information required under the existing coalition-based program.

Now, staff is proposing to build on this record of lack of progress by proposing more of the same. It is clear from the PEIR, the bias evident in the accompanying economic analysis and staff's interpretations of the objectives identified by the coalition-dominated stakeholder group to promote the status quo, that staff is not focused on a program that achieves water quality objectives and protects beneficial uses consistent with the Regional Board's primary mission. Instead, staff is focused on proposing a program that is acceptable to the irrigated lands dischargers. The current program and staff's proposal unfortunately give real meaning to the phrase, "letting the fox guard the hen house." If the Regional Board chooses an ILRP alternative that does not have all individual farms reporting to the Regional Board on their specific management measures, *i.e.*, a farm water quality management plan ("FWQMP"), the Regional Board will not know in a timely manner or perhaps at all what any specific farm is planning on implementing. If the ILRP does not require individual farms to report on what measures they in fact implemented or installed, then the Regional Board will not know in a timely manner or perhaps at all what BMPs have been implemented throughout the Central Valley. And if the Regional Board does not require dischargers to gather water quality data that evaluates the performance of installed management measures, the Regional Board will never know what if any pollution reductions have resulted and whether the measures achieve the BPTC standard.

CSPA's frustration is exacerbated by staff's decision to circulate an environmental impact report that snubs its nose at CEQA's requirements and fails to provide the Regional Board the basic comparative tool to assist it in devising an ILRP that will work to protect water quality while balancing – not pandering – to the possible costs that the agricultural dischargers may have to bear for their pollution. CSPA, however, is not interested in simply critiquing every step that staff takes. CSPA, with the help of its consultants and almost a decade of constructive engagement on the irrigated lands pollution problem, has prepared its own alternative that balances the needs for firm regulatory action while allowing prioritization based on already measured regional pollution problems and basic monitoring needs to balance and alleviate some of the potential costs. We appreciate the Board's and staff's consideration of the following comments and proposals.

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II. CSPA'S PROPOSED (EFFECTIVE, PROTECTIVE AND LEGALLY ADEQUATE) IRRIGATED LANDS REGULATORY PROGRAM.

As is described below in CSPA's comments on the PEIR, the PEIR's proposed alternatives do not evaluate or provide the Regional Board a reasonable range of alternatives to the current ILRP. The following alternative should be included in the PEIR's evaluation. This alternative could be appropriately labeled "Direct Oversight and Prioritized Farm Monitoring," and on the spectrum of alternatives presented in the PEIR falls somewhere between Alternatives 3 and 4 and Alternative 5, depending on the specific component that is being addressed.

1. Individual Growers Covered Not Third Parties: Individual growers would apply for coverage. No third-party applications would be authorized. CSPA generally agrees with the application information outlined in the PEIR. See PEIR, p. 3-15.
2. Farm Water Quality Management Plans (FWQMPs): Under this alternative, growers would be required to develop and implement individual FWQMPs in order to minimize discharge of waste to groundwater and surface water from irrigated agricultural lands. FWQMPs for surface water should be completed within 6 months of issuance of the WDR/conditional waiver and submitted to the Board. The groundwater component could be phased to be completed not later than one year from the WDR/conditional waiver issuance date. The contents of the FWQMPs would be consistent with the contents described in the PEIR. PEIR, p. 3-15. Even though each farm would have its own plan, neighboring farms could still agree on joint practices that address multiple farms. As described in PEIR, "[m]anagement practices could be instituted on an individual basis or could be installed to serve a group of growers discharging to a single location." PEIR, p. 3-16. As the State Board's Policy For Implementation And Enforcement of The Nonpoint Source Pollution Control Program (May 20, 2004) ("NPS Policy") states, "[a] first step in the education process offered by these programs often consists of discharger assessment of their lands or operations to determine NPS problems, followed by development of a plan to correct those problems." NPS Policy, p. 11 (emphasis added). The Board already has ignored this first step for the last 7 years. In regard to agriculture, the NPS Policy effectively requires a FWQMP: "MPs must be tailored to a specific site and circumstances, and justification for the use of a particular category or type of MP must show that the MP has been successfully used in comparable circumstances. If an MP has not previously been used, documentation to substantiate its efficacy must be provided by the discharger." NPS Policy, p. 12 (emphasis added).

3. Tiered Approach: This alternative would regulate the discharge of waste to surface water and groundwater using a tiered approach. Fields would be placed in one of three tiers based on their threat to water quality. The tiers represent fields with minimal (Tier 1), low (Tier 2), and high (Tier 3) potential threat to water quality, along the lines proposed in the PEIR for Alternative 4. PEIR, pp. 3-17 – 3-18. The tiers would be used to adjust the monitoring requirements, assist the dischargers in determining the level of management measures necessary to meet BPTC, and assist the Regional Board in prioritizing enforcement inspections.
4. Non-Water Quality Monitoring: As proposed in the PEIR's Alternative 4, all growers would conduct nutrient tracking, pesticide tracking and implemented tracking of management practices. Again, this information is necessary for a discharger or the Regional Board to evaluate the rationale of a discharger's FWQMP. As the NPS Policy emphasizes, "[i]t is important to recognize that development of a plan is only the first step in developing an implementation program that addresses a discharger's NPS pollution discharges. Implementation of the plan, including any necessary iterative steps to adjust and improve the plan and/or implementation must follow the planning stage." NPS Policy, p. 11.
5. Surface Effluent Quality Monitoring: Within areas where Coalitions are currently required to prepare and implement a management plan, all Tier 2 and 3 farms within that management area that are discharging any pollutant which triggered the management plan, must prepare and implement a discharge monitoring plan for the pollutants governed by the management plan as well as basic parameters that serve as indicators of pollution discharges. The basic parameters would include, for example, flow, toxicity, total nitrogen, nitrate-nitrite, total ammonia, total phosphorous, soluble ortho-phosphate, temperature, turbidity, pH, electrical conductivity, coliform if livestock is present and any applied pesticides and metals. If no toxicity is identified in the initial year, toxicity testing could be dropped for several years. The monitoring plan would include monitoring of effluent discharges at a point downgradient of implementation of BMPs. Where possible, monitoring of influent to any BMP also must be included. CSPA agrees with the proposed number of samples per season outlined in the PEIR. PEIR, p. 3-24. However, like Tier 3, sampling by Tier 2 growers should be every year. Only by direct monitoring of site-specific BMPs can the Regional Board comply with the NPS Policy, where it states that "if the program relies upon dischargers' use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements." NPS Policy, p. 11. Likewise, effluent data of BMP effectiveness within areas known already to be degraded is necessary to implement the state

antidegradation requirement, Resolution No. 68-16, in particular its BPTC requirement as well as its nondegradation provision.

6. Groundwater Monitoring: Growers who qualify as Tier 2 or Tier 3 for groundwater pollution should be required to conduct individual monitoring annually as described for the Tier 3 groundwater growers in the PEIR. PEIR, p. 3-25. All farms should do one season of sampling any existing wells on their property to determine their tier level. All farms also should be required to evaluate any existing public water supply data regarding the presence of pesticides or other pollutants in nearby groundwater. Any regional monitoring should be conducted by the Regional Board or its consultants or other qualified governmental research entities and paid for by a portion of the permit fees collected annually from the dischargers.
7. No Agency "Approval" of Plans: Although staff should review FWQMP or monitoring plans in general, this alternative would not require the Regional Board to approve either an FWQMP or monitoring plan. The minimum conditions of the FWQMP should be clearly set forth in the conditional waiver or general WDRs and staff should "review" as part of their enforcement follow-up. By employing the Board's enforcement options to address any violators who, for example, fail to prepare a good faith FWQMP, the Board also would be in a position to recover the staff costs of those enforcement efforts.
8. Coordination With Dischargers Folded Into Prioritized Inspection and Enforcement by Regional Board: Along those same lines, any follow-up or coordination with growers re compliance would be part of the annual inspection effort. Compliance inspections would include appropriate compliance advice and be implemented consistent with State Board's existing enforcement policy. Growers would have to allow the Regional Board access to inspect. Prioritization of inspections and level of enforcement actions would be up to the Regional Board. Prioritization would be much easier because staff would already have farm specific FWQMPs and effluent data within the management areas where problems already have been identified, which data would make it much easier for Board staff to prioritize inspections and possible enforcement.
9. Regional Monitoring By Board Expanded to All Dischargers: There is no reason why WDRs or waivers in the ILRP should incorporate a regional monitoring program. No NPDES permits require all municipalities to conduct regional monitoring as part of their permits (CSPA is not suggesting any changes to receiving water quality monitoring currently required by most major NPDES permittees). The industrial storm water and construction storm water permit also do not include such a component. That being said, all of these dischargers should be

contributing a portion of their permitting fees toward an objective and agency-controlled (not discharger-controlled) regional monitoring program. Fees for all of these permittees should be assessed annually. Regional monitoring, including toxicity monitoring, would be conducted by the Regional Board, its consultants or other governmental research entities. CSPA believes regional monitoring is important to determining the overall health of waterways in the Central Valley. However, its inclusion in permits for irrigated lands dischargers takes away resources that need to be focused on implementing BMPs and evaluating their effectiveness at the points of discharge. It also would be fairer that all sources of pollution to the Valley's ambient waters contribute a proportionate share of the funds necessary to conduct regional monitoring. Lastly, by consolidating that program within the Regional Board and other non-discharger agencies – rather than under the current program with inexperienced coalitions made up of discharger representatives – the objectivity of the program will be maintained. Placing regional monitoring in another program outside of the ILRP will of course free up a vast quantity of time currently spent by staff attempting to track the coalitions' various monitoring efforts.

10. Request Additional Fee Authority: Critical to any alternative selected by the Regional Board is a frank request to the State Board to increase current fees to cover all of the costs of the program. It is unreasonable to base a regulatory program regulating the largest source of pollution to Central Valley waters on the political reluctance of the Board or Administration to assess appropriate fees to support a regulatory program that is capable of enforcing statutory and regulatory requirements. The fees for the irrigated lands dischargers, as well as fees on existing NPDES permittees, including stormwater permittees, should also be adjusted to accommodate a separate regional monitoring program.

The Regional Board's review and selection of the above alternative would address many of the legal flaws that currently hamper staff's proposal as well as most of the PEIR's alternatives, discussed at length below. More importantly, CSPA believes that, unlike staff's proposal or Alternatives 1 through 4 of the PEIR, the above alternative would have a reasonable chance of achieving significant reductions in irrigated lands pollution, achieving water quality standards and improving the region's overall economy and quality of life without any significant impact on the agricultural industry.

III. THE PEIR FAILS TO COMPLY WITH CEQA'S PROCEDURAL AND SUBSTANTIVE REQUIREMENTS.

The PEIR fails as an analytical document under CEQA. Arguably, rather than assist the Regional Board with making the tough decisions required to properly regulate the irrigated farm dischargers and ensure compliance with the high quality waters policy

and water quality standards, the PEIR erects a barrier to objective evaluation. Several flaws are worth noting right up front. First is the PEIR's failure to identify a proposed project or an environmentally superior alternative. These omissions make the PEIR unrecognizable as an EIR under CEQA.

The second most egregious flaw stems from the PEIR's premise that the current waiver (Alternative 1) will lead to implementation of the same best practicable control technologies as, for example, Alternative 5. This is entirely baseless given the fact that seven years into implementing Alternative 1, the Regional Board's staff cannot point to a single piece of evidence documenting the implementation of any management practices. Even the much touted management plans that already have been approved by staff under the existing waiver each address management practices by bobbing and weaving – replacing BPTC implementation and effectiveness monitoring with informal office meetings with groups of growers. Occasional meetings cannot verify the implementation or effectiveness of a management practice on a specific farm.

Similarly, the PEIR assumes that the four alternatives that rely on regional monitoring, rather than farm specific monitoring, will be able to evaluate the implementation of BPTC equally as well as Alternative 5, the one alternative that requires edge of field monitoring. Although as explained above, CSPA does not believe the universal and expansive monitoring proposed by Alternative 5 is necessary to take the program to its next effective level, CSPA believes it is obvious that only by monitoring the effectiveness of a claimed BPTC at its point of discharge can the Regional Board or its staff claim to ensure it is in fact BPTC and know what effect the discharge is having on compliance with water quality objectives. It also is even more evident that a regional monitoring location 10, 20, or 30 miles downstream of a specific farm tells neither the agency, the farm nor the general public about the presence or effectiveness of any management measures that may be installed there and whether they amount to BPTC.

These few concerns are only the highlights of a long list of deficiencies in the PEIR. The following addresses each of CSPA's concerns in turn.

A. General Purposes and Standards Under CEQA.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). See, e.g., Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.

14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("Berkeley Jets"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); See also *Berkeley Jets*, 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." Pub.Res.Code § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, 91 Cal.App.4th at 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn. 12 (1988). As the court stated in *Berkeley Jets*, 91 Cal.App.4th at 1355:

A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946).

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B. The PEIR fails to include a stable project description - indeed, no proposed project is included.

The PEIR does not evaluate a proposed project. The PEIR attempts to portray this omission as a benefit: "Rather than the typical EIR approach of starting with a project and then looking at alternatives to that project, this draft PEIR will be used as a tool to inform decision makers during the selection process." PEIR, p. 2-1. See also p. 2-5 ("In this document, ... no preferred project has been identified by the Lead Agency from among the considered alternatives"). The drafters overlook, however, that CEQA sets forth the necessary contents of an EIR that can properly serve as a tool to inform the Regional Board. The drafters, staff and the Regional Board do not have any authority to omit a description of the proposed project from the PEIR.

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally adequate EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192; *Berkeley Jets*, 91 Cal.App.4th at 1354; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011, 1023; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal. App. 4th 182, 201. "[A] curtailed or distorted project description," on the other hand, "may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (*i.e.*, the "no project" alternative) and weigh other alternatives in the balance." *Id.* See also, CEQA section 15124; *City of Santee v. County of San Diego*, 263 Cal.Rptr 340 (1989). As one commenter has noted:

The adequacy of an EIR's project description is closely linked to the adequacy of the EIR's analysis of the project's environmental effects. If the description is inadequate because it fails to discuss the complete project, the environmental analysis will probably reflect the same mistake. (Kostka and Zischke, "Practice Under the California Environmental Quality Act," p. 474 (8/99 update).)

A "rigorous analysis" is required to dispose of an impact as insignificant. *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692 (1990). Such a rigorous analysis is not possible if the project description is inaccurate, inconsistent, misleading or, in the case of the PEIR, completely absent.

C. The Objectives Borrowed From The Stakeholder Process Attempt To Lend Support To Purported Benefits of Elements of Alternative 1 – Including Its Regional Planning Basis And Lack Of Farm Specific Information of Any Sort – Which Are Its Main Faults.

The PEIR's objectives rely heavily on objectives formulated through the stakeholder process coordinated by the Regional Board's staff. The stakeholder process was dominated by agricultural interests. http://www.swrcb.ca.gov/centralvalley/water_issues/irrigated_lands/long_term_program_development/advisory_

wrkgrp_member_1st.pdf; See, e.g. 11 May 2010 Long-term ILRP Meeting Attendees (http://www.swrcb.ca.gov/centralvalley/water_issues/irrigated_lands/long_term_program_development/11may10_stakeholder_mtg/11may10_sum.pdf). Although CSPA, for example, nominally is identified as one of the stakeholders involved in the process, CSPA was one of many groups that did not have the resources to attend numerous meetings, conduct multiple reviews of numerous documents, and participate actively in the stakeholder process. Possibly as a result of the lack of representation from a broader spectrum of stakeholders, CSPA is concerned with language included in the objectives that biases the selection of an alternative in favor of those that do not address compliance with all water quality objectives throughout the region, that water down the high quality waters policy requirement that implementation of BPTC be ensured, and that include only regional monitoring.

An overly narrow definition of project objectives renders the alternatives analysis inadequate. To narrowly define the primary "objective" of the proposed project itself constitutes a violation of CEQA since such a restrictive formulation would improperly foreclose consideration of alternatives. See *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438 (holding that when project objectives are defined too narrowly an EIR's treatment of analysis may also be inadequate). As a leading treatise on CEQA compliance cautions, "[t]he case law makes clear that...overly narrow objectives may unduly circumscribe the agency's consideration of project alternatives." (Remy, Thomas, Moose & Manley, Guide to CEQA (Solano Books, 2007), p. 589).

1. The project's objective to restore or maintain "appropriate" beneficial uses qualifies the Regional Board's duty to maintain all existing or designated beneficial uses.

The first objective identified for the ILRP is to "[r]estore and/or maintain appropriate beneficial uses established in Central Valley Water Board water quality control plans by ensuring that all state waters meet applicable water quality objectives." PEIR, p. 1-2. CSPA is concerned with the PEIR's inclusion of the term "appropriate." Neither the Water Code nor the Basin Plan qualify the Regional Boards' or dischargers' obligation to assure attainment of water quality standards by deeming some designated beneficial uses as inappropriate. This language should be revised to clarify that all designated or existing uses must be protected, including those designated by way of the Basin Plan's tributary rule.

2. The objective to encourage implementation of BMPs is inconsistent with Resolution No. 86-16's duty that the Regional Board ensure implementation of all best practicable control technologies.

The second objective is to "[e]ncourage implementation of management practices. . ." PEIR, p. 1-2. The notion that the Regional Board should limit its authority to "encouraging" the implementation of BMPs appears inconsistent with its duties under Porter-Cologne. The Regional Board must establish requirements that implement the

water quality objectives. Water Code § 13263(a) (“[t]he requirements shall implement any relevant water quality control plans. . . .”); § 13269(a) (waivers must be “consistent with any applicable state or regional water quality control plan . . .”). Merely encouraging BMPs will not achieve objectives.

3. The objective to provide incentives to minimize waste discharges cannot be construed to allow less monitoring without any proof that waste discharges have been minimized.

The third objective includes to “[p]rovide incentives (i.e., financial assistance, monitoring reductions, certification, or technical help) for agricultural operations to minimize waste discharge to state waters from their operations.” PEIR, p. 1-2. By specifying the incentives, CSPA believes this objective greases the skids for an alternative that trades away important components of any successful program. In particular, by specifically trading away monitoring of specific discharges, the objective directly undermines the Regional Board’s ability to implement the high quality waters policy’s BPTC requirement as well as the Nonpoint Source Plan’s monitoring requirements. CSPA believes an order with clear requirements is incentive enough and this objective merely opens the door to alternatives that violate relevant law and will once again prove ineffective. Any incentives should be based on encouraging growers to pollute less, not, for example, agreeing to give up essential site specific monitoring for participation in a less effective regional monitoring program.

4. If the objective to coordinate with other regional programs means to mimic the regional scope of other ineffective pollution control programs, then this objective is inconsistent with the other three objectives.

The fifth objective is to “[p]romote coordination with other regulatory and non-regulatory programs associated with agricultural operations . . . to minimize duplicative regulatory oversight while ensuring program effectiveness.” PEIR, p. 1-2. This objective, although sounding innocuous, is interpreted by staff as favoring alternatives that take a regional perspective like other programs referenced in the objective. See Staff Report, p. 103 (Alternatives 1 and 2, “[r]egional configuration for water quality plans and monitoring would facilitate efficient coordination with other programs operating at the regional level” and Alternatives 3-5, “. . .the farm-level management would not promote this coordination.”) Unfortunately, the record is clear that none of the other regional efforts have been successful at preventing the widespread surface water pollution and toxicity from irrigated lands. If coordination with regional programs means that the program must replicate the regional scales of other unsuccessful programs and thus replicate their inability to protect water quality since their inception, then this objective is inappropriate and inconsistent with the objective to restore water quality and meet water quality standards. The objective should be clarified to promote coordination without necessarily copying the ineffective regional programs already in place.

D. The PEIR fails to identify the superior alternative.

By choosing not to propose a project, it is hardly surprising that the PEIR does not identify the superior environmental alternative. One of CEQA's fundamental requirements is that the DEIR must identify the "environmentally superior alternative." CEQA Guidelines §1526.6(e)(2); Kostka & Zischke, *Practice Under the California Environmental Quality Act* §15.37 (Cont. Educ. Of the Bar, 2008). Typically, a DEIR identifies the environmentally superior alternative, which is analyzed in detail, while other project alternatives receive more cursory review.

The lead agency is required to select the environmentally preferable alternative unless it is infeasible. A "feasible" alternative is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. Pub. Res. Code § 21061.1; CEQA Guidelines § 15364. California courts provide guidance on how to apply these factors in determining whether an alternative or mitigation measure is economically feasible.

Since the PEIR fails to identify the environmentally superior alternative, there is not adequate analysis of its impacts or feasibility. See *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322 (county's approval of an 80 unit hotel project over a smaller 64 unit alternative was not supported by substantial evidence); *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (agency must consider small alternative to casino project). Here, although suffering from its own defects (see *infra*, Section IV), the economic analysis prepared for the Regional Board indicates that all of the alternatives identified in the PEIR are economically feasible. Indeed, the alternatives with the most regulatory oversight expand the overall economy of the Central Valley. Because the alternatives are all feasible, the PEIR needed to select an environmentally preferable alternative.

E. The PEIR Does Not Provide Meaningful Comparative Analysis of the Selected Alternatives Because the Assumption That All Five Alternatives Would Be Equally Effective at Implementing BPTC and Achieving Standards is Unsupported by Any Evidence

As noted above, the PEIR fails to facilitate the Regional Board's selection of a new ILRP because the PEIR is based on a fiction that any program – no matter how far removed from the discharge locations and no matter how hard it may avoid documenting and measuring the implementation and effectiveness of BMPs – will result in the same level of pollution control. That core fiction does not allow for a meaningful comparative analysis by the Regional Board of the various alternatives.

CEQA requires that an EIR provide a discussion of project alternatives that allows meaningful analysis. *Laurel Heights I*, 47 Cal.3d at 403. The analysis of project alternatives must contain an accurate quantitative assessment of the impacts of the

alternatives. In *Kings County Farm Bureau*, 221 Cal.App.3d at 733-735, the court found the EIR's discussion of a natural gas alternative to a coal-fired power plant project to be inadequate because it lacked necessary "quantitative, comparative analysis" of air emissions and water use.

The PEIR does not attempt to estimate the relative effectiveness of the five alternatives. It generally assumes that they will all lead to sufficient pollution reductions. For example, the PEIR "assume[s] that continuation of the program would result in implementation of a greater number of surface water management practices than are present under baseline conditions, due to continued use of the program's monitoring feedback loops." PEIR, p. 5.7-45. Given the current absence of information about any BMPs actually installed, never mind whether they amount to BPTC, after seven years of implementing Alternative 1, the PEIR's assumption is entirely unsupported. The PEIR also asserts that "[u]nder all program alternatives, when a constituent of concern is identified through monitoring, management practices would be used to reduce the level of that constituent in surface water or groundwater." PEIR, p. 5.7-43. The PEIR repeats that, for each alternative, the "[p]otential impacts related to vegetation and wildlife under Alternative 3 are expected to be as described for Alternative 2. Like Alternative 2, Alternative 3 would implement water quality management plans that would result in a beneficial impact on surface water quality and groundwater quality, which would ultimately benefit both vegetation and wildlife communities." PEIR, p. 5.7-48. By making believe that all of the alternatives will have a beneficial effect on water quality – despite their obvious differences – the PEIR makes no effort to compare the relative effectiveness and certainty of each alternative in meeting standards or reducing pollution.

Obviously, of the flawed alternatives included in the PEIR, some have more certainty of achieving pollution reductions than others. Nothing in the record demonstrates that Alternative 1, seven years after its enactment, has reduced the volume or toxicity of pollution discharges from irrigated lands. There is no evidence in the Regional Board's files or discussed in the PEIR of what, if any, management practices have been or will be installed under the existing program. There is no discussion of evidence of any observable trends in ambient water quality conditions related to the existing program. There is certainly no evidence of any data showing any trends in pollution reductions at the edge of fields based on management measures applied to those fields. As a result, all of the evidence is that implementation of Alternative 1 and the even weaker Alternative 2 will most likely allow increases in pollution.

Contrary to the claims that all of the alternatives are interchangeable from a water quality perspective, one section of the PEIR discussing impacts to fish acknowledges that some alternatives (Alternatives 4 and 5) will "probably be greater." PEIR, pp. 5.8-52-53. Although still sorely lacking in providing the "quantitative, comparative analysis" required by CEQA, the fisheries section does at least

acknowledge that additional monitoring and additional management practices will result in less pollution being discharged.

given the probability of increased monitoring of individual farms, and especially those at higher risk of generating significant impacts—in addition to wellhead protection, nutrient management plans, tracking of nutrient and pesticide application, and monitoring of individual wells—the positive benefit of Impact FISH1 (improved water quality) would probably be greater under Alternative 4 than under Alternative 2 or Alternative 3.

PEIR, p. 5.8-52. Likewise, contrary to the discussion of water quality, the PEIR does acknowledge in the fisheries discussion that “the positive benefit of Impact FISH1 (improved water quality) probably would be greater under Alternative 5 than under any other alternative.” PEIR, p. 5.8-53. These acknowledgements contradict the PEIR’s earlier unreasonable assertions that the water quality benefits of each of the alternatives are similar despite their drastic differences in monitoring requirements and management practices oversight. The PEIR’s refusal to acknowledge the failure of the existing program to document any BMP implementation or water quality improvements frustrates rather than facilitates the Regional Board’s decision-making. A true quantitative comparison of alternatives 2, 3, and 4 incorporating one or more of the main flaws of Alternative 1, including for example reliance solely on regional monitoring to detect and evaluate BMPs, would demonstrate they will prove equally ineffective. CSPA believes the PEIR should be rewritten to include the required comparative analysis on staff’s proposed alternative (perhaps with some improvements – see Section V below), CSPA’s proposed alternative (Section II above), and perhaps one or two other of the existing alternatives.

F. The Regional Board May Not May Not Approve Four Out Of Five Of The Preferred Alternatives Because They Would Conflict With Other Laws, i.e. Porter-Cologne.

A lead agency may not approve a project with significant unavoidable impacts unless it is “otherwise permissible under applicable laws and regulations.” CEQA §21002.1(c). Likewise, as the PEIR acknowledges, “[t]o be considered as an alternative under CEQA, ILRP alternatives . . . must . . . meet statutory requirements established in applicable state policy and regulations (e.g., . . . , the State Water Resources Control Board *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* [State Water Board 2004], and the State Antidegradation Policy [State Water Board 1968]).” PEIR, p. 2-8.

The PEIR states that all of the alternatives will have a significant unavoidable impact on prime agricultural lands. PEIR, Summary, p. 1-13. CSPA also believes that every alternative considered in the PEIR will have unavoidable impacts to water quality and fisheries, at least in the near term and for several of the alternatives for the indefinite future. As discussed below, Alternatives 1 through 4 all violate the State’s antidegradation policy and the Nonpoint Source Control program. Therefore, only one

of the alternatives considered by the Regional Board (at least as currently formulated) can be approved despite any significant unavoidable impacts – Alternative 5.

1. The first four alternatives all violate the state's antidegradation policy.

The State Board's "Statement of Policy With Respect to Maintaining High Quality of Waters in California" provides, in relevant part, that:

Any activity which produces or may produce a waste or increased 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.

Resolution No. 68-16 (Oct. 28, 1968) (emphasis added). As Regional Board staff explains, "In determining BPTC, the discharger should compare the proposed method to existing proven technology; evaluate performance data (through treatability studies), compare alternative methods of treatment or control, and consider the method currently used by the discharger or similarly situated dischargers." Staff Report, p. 62 (citing SWRCB Order Nos. WQ 81-5, WQ 82-5, WQ 90-6, and WQ 2000-07)." To comply with Resolution No. 68-16's BPTC mandate, the Regional Board "must require the discharger to demonstrate that the proposed manner of compliance constitutes BPTC." *Id.* (citing SWRCB Order No. WQ 2000-7) (emphasis added). See also *id.* p. 67 ("where degradation is occurring, irrigated agricultural operators must *demonstrate* that any set of practices proposed for implementation represents BPTC and will be required to consider existing water quality data or conduct monitoring in support of this demonstration").

Under the existing program, not one irrigated lands discharger has complied with Resolution No. 68-16's BPTC requirement. The Regional Board is entirely in the dark regarding what, if any, measures have been implemented never mind whether they amount to BPTC. Given that the existing management plans' only map out a series of meetings between coalitions and groups of dischargers to discuss measures the dischargers may have planned, there is nothing in Alternative 1 or its mirror proposal, Alternative 2, that would cure these universal violations of the BPTC requirement. See Staff Report, p. 115 ("Alternative 1 would not implement the iterative BPTC and monitoring process for addressing degradation to groundwater").

Alternatives 3 and 4 also succumb to the absurd notion that downstream regional monitoring alone can somehow implement Resolution No. 68-16's BPTC requirement. Although these alternatives both close some of the gap in implementing the BPTC requirement by requiring irrigated lands dischargers to prepare farm-specific Farm Water Quality Management Plans ("FWQMPs"), the omission of monitoring to determine the effectiveness of those measures means the Regional Board will not know whether

the measures are BPTC. Alternative 3 omits any surface or groundwater quality monitoring, essentially erasing the BPTC requirement. See Staff Report, p. 116 (“Surface and/or groundwater quality monitoring would not be required under Alternative 3 to determine effectiveness of BPTC and whether degradation is occurring”). Alternative 4, to the extent it allows dischargers to forego farm specific monitoring in exchange for participating in regional monitoring, cannot reasonably be claimed to identify BPTC many miles upstream of the monitoring location. Nor would measurements of pollution downstream at levels below applicable criteria indicate whether or not waters upstream – shallower and perhaps closer to various pollution discharges – were being degraded by irrigated lands discharges. Any resort to regional monitoring without a farm-specific monitoring component cannot meet Resolution No. 68-16’s requirement. The Staff Report does not explain how regional monitoring would suffice to determine whether upstream measures are BPTC or the presence and extent of upstream degradation. See Staff Report, p. 116.

Of the five alternatives considered in the PEIR, only Alternative 5 is consistent with Resolution No. 68-16. That alternative requires discharges to identify the measures they are installing or implementing and it requires monitoring of the measure’s effectiveness (though as CSPA notes below, Alternative 5 is weighted down with too much monitoring).

As the staff acknowledges, “With regard to selection of measures and practices, the Central Valley Water Board and USEPA recognize that there is often site-specific, crop-specific, and regional variability that affects the selection of appropriate management measures, as well as design constraints and pollution-control effectiveness of various practices.” Staff Report, p. 66-67. Because BPTC and compliance with the state’s antidegradation policy is ultimately a farm specific question, there is no getting around the fact that to implement the policy, one must identify and measure BPTC at the farm level. See *PEIR*, p. 3-9 (“The appropriate management practice is typically selected on a site-specific or property-specific basis”). It is simply ridiculous to claim that one can determine that a discharger has installed BPTC by measuring ambient water quality many miles downstream. If that were the case, the regional monitoring that has occurred under Alternative 1 for the last seven years would already allow the Regional Board to evaluate BPTC throughout the region. Of course, the opposite is true. The Regional Board has no idea what, if any, measures have been installed and whether they amount to BPTC. Alternatives that continue the current failure to apply Resolution No. 68-16 to tens of thousands of dischargers of toxic and impairing pollutants and vast swaths of the State’s inland waters amount to licenses to degrade water. CSPA agrees that farmers can have flexibility but they have to tell the Boards and the public what they decided to implement and then measure its effectiveness to comply with the BPTC requirement.

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2. Alternatives 1 through 4 violate the NPS Policy

Alternatives 1 through 4 also are inconsistent with the State Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (May 20, 2004) ("NPS Policy"). Any NPS program must be consistent with five key elements of the NPS Policy. Alternatives 1 through 4 are all inconsistent the NPS Policy's element requiring compliance with Resolution No. 86-16. Alternatives 1 and 2, as well as the staff's recommended program, fail to comply with second and fourth key elements as well. Alternatives 3 and 4 also fall short of the second and fourth elements to the extent they call for no water quality monitoring or only regional water quality monitoring. Each of the four relevant elements is discussed in turn.

Key element 1 states that "[a]n NPS control implementation program's ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements." NPS Policy, pp. 11-12. As discussed above, Alternatives 1 through 4 do not comply with Resolution No. 68-16. Hence, they also cannot comply with Key Element 1 of the NPS.

Key element 2 provides that: "[a] nonpoint-source control implementation program must include a description of the management practices and other program elements that are expected to be implemented to ensure attainment of the implementation program's stated purpose, the process to be used to select or develop management practices, and the process to be used to ensure and verify proper management practice implementation." NPS Policy, p. 12. "A RWQCB must be convinced there is a high likelihood the MP will be successful." *Id.* In regard to discharges from irrigated lands, this element of the NPS Policy effectively requires farm-based water quality management plans, or their equivalent. "MPs must be tailored to a specific site and circumstances, and justification for the use of a particular category or type of MP must show that the MP has been successfully used in comparable circumstances. If an MP has not previously been used, documentation to substantiate its efficacy must be provided by the discharger." *Id.*, p. 12. In this case, the dischargers are the individual farms and the only way to document the efficacy of a specific management practices for their particular lands is for them to tell the Regional Board what they are doing and why. Likewise, in order "to ensure and verify proper management practice implementation" for irrigated lands, the farms must report on their implementation, including pollutant specific monitoring of the BMP's resulting effluent. Because Alternatives 1 and 2 do not include FWQMPs, they cannot comply with key element 2. Likewise, Alternatives 1 and 2 and Alternative 4's reliance on regional monitoring also cannot comply with key element 2's verification requirement. Alternative 3 has no water quality monitoring at all and, thus, in the context of irrigated lands management practices, cannot verify the effectiveness of any management practice.

Key element 3 of the NPS Policy provides that “[w]here the Regional Water Board determines it is necessary to allow time to achieve water quality objectives, the nonpoint-source pollution control implementation program must include a specific time schedule and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.” NPS Policy, p. 13. Although CSPA may not be opposed to reasonable time frames for irrigated lands dischargers to come into compliance with the requirements of a revised program, the PEIR and staff report need to be clarified to acknowledge that the Regional Board may not have authority to include schedules of compliance in either WDRs or conditional waivers because the Central Valley Basin Plan fails to include any such authority in its program to achieve the applicable water quality standards. See Water Code § 13242(b) (program to achieve standards must include “[a] time schedule for actions to be taken” – if no time schedule provided in Basin Plan, no authority); Basin Plan, p. IV-16 (compliance schedules only authorized for NPDES permits). The Board’s authority appears to be limited to adopting time schedules through enforcement orders. The documents also should be careful to emphasize the NPS Policy’s requirement that, assuming such schedules are authorized in the Basin Plan, the schedules “may not be longer than that which is reasonably necessary to achieve an NPS implementation program’s water quality objectives.”

Key element 4 requires that “[a]n NPS pollution control implementation program must include sufficient feedback mechanisms so that the Regional Water Board, dischargers, and the public can determine whether the program is achieving its stated purpose, or whether additional or different management practices or other actions are required.” NPS Policy, p. 13. “In all cases the NPS control implementation program should describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs are being properly implemented and are achieving the program’s objectives, and/or to provide feedback for use in adaptive management.” *Id.* “[I]f the program relies upon dischargers’ use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements.” *Id.*, p. 12. In the context of irrigated lands, this key element requires reporting and monitoring. It is impossible to describe the management practices that were used and a “strong correlation” between the management practices and water quality standards without FWQMPs and annual reporting. And it is impossible to determine that the management practices are effective without reports from the discharger that they have been properly implemented and monitored to confirm they have reduced pollution. Alternatives 1 through 4 do not achieve this level of comprehensible feedback.

Key element 5 requires that “[t]he Regional Water Board must make clear, in advance, the potential consequences for failure to achieve a nonpoint-source pollution control implementation program’s stated objectives.” Neither Alternative 1 nor 2 make clear the consequences of any failures by coalitions. No coalition or discharger takes seriously the notion that a coalition will be dissolved for failing to comply with the program’s requirements. In essence, the coalition-based alternatives require the Regional Board to dissolve an entire watershed program – with nothing in place to back

it up once it is gone. The Regional Board would appear to punish itself as much as the dischargers under these scenarios. Likewise, as for Alternatives 3 and 4, the consequences of failure also are not clear because the proposals do not include monitoring of the individual dischargers. Although these alternatives have the Regional Board involved (CSPA believes unrealistically) in the development of the FWQMPs, without management practice effluent data and only sporadic site inspections by staff, there are no clear consequences for noncompliance by individual dischargers.

G. The PEIR Fails To Consider a Reasonable Range of Alternatives Because Most of the Alternatives are Weighted Down With Components That Render Them Ineffective.

Because four out of the five alternatives considered in the PEIR are not viable because they violate some of the elemental water quality regulations, the Regional Board is left with only a single feasible alternative – Alternative 5. See PEIR, p. 2-8 (“Alternatives must ... meet statutory requirements established in applicable state policy and regulations”). This is not a reasonable range of alternatives. Even assuming one additional alternative – Alternative 4 – comes close to being legal and thus feasible, the Board is still left with only two options. The Regional Board should redraft the PEIR to focus on feasible alternatives. These would include in addition to Alternative 5, staff’s proposed program (although as discussed below, staff’s proposal is also inconsistent with the PS Policy and Resolution No. 68-16), CSPA’s proposed alternative above, and at least one other variation that includes FWQMPs and farm-specific monitoring for at least some portion of the discharging farms.

An EIR must describe a range of reasonable alternatives to the Project, or to the location of the Project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. “An EIR’s discussion of alternatives must contain analysis sufficient to allow informed decision making.” *Laurel Heights I*, 47 Cal.3d at 404. An EIR must also include “detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” *Id.* at 405.

In addition to their failure to comply with Resolution No. 68-16 and the NPS Policy, CSPA also believes the alternatives considered in the PEIR suffer from the following defects.

1. The ILRP Should Not Rely on Coalitions to Implement or Comply with Irrigated Lands Program.

What, if any, value the existing coalitions may have brought to the program to facilitate some of the regional monitoring and performing outreach to growers, has now passed. The ILRP, to be effective, must now concentrate on getting individual farmers to take actions necessary to control their pollution discharges and document implementation of BPTC. CSPA’s review of the coalitions’ management plans approved

by the Regional Board under the existing program shows that the coalitions have no intention of documenting each farm's management measures or their effectiveness. Instead, as their management plans make clear, the coalitions propose to replace various office meetings with groups of growers as a surrogate for documenting each farm's BMPs and their effectiveness. Of course, to confirm the selection, implementation and monitoring of BPTC on each farm, each farm must provide that information. Adding a layer of unofficial bureaucracy with an interest in obscuring information from both the Board and the public does not add any efficiency to the program. In 2003, CSPA pointed out that:

If one thing is clear, the existing Coalition program has managed to mask from the Regional Board what is going on on-the-ground at most of the farms around the Valley. As several Board members commented and as is painfully evidenced from reviewing the available documents, we still do not have the most basic information about what, if any, BMPs are being applied in the fields, where they're being applied, whether they are working or improving the quality of discharges and what other BMPs might be tried in the future.

Letter from Law Office of Michael R. Lozeau on behalf of Deltakeeper, pp. 5-6 (Nov. 4, 2005). Remarkably, seven years later, the mask erected by the coalitions remains in place. Neither the Board nor the public has any idea what if any management practices have been proposed or implemented by any of the estimated 30,000 farms in the Central Valley. See e.g., Technical Memo, p. 1-2 ("Although Alternative 1 represents the continued implementation of current Central Valley Water Board policies, limited information was available to determine the extent of management practice implementation to date"); *Id.*, p. 2-2 ("Conceptually, the best source of this type of information would be growers or grower coalitions. Because this information was not widely available, other sources were used to estimate the existing conditions (NRCS 2005; DWR 2001)"); Staff Report, p. 117 (explaining that only effort to date by coalitions to "track the progress of management practice implementation through the results of periodic surveys sent to growers"). Nor does the informal effort of the coalitions to collect the farm-specific data appear to have changed since the Regional Board's approval of management plans. See, e.g. East San Joaquin Water Quality Coalition Web Site ("Properties adjacent to or in close proximity to each waterway sampled by the Coalition are the primary focus of mailings and notices for local workshops that cover BMPs to solve the water quality problem"); San Joaquin County and Delta Water Quality Coalition, 2010 Annual Monitoring Report, p. 4 (March 1, 2010) (focused outreach in three subwatersheds consists of asking growers to complete surveys and then conducting unspecified follow-up with growers). The next phase of the ILRP cannot allow coalitions to continue and further obstruct the Board's collection of discharger information.

The use of coalitions also will continue to undermine the Regional Board's enforcement discretion. As the staff acknowledges, by relying on coalitions, the Board effectively limits the availability of all of its enforcement tools. 'The Central Valley

Water Board does not have any direct enforcement authority over a third-party group that is not responsible for the waste discharge (i.e., the Board cannot take enforcement against the coalition.” Staff Report, p. 117. The only option available to the Regional Board to address coalitions’ noncompliance is not to enforce the requirements, but to eliminate the entire program within large areas of the Central Valley. Rather than a readily available and precise tool available to the Regional Board, like a notice of violation or an administrative civil liability, a decision to dismantle the ILRP for an entire area would be the least likely response the Board would want to take and would not be commensurate with the scope and seriousness of most of the violations the Board was trying to address. The coalitions also undermine the Board’s ability to effectively enforce against individual dischargers as well by failing to collect the necessary data regarding management practices on individual farms and otherwise obstructing or slowing down the review and analysis of that information. See Staff Report, p. 140 (discussing Alternative 1, “the Board . . . would not have information regarding the method(s) and practices the operation has or plans to implement to work toward solving identified water quality concerns”).

Staff’s proposal argues that the presence of coalitions will “take advantage of local knowledge and administrative/cost efficiencies in dealing with a few groups versus thousands of individual operations.” Staff Report p. 3. The only administrative/cost efficiencies visible from the record are those realized by the coalitions’ successful effort to date to avoid gathering the key information and data that is necessary to implement a successful program – farm-specific management practices and monitoring data to prove they have been implemented and are effective at reducing the pollutants of concern. It makes no sense that establishing an intermediate layer of bureaucracy between the dischargers who have the information and the agency that needs to know the information makes that process more efficient.

Nor do the coalitions bring the local knowledge necessary for a successful ILRP. If anything, the coalitions are preventing local knowledge of each farm from reaching the Board. As far as CSPA can tell, staffing by the coalitions consists of a few staff for each coalition. There is no reason that the Regional Board itself could not provide the same local presence by modestly expanding its staff and gain efficiencies by cutting out the middleman. To the extent any alternative proposes to rely on coalitions who are not themselves dischargers to conduct sampling, gather information, and prepare plans and reports pursuant to a conditional waiver or WDRs, the program will continue to fail to measurably reduce any pollution discharges and perpetuate or worsen the existing pollution discharges from irrigated lands.

2. Alternatives that rely solely on regional monitoring to determine the adequacy of BPTC or enforcement of individual farms are destined to fail and do not meet CEQA’s duty to mitigate impacts.

The four alternatives that rely on regional monitoring to determine that the program is reducing, rather than increasing, pollution discharges and that management

practices are installed and equal to BPTC, do not provide for the mitigation of impacts required by CEQA. CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); *See also, Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." Pub. Res. Code § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).

In general, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. CEQA Guidelines § 15370. Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. *Id.* at § 15126.4(a)(1)(B). A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved. A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau*, 221 Cal.App.3d at 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available). "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. CEQA Guidelines § 15364. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. *Id.* at § 15126.4(a)(2).

By not requiring any farm-specific mitigation measures, Alternatives 1 and 2 fail to meet CEQA's mitigation requirements. These two alternatives make no effort to resolve the vast uncertainties surrounding the selection and implementation of management practices on irrigated lands throughout the Central Valley, the very mitigation measures relied upon by the PEIR to find that impacts to water quality will be less than significant. Despite the PEIR's acknowledgement that "[t]he appropriate management practice is typically selected on a site-specific or property-specific basis[.]" Alternatives 1 and 2 do not include any site-specific BPTC requirements that are or will be fully enforceable.

Similarly, Alternatives 3 and 4, although requiring FWQMPs that would require, in the future, individual farms to describe their management practices, the absence of any farm specific and BMP-specific monitoring to confirm their implementation and effectiveness also fails to eliminate the rampant uncertainty regarding BMP implementation and their effectiveness at reducing pollution from specific farms. And, again, making believe that one can monitor for the implementation and effectiveness of

management practices on a specific farm from several miles downstream makes any management practice mitigation unenforceable, never mind fully enforceable.

3. Alternative 3 includes components that begin to address the shortcomings of the current program but is weighed down with odious requirements and illegal delegation of Board responsibilities.

Although flawed, some of the alternatives described in the PEIR include components that CSPA believes are necessary to an effective ILRP. However, in each instance, the PEIR weighs down the effective components with various poison pills and odious requirements that stifle any serious consideration of alternatives that substantially change the current program. Additional comments and flaws in Alternative 3, in addition to the absence of any effluent quality monitoring discussed above, include the following.

Alternative 3 does include the important requirement that all irrigated land dischargers prepare a FWQMP. CSPA believes this requirement is fundamental to a program that will achieve BPTC, achieve water quality standards and allow proper oversight by the Regional Board. However, the 2-year time period for developing a FWQMP should be shortened to 6 months for surface water discharges and one year for groundwater discharges.

Alternative 3's proposal that the Regional Board review and approve every FWQMP is unrealistic and unnecessary. See PEIR, p. 3-14 ("Review applications and determine priorities for FWQMP review and approval"); p. 3-16 ("Submit the FWQMP for review and approval by the Central Valley Water Board"). As proposed, the task of reviewing in advance each and every FWQMP is unrealistic. Moreover, such review and approval would be a desk top review of whatever information is included in the FWQMP without the benefit of any field observations. This process would simply repeat the currently inadequate surveys and informal meetings which the coalitions claim can accurately evaluate management practice implementation and effectiveness. Rather than requiring review of and approval of all FWQMPs, the program should specify in sufficient detail the contents of the FWQMP and require them to be submitted under penalty of perjury. CSPA also believes there is a role for an iterative process. The requirements for the FWQMP should include requiring additional management practices wherever effluent data indicates that pollutant discharges are not decreasing or standards are being violated. Any review by the Board staff would be in the context of reviewing for compliance and prioritizing any inspections and enforcement investigations. Staff also could, of course, require additional measures or monitoring for specific problem farms.

Similarly, because such up front review and approval is unnecessary, any resources expended to review proposals by third-parties to take over such review and approval of FWQMPs is also unnecessary. To the extent the Board thought it was

possible to review and approve every FWQMP, farming that task out to third parties would be an illegal delegation of discharge requirements. Water Code § 13223.

CSPA certainly agrees that the Regional Board should prioritize and conduct a significant number of site inspections every year. It is through this oversight and enforcement process that CSPA believes the Regional Board can realistically and accurately review a specific farm's FWQMP to determine its compliance with the program requirements. Likewise, to the extent the Board staff wanted to "coordinate" with a specific farmer or even a group of farmers, such an inspection would be the opportunity for coordination. By including effluent monitoring, the Regional Board would have a better means of prioritizing its inspections and evaluating whether management practices are BPTC. By publicizing through Board meetings and the web site the outcome of these inspections including any "certifications" issued or, equally important, enforcement responses by the Board or staff, CSPA believes that the Regional Board would be taken seriously by a much larger percentage of individual dischargers who would then seek to comply with BPTC and water quality standards.

As discussed in various sections of these comments above, Alternative 3's failure to require any farm-specific water quality monitoring is a fatal flaw. See PEIR, p. 3-16 ("unless specifically required in response to water quality problems, owners/operators would not be required to conduct water quality monitoring of adjacent receiving waters or underlying groundwater"). CSPA believes that monitoring of discharged effluent is what needs to be required to determine compliance with both the BPTC requirement and applicable water quality standards. As outlined in CSPA's proposed alternative, such monitoring should be limited to Tier 2 and Tier 3 dischargers within areas covered by management plans and limited to basic parameters plus any pollutants triggering the management plan. CSPA agrees that visual monitoring does have a role but cannot be the only monitoring. CSPA has many years of experience reviewing annual reports and initiating enforcement actions under the Statewide General Industrial Storm Water Permit. The visual monitoring conducted under that permit is of limited value to documenting pollution discharges or BMP effectiveness (though with appropriate photographs, visual monitoring can document the installation of BMPs and their condition).

4. Alternative 4 includes fewer poison pills but its failure to require BMP and effluent monitoring means that it would not achieve water quality objectives or ensure implementation of BPTC.

Alternative 4 also includes a number of components that CSPA believes are key components to a successful ILRP, including FWQMPs and a tiering component to guide both BMP implementation and different levels of monitoring. Alternative 4 proposes the same procedures for preparing, reviewing and approving FWQMPs. CSPA agrees with requiring all dischargers to prepare and implement FWQMPs but CSPA has the same concerns with the FWQMP procedures discussed for Alternative 3 above.

The key difference proposed in Alternative 4 would be the inclusion of a tiering system to guide dischargers on the proper levels of BMPs they should be considering as well as the intensity of monitoring that is required. PEIR, p. 3-17 ("The tiers represent fields with minimal (Tier 1), low (Tier 2), and high (Tier 3) potential threat to water quality. Requirements to avoid or minimize discharge of waste would be the least stringent for Tier 1 fields and the most stringent for Tier 3 fields"). CSPA agrees that a tiering system is important to controlling the costs of implementing and overseeing the program and assuring that limited resources are aimed at potentially significant pollution dischargers. CSPA believes that the three tiers proposed in the PEIR for both surface and groundwater make sense in providing some initial guidance on the selection and implementation of BMPs. However, CSPA believes both Tier 2 and 3 should conduct similar levels of farm-specific water quality monitoring, albeit not as extensive as that proposed for Alternative 5 and, at least theoretically, for Alternative 4. In addition, CSPA also would use the information gleaned from the ambient monitoring and water quality management plans to further prioritize the farms that must conduct effluent water quality monitoring.

Alternative 4's monitoring requirements for both Tier 2 and 3 dischargers fail to implement Resolution 68-16, evaluate management practice effectiveness and assure compliance with water quality standards by allowing regional monitoring by discharger coalitions to replace the outlined farm-specific monitoring. See PEIR, p. 3-19. The inclusion of farm specific monitoring is an illusion as every discharger obviously will opt for the cheaper monitoring far away from their activities and effluent. Monitoring required by the ILRP should be focused on effluent monitoring and BMP effectiveness.

Likewise, for groundwater monitoring the Alternative should focus on onsite wells and leave the regional monitoring to the Regional Board and its consultants. Regional monitoring could also be supplemented by use of the California Department of Public Health public drinking water supply database. Use of the database, in selecting for pesticide and nitrate concentrations in Central Valley wells, would allow for an analysis of the effectiveness of the Alternative as implemented. CSPA believes the monitoring of existing wells is a reasonable proposal and should be implemented by both Tier 2 and 3 groundwater dischargers. Most farms will have one or more functional wells already in place. It is a simple step to require nutrient and pathogen monitoring of those existing wells. The data also would be much more relevant (though perhaps initially not sufficient to define the scope of any water quality exceedances) to that particular discharger. Any regional groundwater problem would simply measure in that locale and say little if anything about dischargers several miles away.

The proposed monitoring frequency for Tier 2 dischargers of once every five years is also woefully inadequate, whether considered on a farm-specific or regional basis. It is already difficult enough to make determinations about compliance with standards or implementation of BPTC based on edge of field monitoring four times in a single year. To then wait five more years before the next set of samples would prevent

any determination of trends and any improvements to BMPs for that amount of time or longer. Sampling needs to occur every year, whether a discharger is in Tier 2 or Tier 3.

Although not ideal, CSPA believes the proposed number of sampling events in any given year strikes a proper balance. PEIR, p. 3-24 ("Tailwater discharges during the first discharge of the irrigation season and once mid-season. Storm water discharges during the first event of the wet season (between October 1 and May 31) and once during the peak storm season (typically February). Discharges of subsurface (tile) drainage systems annually"). CSPA incorporates this proposal into its preferred alternative.

Alternative 4 again discloses staff's penchant for encouraging the formation of intermediate bureaucracies and entities over whom they have no enforcement authority by inviting groups of dischargers to form "legal entities that could serve a group of growers who discharge to the same general location and share monitoring locations." PEIR, p. 3-20. CSPA agrees that there exist opportunities for neighboring farms to work together to monitor shared irrigation ditches and implement joint control measures. CSPA does not see any reason for the individual dischargers to have to form a separate entity to accomplish this goal. Each of them could incorporate the measure into their respective FWQMPs and each would simply be jointly and severally responsible for its implementation and effectiveness. The Regional Board could respond to one or all, though obviously any inspection and follow-up would want to be with all of the cooperating farms.

5. Alternative 5's aggressive agency reviews and approvals and expensive monitoring proposals go beyond the reasonable next step but it is the one alternative reviewed in the PEIR that, if implemented would dramatically reduce irrigated lands pollution discharges.

Of the five alternatives described in the PEIR, Alternative 5 is the only one that proposes an effective framework that (1) would comply with Resolution 68-16's requirement that each discharger demonstrate BPTC and prevent degradation, (2) assure the attainment of water quality standards not only miles downstream but in the immediate area of a discharger's effluent, and (3) provide information sufficient for the Regional Board staff to properly prioritize its inspections and enforcement. Alternative 5 is modeled on the successful industrial and construction site storm water permit programs, with a few important exceptions. Unfortunately, in their apparent excitement, the PEIR drafters could not refrain themselves from layering in too many requirements the sole purpose of which appears to be to make the alternative so expensive that it would never be selected. CSPA believes that, although the regulatory framework of Alternative 5 is sound, the monitoring frequency and constituents (at least as defined in the accompanying economic analysis) are excessive and the absence of any tiering that would prioritize the riskier dischargers also misses a reasonable method of reducing costs.

Alternative 5 proposes monitoring that goes well beyond, for example, the storm water general permits' focus on basic parameters and representative metals monitoring. Technical Memo, pp. 2-17 – 2-19. See Kings River Coalition Annual Monitoring Report (2010) (according to the Technical Memo, the monitoring constituents are based on the regional samples taken by the Kings River Coalition). This is overkill for site specific monitoring. The frequency of monitoring also is dramatically increased in this Alternative for tailwater discharges. For example, Alternative 5 would require monthly sampling of tailwater as compared to Alternative 4's proposal of twice per irrigation season (albeit with its regional monitoring exception). CSPA believes the extensive and costly monitoring parameters proposed for Alternative 5 go well beyond what is necessary for the Board and a discharger to determine whether they have installed BPTC and are protecting water quality objectives.

The most obvious poison pill in Alternative 5 is the proposal that every farmer drill and install groundwater monitoring wells. Focusing on existing wells would be much more reasonable. Additionally, use of the California Department of Public Health public drinking water supply database would allow for an analysis of the effectiveness of Alternative 5 as implemented. The database could be queried for pesticide and nitrate concentrations in wells in the Central Valley to determine if concentrations are increasing or decreasing. The database could also be used for analysis to determine the role of the Alternative in contributing to trends (*i.e.* what role the Alternative plays in increases or decreases).

As for the FWQMPs, CSPA does not believe there is any basis for allowing dischargers two-years to prepare and implement FWQMPs. PEIR, p. 3-27. They have been on notice for the last seven years that they need to implement management measures. In many areas, management plans that supposedly will not lead to implementation of BMPs have been in place for some time. CSPA believes that all dischargers should prepare and implement FWQMPs within 6 months.

Alternative 5 does drop the proposal to have the Regional Board coordinate with dischargers regarding their FWQMPs and review and approve each plan as well. CSPA believes this is a reasonable omission. However, the FWQMPs need to be submitted to the Regional Board, ideally as pdfs that could be posted on-line. The proposal to have them on-site and available upon the Regional Board's request would eliminate their utility for staff to rely upon them to make decisions about enforcement priorities, undercuts the public's ability to review FWQMPs, precludes other dischargers from reviewing similar dischargers' plans, and sends a message to dischargers that they need not worry until the Board shows up.

Alternative 5 states that Board staff will "[f]ollow up and coordinate with growers to ensure that FWQMPs and implemented management practices are addressing identified water quality problems." PEIR, p. 3-26. The economic analysis presumes that by merely interacting directly with growers, Board staff will have to provide them

technical assistance on their FWQMPs. See Technical Memo, p. 2-24 ("Board staff will be required to interact directly with growers and provide technical assistance when requested"). In so presuming, the economic analysis comes up with an estimated staffing level of 356 staff. *Id.* This number completely exaggerates the level of staff necessary to implement this alternative. Indeed, the industrial and construction storm water program covers more than 7,500 facilities throughout the Central Valley. Currently, the Regional Board assigns fewer than a dozen staff to implement and enforce that entire program, which also includes overseeing the 93 Phase I and II municipal stormwater permits. More staff is clearly necessary to more effectively implement that program. Even with those few staff however, it is clear that almost all of the 7,500 facilities have implemented some level of management measures.

Alternative 5 itself does not suggest that Board staff are obliged to act as dischargers' consultants. That notion, expressed in the economic analysis, is entirely improper. Any follow-up by staff should be pursuant to its oversight and enforcement authority. The Regional Board need not add 356 staff to effectively implement this alternative. As CSPA also proposed for Alternatives 3 and 4, the Board should focus its limited resources by using the monitoring data and FWQMPs to prioritize site inspections and distribute the results – providing examples of good compliance and issuing enforcement orders and penalties where compliance falls short.

6. The PEIR fails to consider the true no project alternative – automatic termination of the waiver and implementation of individual WDRs

The PEIR's formulation of the no project alternative is wrong because the PEIR incorrectly treats the existing general waivers as continuing in perpetuity. PEIR, p. 3-4 ("no project alternative" identified as future renewal of existing program and continued implementation) (emphasis added). The PEIR claims that a future extension or renewal of the existing waiver is of a "ministerial nature." *Id.* Both of these assertions are incorrect as a matter of law. If the Board takes no action, the existing waiver terminates on June 30, 2011. Order No. R5-2006-0053, p. 17; Water Code § 13269(a)(2). Any renewal of the existing waiver is not ministerial but discretionary, requiring the Regional Board to hold a hearing and exercise its discretion to determine whether renewing an existing waiver complies with the Basin plan, is in the public interest and includes adequate monitoring. Water Code §§ 13269(a)(2), (f). Hence, the no project alternative is allowing the existing waiver to automatically terminate on June 30, 2011 and what would reasonably be expected to occur once that happens.

The PEIR cites out-of-context a single sentence from the CEQA Guidelines relating to revising a regulatory plan. The PEIR quotes the following sentence from CEQA Guideline § 15126.6(e)(3)(A) – "When the project is the revision of an existing land use or regulatory plan, policy or ongoing operation, the 'No Project' Alternative will be the continuation of the existing plan, policy, or operation into the future." PEIR, p. 1-3. The PEIR suggests that guidance allows the Regional Board to make believe that

doing nothing somehow magically renews the existing waivers come June 20, 2011. That, of course, is not a "no action" or "no project" alternative. Renewing the waivers would be selecting a discretionary action.

CEQA requires that an EIR consider a no project alternative. CEQA Guidelines § 15126.6(e)(1) ("The specific alternative of "no project" shall also be evaluated along with its impact"). "The purpose of describing and analyzing a no project alternative is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." *Id.* "The "no project" analysis shall discuss the existing conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services. CEQA Guidelines § 15126.6(e)(2). "The [no project] description must be straightforward and intelligible, assisting the decision maker and the public in ascertaining the environmental consequences of doing nothing; requiring the reader to painstakingly ferret out the information from the reports is not enough." *Planning & Conservation league v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 911 (emphasis added).

The Guidelines note that "[a] discussion of the "no project" alternative will usually proceed along one of two lines . . . CEQA Guidelines § 15126.6(e)(3). The PEIR attempts to rely on the first category, which states in full that:

When the project is the revision of an existing land use or regulatory plan, policy or ongoing operation, the "no project" alternative will be the continuation of the existing plan, policy or operation into the future. Typically this is a situation where other projects initiated under the existing plan will continue while the new plan is developed. Thus, the projected impacts of the proposed plan or alternative plans would be compared to the impacts that would occur under the existing plan.

CEQA Guidelines § 15126.6(e)(3)(A) (emphasis added). However, the existing waiver, unlike a typical land use or general plan (or for example the Regional Board's Basin Plan) that does not expire by a date certain, expires as a matter of law on a date certain, June 30, 2011. The Guidelines make clear that the Regional Board cannot treat one of its alternatives to a proposed project (assuming the PEIR included a proposed project) as a no project alternative:

After defining the no project alternative . . . , the lead agency should proceed to analyze the impacts of the no project alternative by projecting what would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.

CEQA Guidelines § 15126.6(e)(3)(C). The current relevant plans germane to the PEIR are the existing waivers. If the Regional Board were to do nothing by June 30, 2011, *i.e.*, a true no project alternative, the waivers will automatically expire. The Board cannot assume it will select one of the project's alternatives and pretend it is not approving the project. This methodology was firmly rejected by the Court in *Planning & Conservation League*:

A no project description is nonevaluative. It provides the decision makers and the public with specific information about the environment if the project is not approved. It is a factually based forecast of the environmental impacts of preserving the status quo. It thus provides the decision makers with a base line against which they can measure the environmental advantages and disadvantages of the project and alternatives to the project. By contrast, the discussion of alternatives is evaluative.

Planning & Conservation League, 83 Cal.App.4th at 917-918. The PEIR fails to project out an actual no project alternative, incorporating the reality that the existing waivers are temporary with only 10 months to live.

The PEIR's assertion that the existing waivers can be ministerially extended or renewed is blatantly incorrect. See PEIR, p. 3-29 ("If the Central Valley Water Board fails to take the ministerial action to extend or renew the waiver program, regulation of irrigated agriculture would not cease"); *id.*, p. 1-3 ("Given the ministerial nature of the extension or renewal of the ongoing waiver, which would allow continuation of the existing program, Alternative 1 is best characterized as the "No Project" Alternative"). Pursuant to Water Code § 13269, the Regional Board must apply its discretion to adopt or renew a conditional waiver. Water Code §§ 13269(a)(2), (f). See CEQA Guidelines §§ 15002(i)(2) ("[w]hether an agency has discretionary or ministerial controls over a project depends on the authority granted by the law providing the controls over the activity"). The initial decision as to whether to renew a waiver or adopt waste discharge requirements or a prohibition are highly discretionary. Assuming the Regional Board chooses to pursue issuance of a conditional waiver, the Regional Board wields considerable discretion in adopting the necessary conditions of the waiver. The Regional Board must employ its discretion to make the fundamental determinations that the conditional waiver will be consistent with the Basin Plan and in the public interest. Lastly, Section 13269 precludes the Regional Board from renewing any waiver without holding a public hearing where it must review the terms of the waiver.

Porter-Cologne's waiver renewal process cannot be equated even remotely with a ministerial action. "Ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision." CEQA Guidelines, 14 CCR § 15369. "A ministerial decision involves only the use of fixed standards or objective

measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.” *Id.* As we are all well aware, having gone through this waiver process several times now, the decisions to be made by the regional Board are loaded with subjective, personal judgment. See CEQA Guidelines § 15357 (“Discretionary project’ means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations”); § 15002(i) (“[a] project subject to . . . judgmental controls is called a ‘discretionary project’”). See also CEQA Guidelines § 15268(d) (“Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA”).

The PEIR must be revised and recirculated with a properly defined and evaluated no project alternative.

H. The PEIR Ignored CSPA’s and Others Scoping Comments.

As the PEIR recognizes, “[i]n accordance with State CEQA Guidelines Section 15123(b)(2), the areas of controversy known to the lead agency, including issues raised by agencies and the public, shall be identified in the EIR.” PEIR, p. 1-8. See CEQA Guidelines § 15123 (“(a) An EIR shall contain a brief summary of the proposed actions and its consequences. . . . (b) The summary shall identify: . . . (2) Areas of controversy known to the lead agency including issues raised by agencies and the public. . . .”).

CSPA and others have participated in the development of the EIR from its inception, submitting detailed scoping comments that fully advised the Regional Board of CSPA’s long-standing criticisms of the existing ILRP and the need for FWQMPs, farm-specific monitoring and compliance with antidegradation requirements. See CSPA/Baykeeper Scoping Comments (May 30, 2008); CSPA et al. Scoping Comments (March 12, 2003). In those comments, CSPA emphasized the main controversies surrounding the ILRP – embellished further by these PEIR comments – that the ILRP and EIR “must directly address and eliminate . . . violations of water quality standards in light of the fact that, under the present program, the Regional Board cannot know who is actually discharging pollutants, what specific pollutants are being discharged, what are the localized water quality impacts in the vicinity of the discharge, who has or has not implemented best management practices (BMPs) and whether any reductions in pollutant loading or improvements in water quality have occurred.” CSPA/Baykeeper Scoping, p. 3 (May 30, 2008). CSPA also reiterated the ongoing controversy “that Reports of Waste Discharge and individual farm-based management plans (similar to pollution prevention plans under the industrial or construction stormwater permits) are fundamentally necessary for any meaningful program addressing discharges from irrigated lands.” *Id.*, p. 4. The scoping comments also highlighted the ongoing controversy that the ILRP, to be successful and comply with Resolution No. 68-16, must

include farm specific water quality monitoring. See *id.*, p. 2 (“[EIR] cannot rely on information collected far downstream to adequately address and mitigate upstream adverse impacts to sensitive biological resources, *i.e.*, it must identify localized impacts in the vicinity of actual discharge locations”). Many of these same issues have been raised by CSPA and others in their comments on the previous waivers as well, debated by the Regional and State Boards, and been the subject of previous litigation. See, *e.g.* CSPA et al. Comments (May 23, 2003); Deltakeeper et al. Comments (November 4, 2005).

Despite these well-known areas of controversy, the PEIR fails to include them in the summary as required by CEQA. This blatant omission underscores the bias built into the PEIR and ultimately informing staff's separate recommendation in its staff report. Indeed, the few controversies listed in the summary are for the most part restricted to those articulated by the coalitions. PEIR, p. 2-9. The PEIR's summary needs to be rewritten to comply with the CEQA Guidelines.

I. The PEIR Overlooks a Number of Important Significant Impacts.

The PEIR opts not to discuss any impacts on at least three issue categories – recreation, aesthetics, public health and cultural impacts – which common sense would indicate will be adversely affected by the Regional Board's selection of an ILRP that is ineffective and fails to significantly reduce pollution discharges from irrigated lands. PEIR, p. 1-8. Since the EIR fails entirely to analyze the impact of the alternatives on these issues, these impacts are subject to the fair argument, rather than the substantial evidence standard. Fair argument standard applies even to EIRs if the EIR fails entirely to analyze a particular impact. *Bakersfield Citizens For Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208.

Under the “fair argument” standard, an EIR must analyze an impact if *any* substantial evidence in the record indicates that a project may have an adverse environmental effect – even if contrary evidence exists to support the agency's decision. CEQA Guidelines § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon v. Stanislaus* (1995) 33 Cal.App.4th 144, 150-151 (1995); *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1602. The “fair argument” standard creates a “low threshold” favoring environmental review through analysis in an EIR. *Pocket Protectors*, 124 Cal.App.4th at 928.

1. The PEIR fails to address impacts to Recreation and Aesthetics.

In its scoping comments, CSPA pointed out the need to evaluate the ILRP's alternatives on recreational uses in the Central Valley. See CSPA et al. Scoping Comments (March 12, 2003) (EIR should analyze impacts on “recreational, tourism and beneficial uses”). There is clearly a “fair argument” that any version of the ILRP may have significant impacts on both recreation and aesthetics in the Central Valley,

especially within the Delta. By authorizing irrigated lands discharges without FWQMPs or "edge-of-field" effluent quality monitoring, any new ILRP could further exacerbate pollution discharges from irrigated lands. Discharges of both nutrients and pesticides likely would have adverse effects on recreational and aesthetics by continuing to support the growth of nuisance aquatic species, including for example water hyacinth. The growth of water hyacinth in turn results in further water quality impacts to the Delta, including depressed dissolved oxygen levels, increased herbicide spraying, including toxic surfactants, and other pollution concerns. None of these potential impacts were discussed in the PEIR. See PEIR, p. 5-11-2 ("It is not anticipated that the program alternatives would substantially increase or decrease the use of recreational facilities, create the need for such facilities, or result in any other foreseeable significant impact on recreational opportunities in the program area"); p. 5.11-1 (no review of impacts to aesthetics).

Discharges of nutrients from farms contribute to the explosive growth of water hyacinth (*Eichhornia crassipes*) and Brazilian elodea (*Egeria densa*) in the Sacramento-San Joaquin River Delta. Both Brazilian elodea *Egeria densa* and water hyacinth *Eichhornia crassipes* "form dense growths that block waterways and destroy natural habitat by slowing water flow and drastically changing water quality. <http://www.dbw.ca.gov/PDF/Egeria/WHSciProbsExcerpts.pdf>. As the San Francisco Estuary Institute reports, "[d]ense contiguous mats" of water hyacinth "create navigation and safety concerns in waterways, harbors, and marinas." <http://legacy.sfei.org/nis/hyacinth.html>. Hyacinths "[i]nterfer[e]" with irrigation and power generation by clogging pumps and siphons." *Id.* Hyacinth "[c]an completely exclude native floating and submerged vegetation, shade habitat, change water temperature [and] ... deplete dissolved oxygen." *Id.* As Dr. G. Fred Lee has summarized,

Delta waters experience excessive growths of aquatic plants such as water hyacinth and *Egeria densa*. These water weeds interfere with recreational use of Delta waters for boating, swimming, water skiing, fishing, etc. The water weeds develop on nutrients added to Delta tributaries from urban, agricultural and wetlands sources in the Delta watershed, and from Delta island discharges. The California Department of Boating and Waterways spends several hundred thousand dollars per year to apply chemicals for controlling water weeds. There is concern about the potential toxic and other impacts of these chemicals on non-target organisms, such as fish food organisms, in the water column and sediments.

Lee, G. Fred and Anne Jones Lee, "Overview of Sacramento-San Joaquin River Delta Water Quality Issues," p. v (June 24, 2004). Because of the significant contribution of nutrients from irrigated lands, there is plainly a fair argument that the Regional Board's authorization of irrigated lands discharges may have a significant impact on recreational boaters and persons recreating in the Delta and observing vast areas of water hyacinth.

Because of the navigational, recreational and aesthetic impacts resulting from excessive water hyacinth growth, the State of California expends resources every year spraying herbicides into Delta waterways. See Lee, p. 19 ("large amounts of aquatic herbicides are used in the Delta to control excessive growths of water hyacinth this could be an important issue impacting Delta water quality"). See Dept. of Fish & Game, "Acute Toxicities of Herbicides Used to Control Water Hyacinth and Brazilian Elodea on Larval Delta Smelt and Sacramento Splittail (June 8, 2004).

In addition to increasing herbicide discharges to the Delta, water hyacinths also provide habitat for other nonnative crabs and parasites, which ultimately may affect endangered salmon in the Central Valley. As one recent study reports,

[t]he newfound presence of these crustaceans could have significant ramifications apart from just adding their names to the already lengthy list of non-indigenous species in the Delta. Amphipods and isopods are known to be intermediate hosts of a number of parasites, including acanthocephalan parasites of fish (Nagasawa et al. 1983, Yasumoto and Nagasawa 1996). *Asellus hilgendorffii* has specifically been shown to serve as an intermediate host for numerous species of acanthocephalans that parasitize salmonids and other fish in waters of Japan (Nagasawa and Egusa 1981, Nagasawa et al. 1983, Mayama 1989). Infection occurs when fish prey upon *A. hilgendorffii* that contain acanthocephalan larvae. Adult acanthocephalans parasitize the intestinal tract of the definitive host fish (Nagasawa et al. 1983). Studies have shown that salmonids can have infection levels of 83-100% depending on the season, when *A. hilgendorffii* is only 2.1 % of the total wet weight of food items in the fish diet (Nagasawa et al. 1983). Thus, even though *A. hilgendorffii* occurs in low abundance in the diets of fish in the Sacramento/San Joaquin Delta, it could still potentially infect the entire population of salmonids with acanthocephalan parasites."

Toft, Jason David, "Community Effects of the Non-Indigenous Aquatic Plant Water Hyacinth (*Eichhornia crassipes*) in the Sacramento/San Joaquin Delta, California" (2000). All of these direct and indirect effects must be discussed and analyzed in the PEIR.

In addition, the presence of bacteria in samples collected by the existing ILRP obviates the need to address the affect of PEIR's alternatives and their ability to reduce fecal discharges on recreation, especially swimming, and human health. In CSPA's experience, it is not possible to keep kids from playing in water. As the staff report summarizes:

The fecal pathogen indicator *E. coli* is the most common parameter with surface water exceedances of water quality objectives in the ILRP; it was detected in 99 percent of all samples. Fecal contamination is a concern

because certain pathogenic bacteria found in feces can cause gastrointestinal illness.

Staff Report, p. 33. Indeed, 24 and 55 management plans in the Sacramento River and San Joaquin, respectively, have been triggered because of exceedances of E. coli standards in those rivers. Staff Report, p. 26, Table 3. The PEIR makes a passing reference to the fecal coliform problem, noting that "[t]oxicity, and bacteria are also known water quality problems in the Sacramento River Basin." PEIR, p. 5.9-6. The obvious impacts of fecal coliform discharges on recreational uses like swimming and boating in the Delta and other waters of the Central Valley must be addressed in the PEIR.

Lastly, CSPA is aware of numerous individuals who once recreated in and on the Delta and other Central Valley waters who have stopped or reduced such recreation because of fears of contaminants and experiencing health effects that were associated with exposure to Central Valley waters. For example, one of CSPA's members, Linda Forbes, reports:

I was a frequent visitor to the Delta region for five years, enjoying water skiing, camping, boating and swimming. I experienced several strange skin rashes after weekends of recreation at the Delta, with the severity increasing over time. Two summers ago I began to feel more and more uncomfortable about the risks of pursuing my water sports passion there; I have not gone swimming or skiing in Delta waters for over a year.

E-mail from Linda Forbes to Bill Jennings, CSPA (Sept. 23, 2010). Another example is from Barbara Barrigan-Parrilla, a CSPA member and the Director of Restore the Delta. She tells of her daughter's first swim in the Delta as an infant resulting in an emergency room visit and her refusal to swim in the Delta since that day. E-mail from Barbara Barrigan-Parrilla to Bill Jennings, CSPA (Sept. 25, 2010). Kari Burr, a fisheries biologist, also describes the adverse impacts of agricultural discharges on her professional and recreational activities. E-mail from Kari Burr to Bill Jennings, CSPA (Sept. 26, 2010). See *also* E-mail from Frank T. Rauzi to Bill Jennings (Sept. 26, 2010) (Mr. Rauzi, a lifelong resident and fisherman of the Delta, recounts his refusal to eat fish and concerns about swimming in the Delta). Based on conversations between Bill Jennings and other CSPA members over the years, CSPA does not believe Ms. Forbes,' Ms. Barrigan-Parilla's, Ms. Burr's or Mr. Rauzi's experiences are isolated incidents but unfortunately are shared by numerous people who would recreate in waters of the Central Valley but for the incredible levels of toxic and health-threatening pollution that is discharged from irrigated lands.

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2. PEIR fails to analyze cultural impacts re: traditional uses of salmon or other fish.

The PEIR opts not to evaluate any cultural impacts of the various ILRP alternatives. PEIR, p. 5.3-9. Contaminants affecting Central Valley salmon and contributing to their decline have adverse impacts on Native American culture and religious practices. It is widely acknowledged by scientists and government agencies that agricultural runoff is one of the factors adversely affecting Chinook salmon. See PEIR, p. 5.8-22 (“Other factors affecting the fall-run/late fall-run Chinook salmon include . . . pollution (e.g., municipal discharges and agricultural runoff), . . . (Moyle et al. 2008:141–143)”). *Id.* at 5.8-39 (“NMFS (2008) concluded that EPA registration of chlorpyrifos, diazinon, and malathion would jeopardize the continued existence of, and destroy or adversely modify critical habitat for, the Central Valley spring-run Chinook salmon ESU, the Sacramento River winter-run Chinook salmon ESU, and the California Central Valley steelhead DPS”); National Academy of Sciences, “A Scientific Assessment of Alternatives for Reducing Water Management Effects on Threatened and Endangered Fishes in California’s Bay–Delta,” p. 42 (2010) (“It has long been recognized that contaminants are present in the delta, have had impacts on the fishes, and may be increasing (Linville et al., 2002; Davis et al., 2003; Edmunds et al., 1999).

Native American traditional uses and religious ceremonies involving salmon continue on the Sacramento River and, to a lesser degree, the San Joaquin River, and their tributaries. As the United States District Court for the Eastern District of California recently ruled, “salmon have sustained the Winnemem Wintu and have formed the foundation of the Tribe’s cultural and spiritual ceremonies and beliefs.” Order, p. 88. (May 18, 2010). Judge Wanger specifically recognized the “significant cultural and spiritual interests of the Winnemem Wintu” tied to the health of salmon. *Id.*, pp. 88-89. The District Court relied upon the declaration of Gary Hayward Slaughter Mulcahy, the Governmental Liaison and a Tribe member of the Winnemem Wintu Tribe. As Mr. Mulcahy testified to the Court,

For centuries, the Winnemem Wintu have had a deep cultural and spiritual relationship with the salmon that utilize the Sacramento River and its tributaries. We sing to the salmon and the waters that sustain them. Our history, traditions, ceremonies, and culture are filled with respect, reverence, appreciation, and dependence on the salmon and these waters. Salmon were the staple of the Winnemem Wintu. Salmon are the food necessary to complete and fulfill many of the Winnemem Wintu’s very special sacred ceremonies. Salmon are the sustainer of health and life of the Winnemem Wintu. We believe that when the first spirits were choosing what form they would take (i.e., Salmon, Eagle, Bear, Human, etc.), when Human chose to be human, the Grandfather spirit said that these Humans will need lots of help, and each of the other spirits gave something to Humans to help them through life. We believe that Salmon gave us speech and in return we promised to always speak for them. This

is remembered and celebrated in ceremonies on the McCloud River, Sacramento River, Squaw Creek and at Mt. Shasta several times a year. We believe that if the salmon go, the Winnemem Wintu will also disappear.

Declaration of Gary Hayward Slaughter Mulcahy, ¶ 3 (March 12, 2010). The Tsi-Akim Maidu Tribe conducts a "calling back the salmon" ceremony on the Yuba River. <http://www.callingbackthesalmon.com/ceremony.php>. The PEIR must gather in and discuss relevant information regarding Native American cultural and religious uses of salmon that may be affected by the Regional Board's proposal to authorize contaminants affecting salmon in the Central Valley.

3. The PEIR fails to address public health impacts of authorizing continued discharges of pesticides and other pollutants from irrigated lands effluent to groundwater.

As early as March 2003, CSPA and others urged the Regional Board to consider human health impacts of authorizing irrigated land discharges in its EIR. CSPA et al. Scoping Comments (March 12, 2003) (EIR must consider "human health throughout the Central Valley and California in terms of both acute and chronic impacts including, but not limited to: - children, including residents and school children - laborers, including farmworkers, farmers, pesticide applicators, etc. – residents – anglers - pregnant women - newborn infants"). Despite that request, the PEIR has opted to ignore potential human health impacts of the various ILRP alternatives approval of continuing irrigated land discharges.

More than two million Californians have been exposed to harmful levels of nitrates in drinking water over the past 15 years and the population of those exposed keeps growing. The PEIR acknowledges the extent of nitrate contamination and includes, as Figure 5.9-17, a map that shows nitrate contamination to be concentrated in the Central Valley. Incredibly, however, the PEIR makes no attempt to analyze how nitrogen-based fertilizer application in the Central Valley results in the exposure of the public to contaminated groundwater, the health impacts of that exposure, or how implementation of any of the five alternatives would reduce exposure, other than to say, for Alternative 1:

Nutrient management would improve both surface water quality and groundwater quality by improving the use of chemicals and using improved application techniques, and by limiting the use of nutrients as fertilizer that could potentially seep to groundwater and add nitrate to the groundwater table.

PEIR, p. 5.9-14.

The assertion that ongoing nutrient management efforts would somehow improve water quality is not borne out by recent data. In fact, the status quo, as proposed in Alternative 1, has resulted in an increase, statewide, in the number of wells that exceeded the health limit for nitrates, from nine in 1980 to 648 by 2007. http://articles.sfgate.com/2010-05-17/news/20901575_1_nitrate-contamination-water-supply-water-systems. In Tulare County, more than 40% of private domestic water wells exceed the drinking water standard for nitrate. http://www.swrcb.ca.gov/gama/docs/ekdahl_gra2009.pdf. On the basis of more than 25 years of data, the number of wells that exceed the drinking water standard for nitrate is growing as a percentage of all nitrate detections. http://www.swrcb.ca.gov/gama/docs/ekdahl_gra2009.pdf Clearly the status quo is not working.

Health effects of exposure to nitrates most notably results in methemoglobinemia or "blue baby syndrome." Toxic effects of methemoglobinemia occur when bacteria in the infant stomach convert nitrate to more toxic nitrite, a process that interferes with the body's ability to carry oxygen to body tissues. Infants with these symptoms need immediate medical care since the condition can lead to coma and eventually death. Pregnant women are susceptible to methemoglobinemia and should be sure that the nitrate concentrations in their drinking water are at safe levels. Additionally, some scientific studies suggest a linkage between high nitrate levels in drinking water with birth defects and certain types of cancer. http://www.swrcb.ca.gov/water_issues/programs/gama/docs/coc_nitrate.pdf.

The PEIR should be rewritten to include an assessment of the potential for the public to be exposed to nitrates in drinking water from agricultural practices in the Central Valley and measures implemented as a result of the ILRP. This is especially important to the extent the Regional Board anticipates the installation of numerous tailwater recovery systems. See Technical Memo, p. A-2. The assessment of each alternative should include an estimate of nitrogen loading to fields; nitrogen fate and transport in soil, surface water, and groundwater; nitrogen monitoring; and a summary nitrogen impacts to water supplies. Linking monitoring to measurement of each of the alternatives is critical. An annual assessment of the performance of the alternative that is selected should be required and use of the 10,000-well California Department of Public Health database should be required as a tool for evaluation.

Another potential health impact unaddressed by the PEIR is the potential threats from fecal contamination of wells and surface waters. As the Existing Conditions Report tells us:

The presence of pathogen indicators, such as fecal coliform and *E. coli*, are ubiquitous in water samples collected throughout the Central Valley and are frequently measured at levels higher than the EPA recommended criterion for *E. coli*. Not all strains of *E. coli* are pathogenic, but the presence of *E. coli* or fecal coliform is an indicator of fecal contamination.

Several coalitions funded a study to determine the sources of *E. coli* contamination.

Existing Conditions Report, p. 3-11. See also U.S. EPA, "Conceptual Model For Pathogens and Pathogen Indicators in The Central Valley and Sacramento-San Joaquin Delta - Final Report," p. ES-1 (Aug. 24, 2007) (highest concentrations of *E. coli* data "were observed for waters affected by urban environments and intensive agriculture in the San Joaquin Valley") (http://www.swrcb.ca.gov/rwqcb5/water_issues/drinking_water_policy/concept_path_indicators/cover_toc_es.pdf). As the California Department of Public Health's health notices explain:

Fecal coliforms and *E. coli* are bacteria whose presence indicates that the water may be contaminated with human or animal wastes. Microbes in these wastes can cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants, young children, some of the elderly, and people with severely compromised immune systems.

DPH, Tier 1 Fecal Coliform or *E. coli* Notice Template (<http://www.cdph.ca.gov/certfic/drinkingwater/Documents/Notices/Tier%201%20Fecal%20Coliform%20or%20E%20coli%20Notice.doc>). Despite its ubiquitous presence and clear connection to irrigated land discharges, the only mention of pathogens in the PEIR is a passing reference in the Fisheries section. PEIR, p. 5.8-49 ("Pathogens are monitored for potential exceedance of trigger limits in relation to human health. Pathogens of concern to fish may affect fish populations in the program area, but data are insufficient to draw any conclusions about existing effects"). Like nitrates, no effort is made in the PEIR to discuss the obvious human health and recreational impacts that are adversely affected by an ILRP that authorizes coliform discharges from farms.

Lastly, the PEIR fails to consider any human health impacts PEIR associated with discharges of other pollutants, including certain metals, that will be authorized through the ILRP. The Existing Conditions Report acknowledges that irrigated land discharges authorized by the ILRP will mobilize various metals that can pose serious human health risks, including lead and arsenic. Existing Conditions Report, p. 3-55 ("elevated levels of naturally occurring metals that are mobilized and suspended in agricultural return flows are common in these watersheds—such as copper, arsenic, cadmium, boron, nickel, lead, and selenium"). The PEIR also should explore the human health impacts of ILRP-authorized discharges of metals.

J. PEIR's Analysis of Many Key Potential Impacts and the Alternatives' Proposed Mitigations Are Not Supported by Substantial Evidence.

The alternatives, at their core, are projects by which the Regional Board proposes to authorize discharges of polluted effluent from irrigated lands to surface and

groundwater throughout the Central Valley. Each alternative includes various program elements which are the mitigations proposed to purportedly reduce the effect of the Regional Board authorizing the discharge of hundreds of millions of gallons of polluted effluent. The PEIR's discussion of impacts boils down to a discussion of the alternatives' proposed mitigation measures. In addition to those proposed mitigations, the actual dischargers would have to implement site-specific mitigation measures, *i.e.* BPTC, in order to address the impacts of discharging to the State's waters.

The PEIR fails to substantiate or properly analyze the alternatives' programmatic-level mitigation measures, including for example the effectiveness of any FWQMPs and reporting requirements, monitoring requirements, and third party actions. Nor does the PEIR adequately discuss the effectiveness in reducing pollution of any of the BMPs that are listed and which might achieve BPTC. The PEIR leaves out any discussion of numerous management measures that likely will be applied on irrigated lands. Lastly, the PEIR fails to analyze cumulative impacts of the alternatives when considered with numerous other projects in the Central Valley relating to water diversions, dam operations, proposed development, pending pesticide registration proceedings, dredging projects and others that are and will affect water quality, fisheries, and other impacts.

Mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. CEQA Guidelines § 15370. Mitigations may be proposed as part of the project but must still be fully discussed and analyzed. "The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project." CEQA Guidelines § 15126.4(a)(1)(A)

Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. *Id.*, § 15126.4(a)(1)(B). A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved. A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau*, 221 Cal.App.3d at 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available). "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. CEQA Guidelines § 15364.

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project's potentially significant environmental impacts and describe those mitigation measures in the CEQA document. Pub. Res. Code §§ 21002, 21081(a), 21100(b)(3); CEQA Guidelines § 15126.4. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding

instruments. *Id.* at § 15126.4(a)(2). If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed. CEQA Guidelines § 15126.4(a)(1)(D).

1. The analysis of impacts to water quality is flawed because there is no evidentiary support for the assumption that mitigation measures proposed by each alternative would be equally effective.

The most obvious impact of the Regional Board authorizing discharges of waste from irrigated lands to surface or groundwater is impaired water quality. The PEIR, however, takes an entirely cavalier approach to evaluating this obvious impact. No effort is made in the PEIR to discuss the efficacy and uncertainty of the various monitoring and management plans proposed by each alternative. The PEIR makes no effort to quantify or compare the actual pollution reductions that would be likely to occur under each alternative. Nor does the PEIR discuss whether the monitoring proposed or omitted by each alternative would be effective in informing the Regional Board and public about whether irrigated lands pollution in specific areas is increasing or decreasing. Nor does the PEIR compare how long it would take to figure out pollution trends based on the level of monitoring proposed or omitted in each alternative.

As mentioned above, a fundamental flaw in the PEIR is its failure to estimate the relative effectiveness of the five alternatives. It generally assumes that they will all lead to sufficient pollution reductions. This flaw is magnified in the discussion of impacts to water quality. In addressing water quality impacts, the PEIR assumes that surface water quality improvements under Alternative 1 would be the same as all of the other alternatives, including Alternative 5. As for groundwater, the PEIR makes a similar assumption – that Alternatives 2 through 5 will be equally effective at reducing pollution to groundwater (the PEIR does acknowledge that not addressing groundwater at all would be less effective).

Thus, for Alternative 1, the PEIR states that “[i]t is expected that existing water quality conditions, such as the surface water quality impairments detailed in the environmental setting section above and in the ECR, would improve over time as the program would continue to implement surface water management practices and management plans.” PEIR, p. 5.9-14. The same is said for Alternatives 2 and 3, even though the former reduces water quality monitoring and the latter eliminates water quality monitoring. *Id.*, pp. 5.9-16 (“Under Alternative 2, existing water quality impairments are expected to improve over time as third parties develop and implement surface water and groundwater quality management plans”), 5.9-17 (“Alternative 3, existing surface water quality and groundwater quality impairments are expected to improve over time as the FWQMPs are developed and implemented”). The same unexplained expectation is stated for Alternatives 4 and 5, simply incorporating the assertion made for Alternative 2. *Id.*, p. 5.9-18 (Alternative 4) (“Potential impacts to water quality and hydrology under Alternative 4 would be similar to those described for

Alternative 2"); p. 5.9-18 ("Potential impacts to water quality and hydrology under Alternative 5 would be similar to those described for Alternative 2").

These expectations are unsupported by any evidence in the record. The Regional Board cannot point to anything in its current record that "clearly shows that all uncertainties" of the mitigations set forth in each alternative will eliminate the well-documented significant environmental impacts of allowing irrigated lands to discharge waste to surface and ground water.

The PEIR's simplistic and conclusory assertions fail to assist the Regional Board or the public in discerning the real life differences in pollution discharge rates that the different mitigations incorporated into each of the proposed alternatives will have. For example, in regard to FWQMPs, it is simply not realistic to assume that the two alternatives that do not require FWQMPs – Alternatives 1 and 2 – will be as effective at identifying and implementing measures as the alternatives that do require dischargers to prepare FWQMPs and, at least for two of them, require them to be submitted to the Regional Board. Likewise, for the alternatives that require FWQMPs, there would have to be some difference in effectiveness and pollution reductions between the two alternatives (3 and 4) that would have the Regional Board review and approve FWQMPs and Alternative 5's provision that FWQMPs not be reviewed or approved. Conversely, if the proposal to have the Regional Board approve every FWQMP before they go into effect slows down their implementation, then there would undoubtedly be an impact during the term the Board did not act on any FWQMPs. Until the PEIR can remove the uncertainty of how the Regional Board can assure BPTC is implemented without requiring FWQMPs, the Regional Board may not rely on alternatives that do not propose FWQMPs.

In terms of monitoring, no evidence could support the PEIR's assumption that Alternative 3's omission of any water quality monitoring for surface or groundwater discharges could somehow be as effective as any of the alternatives that do provide some water quality monitoring. And as between Alternative 5's farm-specific monitoring requirement and Alternatives 1, 2 and in effect 4's proposal to rely on regional monitoring, no evidence could support the PEIR's assertion that the regional monitoring measures will tell the Board or anyone whether a particular dischargers' management measures in fact reduce any pollution discharges and would address specific dischargers' pollution problems as promptly as a measure that required them to monitor their discharges. Until the PEIR sufficiently discusses and eliminates the obvious uncertainty of a regional monitoring mitigation measure to evaluate the effectiveness of an on-site management measure miles upstream, the Regional Board cannot rely on alternatives relying on such regional monitoring.

As noted above, the PEIR's assumption that the monitoring required by each of the proposed alternatives is equally effective, is inconsistent with the PEIR's acknowledgment in its discussion of fisheries that more farm-specific monitoring results in more pollution reductions and fewer impacts. PEIR, p. 5.8-52 ("given the probability

of increased monitoring of individual farms, and especially those at higher risk of generating significant impacts—in addition to wellhead protection, nutrient management plans, tracking of nutrient and pesticide application, and monitoring of individual wells—the positive benefit of Impact FISH1 (improved water quality) would probably be greater under Alternative 4 than under Alternative 2 or Alternative 3”); *Id.*, p. 5.8-53 (Alternative 5) (“Given the emphasis on monitoring of individual farms, wellhead protection, nutrient management plans, tracking of nutrient and pesticide application, monitoring of individual wells, and potential installation of monitoring wells, the positive benefit of Impact FISH1 (improved water quality) probably would be greater under Alternative 5 than under any other alternative”). Although as discussed below, these analyses also must be better analyzed, the general observation is obvious and the PEIR’s failure to discuss these differences in the water quality section renders it inadequate.

Nor is there any attempt in the water quality discussion to quantify the effectiveness of management measures that will likely be employed by individual farms. The PEIR lists a handful of likely measures. This list is incomplete, omitting numerous measures that one can find by reviewing some of the management plans that have been developed. Of particular note is the complete omission in the PEIR of any discussion of integrated pest management options to reduce the use or rate of pesticide applications. Until the Regional Board can sufficiently discuss the available management measures and whether any of them, alone or in combination will effectively eliminate the significant impacts of the Board authorizing waste discharges from irrigated lands, then the Board cannot rely on them.

2. The analysis of impacts to fisheries is flawed because there is no evidentiary support for the assumption that all alternatives would be equally effective at protecting fisheries

The PEIR’s handling of impacts to fisheries suffers from flaws similar to those described in the discussion of water quality above. The PEIR’s discussion of fisheries impacts, again without any evidence or common sense, simply assumes that the same level of management measures and surface water pollution control effectiveness will result with implementation of any of the alternatives, with or without FWQMPs and without regard to how far away some water quality monitoring may (or may not) be occurring. PEIR, p. 5.8-50 (“Under this alternative, management practices would be implemented to reduce the levels of identified constituents of concern below the baseline conditions. Monitoring and management plan requirements of Alternative 1 are expected to result in further implementation of management practices by growers”) As for groundwater, the same is true with the exception of Alternative 1.

The PEIR’s assertion that Alternative 1 will improve surface water quality is entirely unsupported by any evidence. Alternative 1, now in its seventh year of implementation, has failed to result in the Regional Board documenting the installation of a single management measure anywhere in the Central Valley. Nor is there any evidence of a trend that the rampant violations of water quality standards throughout the

Central Valley resulting from irrigated lands discharges are on the mend. Nevertheless, the PEIR asserts that “[i]mprovements to surface water quality from implementation of management practices [under Alternatives 1] in impaired water bodies receiving inputs from lands in the program area are likely to benefit fish (e.g., by reducing contaminant loads and decreasing sedimentation and total suspended solids).” PEIR, p. 5.8-50. The PEIR makes the same assertion for Alternative 2. *Id.*, p. 5.8-52. As discussed above, the coalitions’ current plans are to have informal meetings with some farms to discuss BMPs. *See supra*, Section F.1. The coalitions have no legal authority to require implementation of any BMPs by any of their members. What, if any, BMPs may result from the proposed meetings is anybody’s guess. And, without FWQMPs, whether or not the Regional Board would even be aware of a specific farmer’s installation of measures is not clear. The PEIR’s cavalier assertion that Alternatives 1 and 2, despite omitting any FWQMPs or farm-specific monitoring could somehow lead to the certain implementation of pollution reduction measures, does not resolve the uncertainties that coalitions and regional monitoring will resolve irrigated land’s water pollution impacts.

Although the PEIR does acknowledge some relevant benefit from the mitigations included in Alternatives 4 and 5 farm-specific monitoring proposals, coupled with the farm-specific plan requirements, the discussion is still insufficient to remove uncertainties about the efficacy of Alternative 4’s proposal. *See* PEIR, pp. 5.8-52; 5.8-53. Specifically, because a discharger may opt out of farm-specific monitoring in exchange for participation in regional monitoring, it is uncertain whether any discharger will conduct farm-specific water quality monitoring. As a result, and as discussed above, there is no certainty that the Regional Board will be able to determine that any measures installed on that farm will amount to BPTC or assure compliance with water quality standards. In addition, the PEIR’s discussion of the relative benefit to water and additional pollution reductions one should expect from requiring FWQMPs coupled with farm-specific monitoring is not specific enough for the Regional Board to compare those benefits to the other alternatives.

Even assuming all of the alternatives may have some benefit on water quality, the PEIR also makes no effort to determine the time frames within which any such improvements would be realized under the various alternatives. Given the frames of reference in each alternative, it appears clear that some, for example, Alternative 5, would result in measures being installed faster and hence pollution reductions being achieved more quickly, as compared to any other alternative.

The PEIR cannot succeed in achieving the goals of CEQA if it shies away from frankly addressing the mitigations proposed in each alternative and comparing their ability or inability to reduce pollution that will be discharged to surface and groundwater from irrigated lands.

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3. The PEIR fails to discuss numerous cumulative impacts to water quality and fisheries habitat currently plaguing the Delta and other areas of the Central Valley.

The PEIR attempts to pass on evaluating the cumulative impacts of the ILRP. PEIR, p. 6-1 ("Because of the unidentified location of potential impacts, the Lead Agency has not identified any projects or programs adequately similar in nature, location, and type to result in a meaningful comparative analysis"). The notion that either the geographic area or obvious water quality and fisheries impacts of allowing discharges of irrigated lands waste is unknown is patently incorrect, as the preceding sections of the PEIR make clear despite their obvious flaws. The PEIR recognizes a number of specific categories of actions in the Central Valley that are contributing to impacts to fisheries and water quality, in addition to discharges from agricultural lands. Of particular note is the operation of the massive state and federal water projects, which are having obvious cumulative impacts to fish in the Central Valley by killing massive numbers of fish at their respective pumping facilities. See http://www.swr.noaa.gov/ocap/Executive_summary_to_NMFS'_CVP-SWP_operations_BO_RPA.pdf; 5.8-17 ("water projects have adversely modified [longfin smelt's] habitat, distribution, food supply, and probably abundance"); See NMFS Biological Opinion Regarding Proposed Long-Term Operations of the Central Valley Project And State Water Project (June 4, 2009) (http://www.swr.noaa.gov/ocap/NMFS_Biological_and_Conference_Opinion_on_the_Long-Term_Operations_of_the_CVP_and_SWP.pdf). Both EPA's registration of various pesticides that the National Marine Fisheries Service has determined will jeopardize the continued existence of listed salmon must be considered, especially considering NMFS's proposed mitigation requirements prohibiting pesticide application on irrigated lands within 1000 feet of water. PEIR, p. 5.8-39 ("NMFS (2008) concluded that EPA registration of chlorpyrifos, diazinon, and malathion would jeopardize the continued existence of, and destroy or adversely modify critical habitat for, the Central Valley spring-run Chinook salmon ESU, the Sacramento River winter-run Chinook salmon ESU, and the California Central Valley steelhead DPS"); NMFS Biological Opinion on the Effects of the U.S. Environmental Protection Agency's Proposed Registration of Pesticide Products (Nov. 18, 2008) (http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biop.pdf).

The proposed Peripheral Canal being pursued by various agencies also is a reasonably foreseeable project that will enormously exacerbate water quality and fisheries impacts within the Delta. See Bay Delta Conservation Plan, Status Update 3 (June 2010). Likewise, the Regional Board is in the best position to evaluate the cumulative impacts of the hundreds of discharge permits it has issued to dischargers throughout the Central Valley. See Central Valley Regional Board Web Site, Adopted Orders (http://www.swrcb.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml). The PEIR also should evaluate, for example, cumulative bacterial issues resulting from rampant sewage overflows from municipalities throughout the Valley in combination with the bacteria coming from farms. http://www.waterboards.ca.gov/water_issues/programs/sso/sso_map/sso_pub.shtml (accessed September 27, 2010).

These and other cumulative impacts must be addressed in the PEIR. Recognizing that several projects may together have a considerable impact, CEQA requires an agency to consider the "cumulative impacts" of a project along with other projects in the area. Pub. Resources Code §21083(b); CEQA Guidelines §15355(b). It is vital that an agency assess "the environmental damage [that] often occurs incrementally from a variety of small sources . . ." *Bakersfield Citizens*, 124 Cal.App.4th at 1214. This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable. . . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines §15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." CEQA Guidelines § 15355(a).

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Communities for a Better Environment v. Cal. Resources Agency* ("CBE v. CRA") (2002) 103 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand.

As the court recently stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:
Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

In *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: "The [] EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project

when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.”¹ The *Kings County* case was recently reaffirmed in *CBE v. CRA*, 103 Cal.App.4th at 116, where the court rejected cases with a narrower construction of “cumulative impacts.”

Similarly, in *Friends of Eel River v. Sonoma County Water Agency*, (2003) 108 Cal. App. 4th 859, the court held that the EIR for a project that would divert water from the Eel River had to consider the cumulative impacts of the project together with other past, present and reasonably foreseeable future projects that also divert water from the same river system. The court held that the EIR even had to disclose and analyze projects that were merely proposed, but not yet approved. The court stated, CEQA requires “the Agency to consider ‘past, present, and probable future projects producing related or cumulative impacts . . .’ (Guidelines, § 15130, subd. (b)(1)(A).) The Agency must interpret this requirement in such a way as to ‘afford the fullest possible protection of the environment.’” *Id.*, at 867, 869. The court held that the failure of the EIR to analyze the impacts of the project together with other proposed projects rendered the document invalid. “The absence of this analysis makes the EIR an inadequate informational document.” *Id.*, at 872.

The court in *Citizens to Preserve the Ojai v. Bd. of Supervisors* (1985) 176 Cal.App.3d 421, held that an EIR prepared to consider the expansion and modification of an oil refinery was inadequate because it failed to consider the cumulative air quality impacts of other oil refining and extraction activities combined with the project. The court held that the EIR’s use of an Air District Air Emissions Inventory did not constitute an adequate cumulative impacts analysis. The court ordered the agency to prepare a new EIR analyzing the combined impacts of the proposed refinery expansion together with the other oil extraction projects.

As the PEIR notes, water quality standards already are not being met in locations throughout the Delta. As the National Academy of Sciences report and a plethora of other reports and agency decisions make clear, fisheries and water quality already are adversely affected by the massive water diversions of the State and Federal water projects and flow reductions caused by dams throughout the Valley. As NMFS makes clear, pesticide use currently approved by EPA registrations throughout the Valley is

¹ *Los Angeles Unified v. City of Los Angeles*, 58 Cal.App.4th at 1024-1026 found an EIR inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the regulatory recommended maximum of 70 dBA. The court concluded that this "ratio theory" trivialized the project's noise impact by focusing on individual inputs rather than their collective significance. The relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem.

threatening salmon with extinction throughout the Central Valley. In short, the need for a cumulative impact analysis of water quality, fisheries, and other related impacts like human health, cultural, recreational, air quality, and aesthetic cannot be seriously questioned. It is plain that massive cumulative impacts from water diversions, pesticide use approvals and, with the ILRP, massive pollution from irrigated lands are occurring throughout the Central Valley and particularly in the Delta.

4. The PEIR's discussion of possible agricultural impacts is inadequate because it relies on a flawed economic analysis.

CSPA retained the economic consulting firm ECONorthwest to evaluate and comment on the economic analysis accompanying the PEIR. See *infra*, Section IV. The PEIR's consideration of agricultural impacts relies almost exclusively on the economic analysis. PEIR, p. 5.10-1 ("The catalyst for these impacts is the cost of achieving and maintaining compliance with the alternatives as discussed in *Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program* (ICF International 2010) (Draft ILRP Economics Report), incorporated herein by reference"). Because the economic analysis is not reliable, as is discussed in detail below and in the accompanying ECONorthwest Review, the PEIR's discussion of asserted impacts to agricultural production is unsupported by substantial evidence.

IV. THE ECONOMIC ANALYSIS RELIED UPON BY THE PEIR AND STAFF REPORT IS SUBSTANTIALLY DEFICIENT AND BIASED TOWARD THE LEAST EFFECTIVE AND COALITION-PREFERRED ALTERNATIVES.

Both the PEIR, especially in its discussion of potential agricultural impacts, and the Staff Report rely extensively on ICF International's Technical Memo. A review of that analysis by ECONorthwest, a firm exclusively dedicated to expert economic consulting, reveals fundamental errors and biases. Because of the following errors, any reliance on the Technical Memo by the Regional Board and its staff would be an abuse of discretion. The Regional Board cannot substantiate a finding under Resolution No. 68-16 or the federal antidegradation policy that under a newly adopted ILRP, "the highest water quality consistent with maximum benefit to the people of the State will be maintained." Resolution No. 68-16 (emphasis added). Similarly, to the extent the Board intends to rely on any conditional waivers to implement the next version of the ILRP, a finding by the Regional Board pursuant to Water Code § 13269 that such waiver is in the public interest also would not be supported by substantial evidence.

The ECONorthwest Review discloses the following fundamental errors in the preparation of the Technical Memo.

1. **The Analytical Objectives and Approach:** ECONorthwest demonstrates that the Technical Memo ignores generally accepted guidelines for this type of analysis, including for example guidelines prepared by the California Department

of Water Resources, an agency with, of course, considerable experience interfacing with California's agricultural community. Because of this failure, ECONorthwest concludes that the Technical Memo "provides decision-makers and stakeholders with biased and unreliable descriptions of the economic outcomes likely to materialize if the Board were to implement any of the alternatives in the EIR." ECONorthwest Review, pp. 1, 2-5.

2. **Baseline:** ECONorthwest's review establishes that ICF International's analysis "does not compare the alternatives against an appropriate baseline that describes potential future conditions absent implementation of each alternative" further biasing its conclusions. Hence, it provides an incomplete, biased representation of the alternatives' economic consequences. ECONorthwest Review, pp. 1, 5-7.
3. **Management Practices:** ECONorthwest's review discloses that ICF International only considered a truncated range of the more expensive management practices in determining projected costs of the various alternatives and excluding the less expensive and more efficient practices. ECONorthwest Review, pp. 1, 7-9. As a result, "the EIR and *Technical Memo* provide an incomplete and biased representation of the choices that realistically are available to the [Regional] Board." *Id.*, p. 1.
4. **Costs and Benefits:** ECONorthwest's review shows that the Technical Memo incorrectly calculates the costs of adopting practices that improve water quality and completely overlooks major categories of economic costs and benefits, once again skewing its conclusions to support the less rigorous and coalition-preferred alternatives. See ECONorthwest Review, pp. 1, 9-11.
5. **Risk and Uncertainty:** ECONorthwest also criticizes the Technical Memo for failing to provide information and analysis of the risks and uncertainty facing irrigators and others from each proposed alternative. The omission of this standard component of any complete economic analysis of a program such as the IRLP is a fatal flaw in the Technical Memo. See ECONorthwest Review, pp. 1, 11.
6. **Regional Impacts:** Lastly, ECONorthwest's review demonstrates that the Technical Memo's discussion of regional impacts "emphasize[s] negative outcomes and ignore[s] the analytical assumptions that overstate costs and the resulting negative outcomes." ECONorthwest Review, p. 1. Even with this built-in bias, the Technical Memo still must acknowledge the improvement to the Central Valley's economy by implementation of Alternatives 3 through 5. An accurate economic analysis likely would further support the economic benefit of the alternatives that incorporate farm specific measures.

Because of these fundamental flaws, the Technical Memo, as well as the portions of the PEIR and Staff Report that rely upon it, must be redone and recirculated in order to provide the Regional Board with substantial evidence upon which it may rely.

V. THE STAFF REPORT FAILS TO ACKNOWLEDGE THE LEGAL AND POLLUTION CONTROL SHORTCOMINGS OF THE CURRENT ILRP

The Staff Report disingenuously seeks to justify a predetermined and environmentally non-protective course of action by misrepresenting the present program and carefully crafting a needlessly expensive and overly bureaucratic strawman to reject alternatives that would better protect water quality. Water quality problems and the adverse impacts resulting from the continuing discharge of agricultural pollutants are largely ignored while the Staff Report focuses on potential impacts to farmers from having to comply with water quality standards.

A. Rather Than Keep Its Eye On The Regional Board's Primary Mission To Protect Water Quality, Staff's Analysis And Proposed Alternative Make Believe The Serious Flaws In The Current Program Are Actually Benefits.

The "elements" from each of the alternatives selected by Regional Board staff to be included in the long-term irrigated lands program (or recommended alternative) are flawed and represent the continuation of a program that has failed to protect water quality.

There can be no doubt that, after seven years, the ILRP has not demonstrated any success at protecting or even reducing the rampant pollution of Central Valley waters by irrigated land dischargers. According to the *Revised Draft of the 2007 Review of Monitoring Data for the Irrigated Lands Conditional Waiver Program*, 12 July 2007, between 2003 and 2007, agricultural coalitions and the U.C. Davis Irrigated Lands Monitoring Project collected data from 313 sites throughout the Central Valley. Coalitions or individual water agencies monitored 148 sites and U.C. Davis monitored the remaining 165 sites. While the adequacy of monitoring (*i.e.*, frequency and comprehensiveness of monitoring) varied dramatically from site to site, the report presents a dramatic panorama of the epidemic of pollution caused by the discharge of agricultural wastes. Toxicity to aquatic life was present at 63% of the sites monitored for toxicity (50% were toxic to more than one species). Pesticide water quality standards were exceeded at 54% of sites monitored for pesticides (many for multiple pesticides). One or more metals violated criteria at 66% of the sites monitored for metals. Human health standards for bacteria were violated at 87% of sites monitored for coliform. More than 80% of the locations reported exceedances of general parameters (dissolved oxygen, pH, salt, TSS). It would be difficult for anyone reading the Surface Water Summary (p. 23-44) of the Staff Report to appreciate the extent of pollution caused by irrigated agriculture. An Examination of the Draft 2007 Review of Monitoring Data, Irrigated Lands Condition Waiver Program, CSPA, p. 1-2. The PEIR

Staff Report discussion of surface water quality also fails to describe and discuss the monitoring results from other programs (i.e., NPDES, SWAMP, etc.).

After seven years of the irrigated lands program, the Central Valley Regional Water Quality Control Board still does not know who is actually discharging pollutants, the points of discharge, the constituents discharged, receiving water impacts, whether management measures have been implemented or if those measures are BPTC that are effective in reducing pollutant discharges. The Board cannot enforce against recalcitrant dischargers because it cannot know who they are and dischargers have little incentive to comply because they know that monitoring far downstream cannot produce the evidence to hold them accountable.

The irrigated lands waiver adopted by the Central Coast Regional Board in 2004 is illustrative. The Central Coast Board conditional waiver is substantially more rigorous than the waiver adopted by Region 5. The Central Coast Board had hopes that, because there were fewer irrigated lands dischargers in the region, they would be able to see significant water quality improvements within the first term of the waiver. The Central Coast waiver requires farmers to enroll with the Board, prepare individual farm management plans, attend water quality education courses and participate in a third-party watershed monitoring program. Yet, it has proved incapable of protecting water quality, even in that smaller region, because it fell short of requiring farm-specific monitoring. If that more robust program in a smaller region could not protect water quality, the less stringent program currently in place and proposed to be continued by staff for the much larger Central Valley will certainly fall even further short of protecting water quality.

Unlike the Central Valley staff's report, the Central Coast staff frankly addressed their existing program's shortcomings. As the Central Coast *Preliminary Draft Staff Recommendations For An Agricultural Order* (February 2010) puts it, "[t]he current Conditional Waiver . . . lacks clarity and does not focus on accountability and verification of directly resolving the known water quality problems" and "[c]urrently, the Water board and the public have no direct evidence that water quality is improving due to the 2004 Conditional Waiver." Central Coast Staff Report, p. 6. It goes on to note, "[t]he current watershed monitoring program only indicates long-term (multi-year), receiving water changes without measuring: 1) if individual agricultural dischargers are in compliance with Conditional Waiver conditions or water quality standards, or 2) if short-term progress towards water quality improvements on farms or in agricultural discharges is occurring" and "[c]urrently, information that provides evidence of on-farm improvements and reductions in pollutant loading from farms is not required, and therefore probably does not exist for most farms. The public, including those who are directly impacted farm discharge, and the Water Board, do not have the necessary evidence of compliance or improvements. This is unacceptable given the magnitude and scale of the documented water quality impacts and the number of people directly affected. At a minimum, we continue to observe that agricultural discharges continue to severely impact water quality." *Id.*, 7.

Acknowledging the failure of its present program (i.e., "Most of the same areas that showed serious contamination from agricultural pollutants five years ago are still seriously contaminated," (*id.* Page 11), Central Coast Board staff has recommended a revised program where dischargers must; 1) enroll to be covered by the order, 2) develop and implement a farm plan that includes management practices, 3) eliminate non-storm water discharges, or use source control or treatment such that non-storm water discharges meet water quality standards, 3) demonstrate through water quality monitoring that individual discharges meet certain basic water quality targets (that are or indicate water quality standards that protect beneficial uses), 4) demonstrate through water quality monitoring that receiving water is trending toward water quality standards that protect beneficial uses or is being maintained at existing levels for high quality water and 5) farm operation must support a functional riparian system and associated beneficial uses. *Id.*, p. 20. Individual monitoring is in addition to the watershed monitoring program. *Id.*, p. 23.

Inexplicably, Central Valley Board staff persists in the illusion that inserting an unaccountable bureaucracy between the Board and actual dischargers and relying upon a monitoring program that ignores numerous waterways and collects ambient data far removed from the point of actual discharges will somehow protect water quality. Right from the opening paragraphs, the Staff Report predetermines its analysis by conjuring up five "[e]lements of the long-term ILRP alternatives found to best achieve evaluation measures are summarized below." Staff Report, p. 2. Four out of five of these elements are baseless. Staff boldly asserts that unaccountable coalitions' "local knowledge" and claimed efficiencies somehow trump the Regional Board taking a lead role in implementing an ILRP; that regional monitoring is more effective at implementing measures than farm-specific monitoring; that providing incentives is better than requiring; and that in order to coordinate with other failed regional programs, the ILRP must also avoid focusing on individual dischargers and only address problems from a distance. As is discussed above in CSPA's comments on the PEIR, these are not attributes of an effective or legal program. Staff's generalizations dramatically conflict with the Central Coast Regional Board staff's more objective and frank assessment. Contrary to Central Valley staff's blind optimism that doing less equals more, the evidence in the record demonstrates that the staff's recommendation will not be able to document any improvements in water quality, the effectiveness of applied management measures or compliance with water quality standards by individual dischargers.

- 1. Staff cannot continue to pretend that relying on discharger coalitions conducting regional monitoring and management plans with no plan to require BMPs by dates certain will implement BPTC on individual farms and achieve standards in a timely manner.**

The first element that staff claims best achieve its "evaluation measures" is the reliance on "[t]hird-party lead or coalitions groups, as opposed to Central Valley Board lead, to take advantage of local knowledge and administrative/cost efficiencies in dealing with a few groups versus thousands of individual operations."

There is no evidence coalition groups have successfully used their purported "local knowledge" to secure and verify implementation of management measures at the farm level and quantitatively reduce the mass loading of agricultural contaminants. See *supra*, Section G.1. Nor is there any evidence of cost efficiencies that would materialize if coalitions actually instituted a comprehensive program that successfully complied with regulatory requirements and held farmers accountable for implementing management measures and reducing pollutant loading.

Other Central Valley Board regulatory programs with inadequate resources have been far more successful in protecting water quality than the irrigated lands program. For example, the Board has less than a dozen staff to manage a stormwater program that oversees more than 7,500 industrial and construction operations and more than 93 Phase I and Phase II municipal permits. *State of the Central Valley Region*, slide 32, presentation by Executive Officer Pamela Creedon at the Central Valley Water Board meeting of August 2007. The stormwater program requires industrial and construction program applicants to submit a Notice of Intent, develop a comprehensive Stormwater Pollution Prevention Plan (SWPPP), implement BMPs, monitor individual discharges, revise BMPs, iteratively install new BMPs as needed and submit annual reports. Municipal permits are complicated, resource draining and consume the majority of staff time. However, CSPA has reviewed the files of literally hundreds of industrial and construction program permittees and found that the severely understaffed program (the program has less than 12% of needed staff, *Id.*) has been able to routinely review annual reports, conduct many routine site evaluations, send corrective and enforcement notices to numerous facilities. The relative successes of the stormwater program stand in stark contrast to the black hole of the irrigated lands program that remains unable to document any implementation of management measures or reduction of pollutant mass loading. For staff to claim still unproven coalitions as a key element to success is contrary to the available evidence.

2. Staff cannot protect water quality by making believe that regional monitoring results in clear expectations for dischargers or by putting reducing paperwork ahead of protecting water quality.

The next key element to success identified by the Staff Report is to rely upon "[r]egional surface and groundwater quality management plans, as opposed to individual water quality management plans, to minimize paperwork/administrative burdens while clearly defining the expectations and approach for addressing water quality problems." Staff Report, p. 2. Again, staff cannot cite to any evidence that this statement is reliable. Avoiding paperwork is simply a euphemism for not collecting information. At some point, staff has to acknowledge that the Board cannot claim to regulate 30,000 farms without at some point gathering information from them about their pollution discharges. The notion that the requisite information becomes less bureaucratic and involves less paperwork by inserting fictitious entities – with their own layers of management and paperwork – between the Regional Board and the dischargers is nonsensical. And staff has no explanation as to how plans devised on a

regional basis can clearly define expectations of all relevant dischargers in that area. Especially where, as the PEIR acknowledges, “[t]he appropriate management practice is typically selected on a site-specific or property-specific basis.” PEIR, p. 3-9. Even the Staff Report admits that “[w]ith regard to selection of measures and practices, the Central Valley Water Board and USEPA recognize that there is often site-specific, crop-specific, and regional variability that affects the selection of appropriate management measures, as well as design constraints and pollution-control effectiveness of various practices.” Staff Report, p. 66-67. Only by addressing site-specific measures that are at least BPTC and assure compliance with standards can expectations and water quality measures be clearly defined. To rely exclusively on regional management plans rather than FWQMPs, the Board will only continue to maintain the existing fog that obscures individual farm’s actions or, more likely, inactions. See *supra*, Section F-2.

3. Staff cannot protect water quality by making believe that repeating the regional scale of other monitoring efforts that have not curtailed irrigated lands’ pollution dischargers will miraculously characterize effluent quality and BPTC implementation at individual farms.

Staff continues to regulate in a dream state by claiming a third element to achieve success is that “[r]egional surface and groundwater quality monitoring, as opposed to individual or no water quality monitoring, to take advantage of cost efficiencies in coordinating with other monitoring efforts while providing sufficient information to characterize water quality.” Once again, staff’s claim that regional monitoring miles downstream from a farm’s discharge location would characterize that discharger’s water quality is absurd. It is not clear what monitoring efforts staff is referring to, but there is no evidence that any regional monitoring effort to date has reduced any irrigated lands pollution in the Central Valley. For example, the Rice Pesticide Program has not succeeded in reducing pesticide discharges from rice fields by relying on regional monitoring. Rice farmers monitor specific fields before releasing their irrigation waters. As discussed above, like the absence of FWQMPs, allowing farm dischargers to rely solely on regional monitoring to determine water quality impacts occurring near their discharge locations or to evaluate whether their management measures are BPTC defies common sense. See *supra*, Sections F.1 - .2, G.2. No current monitoring program is monitoring only farm discharges. Nor has any existing program, including even the current ILRP regional monitoring, reduced the massive pollution from irrigated farms. Any “cost efficiencies” claimed by staff are simply another way of saying they do not want the most relevant information necessary to implement BPTC and achieve water quality standards.

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B. The “Goals and Objectives” selected by a stakeholder group dominated by agriculture protect the regulated community more than they protect water quality, in contrast to virtually every other regulatory program.

As discussed in Section III.C above, CSPA is concerned with the language of the objectives selected by the coalition-dominated stakeholder process. CSPA's concerns are heightened by the further spin placed on the objectives by staff's interpretations of those objectives applied in the staff report. Invariably, staff's interpretation of each objective favors the status quo and avoiding any site specific regulation of farms and trumping resolution 68-16.

Staff restates the PEIR's goals and objectives. Staff Report, pp. 98-99. The objectives, other than the objectives of restoring and/or maintaining beneficial uses, ensuring that all state waters with the Central Valley meet applicable water quality objectives and ensuring that irrigated agricultural discharges do not impair Central Valley communities' and residents' access to safe and reliable drinking water are flawed. In fact, the other four objects work against the successful attainment of restoring beneficial uses and meeting standards. Yet, invariably, the non-water quality or public safety objectives are the hooks which staff uses to propose an ineffectual ILRP recommendation.

For example, the goal of maintaining the economic viability of agriculture in California's Central Valley is highly subjective because it contains no yardsticks by which to measure impacts to irrigated agriculture and is buttressed by a seriously deficient economic analysis. Retirement of some farmland may be an overall economic benefit where overproduction has depressed commodity prices. Retirement of lands because of an inability to continue externalizing adverse costs of production benefits farmers who internalize those costs and comply with regulatory requirements. Economic viability of agriculture cannot be considered in a vacuum where the costs of agricultural pollution are simply transferred to other economic sectors, *i.e.*, recreation, commercial fishing, public health, municipalities, etc. It is unreasonable to establish a program goal of maintaining the economic viability of agriculture at the expense of other sectors of society who comply with requirements to protect water quality.

Also for example, the objective of maintaining “appropriate” beneficial uses ignores mandates to protect all identified beneficial uses. Encouraging “implementation of management practices that improve water quality in keeping with the first objective without jeopardizing the economic viability for all sizes of irrigated agriculture” ignores the fact that discharging pollutants is a privilege allowable only so long as measures are implemented to reduce or eliminate conditions of pollution. Likewise, providing “incentives for agricultural operations to minimize waste discharge to state waters” ignores that this is a mandated requirement. The objective to coordinate with other programs, such as the Grasslands Bypass Project, TMDLs, CV-Salts and WDRs for dairies is simply a non sequitur as none of those programs have been effective in cleaning up polluted waterways. For example, the Central Valley Board recently

extended the compliance schedule for the Grasslands Bypass Project to more than 20 years. To “promote coordination with other regulatory and non-regulatory programs associated with agricultural operations” is simply an attempt to replicate other regional programs that have failed to protect water quality. The Central Valley Board has apparently forgotten the failures of the Management Agency Agreement with the Department of Pesticide Regulation (DPR), where after the five-year agreement had expired, DPR claimed it didn't have the authority to implement the measures it had agreed to.

The last four objectives simply provide Regional Board staff the rationale to avoid rigorously implementing what staff believes to be a politically unpalatable program that would meet the first objective of maintaining beneficial uses and meeting water quality standards. Consequently, staff dismisses individual edge-of-field monitoring because it would be expensive, *i.e.*, subject farmers to the same requirements applicable to every other segment of society that discharges pollutants to waters of the state. However, without individual discharger monitoring, the Board will never know the impacts of individual discharges or whether implemented management measures are effective.

Direct Regional Board administration is rejected because it would require the Regional Board to candidly acknowledge the politically unpalatable need to assess additional fees to provide sufficient staff to regulate 30,000 plus farms spread over eight million acres. In 2002-05, Regional Board staff estimated that 40 to 70 staff would be needed to effectively implement the program. This seems to be a reasonable estimate based upon the stormwater program.

C. Staff's Recommended Alternative Continues The Existing Flaws Of The Existing Program.

1. The “recommended alternative” cannot identify sources of pollution, localized water quality impacts, the implementation of Best Management Practices (BMPs) or the effectiveness of BMPs.

The reality is that the regional monitoring approach embraced by staff has been woefully inadequate, as revealed by even a cursory review of coalition monitoring reports. What staff characterizes as cost efficiencies is simply insufficient monitoring that is incapable of characterizing all receiving waters, let alone identify specific sources or quantify the effectiveness of management measures. Coalition monitoring only represents a small percentage of irrigated acres. For example, review of recent monitoring reports submitted to the Regional Board by coalitions representing irrigated lands that discharge into the Sacramento-San Joaquin Delta estuary or waters tributary to the estuary shows that:

The San Joaquin County and Delta Water Quality Coalition comprises approximately 609,134 acres of irrigated land. SJCDWQC Annual Monitoring Report

2010, p. 6. Between October 2008 and March 2009, the Coalition monitored 10 sites and six sites from April 2009 through December 2009. In addition, three sites were monitored for Management Plan monitoring. *Id.*, p. 1. The report observes, "...water quality is still not protective of beneficial uses across most of the Coalition." *Id.*, p. 4. Rough calculations reveal that irrigation season monitoring represented approximately one site for every 60,000 plus acres.

The East San Joaquin Water Quality Coalition comprises approximately 919,730 acres of irrigated land. ESJWQC Annual Monitoring Report 2010, p. 5. Between October 2008 and December 2009, the Coalition monitored 20 sites and eleven additional sites were monitored for Management Plan monitoring. *Id.*, p. 1. Fourteen sites were monitored during the 2009 irrigation season and 12 sites were monitored during the 2009 wet season. *Id.*, p. 23-24. The report observes, "...water quality is still not protective of beneficial uses across most of the Coalition." *Id.*, p. 4. Rough calculations reveal that irrigation season monitoring represented approximately one site for every 54,000 plus acres.

The Westside San Joaquin River Watershed Coalition comprises approximately 460,500 acres. Westside Coalition Semi-Annual Report, 15 June 2010, p. 3. The Coalition monitors 17 discharge sites during the irrigation and wet seasons. *Id.*, Table 3, p. 5. This represents approximately one site for every 27,000 acres.

The Sacramento Valley Water Quality Coalition comprises approximately 27,000 square miles and contains over a million acres of farms. SVWQC Annual Monitoring Report 2009, March 2010, p. 3. Apparently, the Coalition monitored 32 sites, of which 18 were sampled during the irrigation season. *Id.*, Table 5, Planned Annual Sampling Frequency, p. 19. This would represent irrigation season monitoring of one site for approximately every 55,000 acres.

Monitoring a downstream point draining thousands of acres accomplishes little other than long-term trend analysis. And trend analysis requires a program that consistently monitors the same set of constituents over many years. Most coalition sites are not monitored every year for the same parameters and, consequently, existing coalition monitoring programs are unreliable even for trend analysis. In any case, trend analysis of downstream monitoring points can never establish whether an individual upstream discharger is in compliance with water quality standards or implementing BPTC.

Staff has apparently forgotten that the 2003 waiver originally required coalitions to yearly monitor all major drainages, 20% of intermediate drainages on a yearly rotating basis and minor drainages where downstream problems are identified. Those requirements have been substantially relaxed and currently large areas of the Central Valley are not monitored and have never been monitored, despite identification of serious downstream water quality problems.

Monitoring of actual discharge points is important because upstream waterways are disproportionately 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. Larval fish and their food supplies found in these areas also are particularly vulnerable to adverse impacts of pesticides and other pollutants. Monitoring at the edge-of-field is crucial for evaluating the presence of BPTC and determining if recommended management practices are being implemented properly or if benefits from adopted practices are actually being realized.

2. The “recommended alternative” cannot ensure that dischargers will demonstrate that they have implemented Best Practical Treatment and Control (BPTC) or prevent degradation of water quality.

The Staff Report states, “... the Regional Water Board still must require the discharger to demonstrate that the proposed manner of compliance constitutes BPTC (SWRCB Order No. WQ 2000-7).” Staff Report, p. 62. And that, “...implementation of the program must work to achieve site-specific antidegradation requirements through implementation of BPTC and representative monitoring to confirm the effectiveness of the BPTC measures in preventing or minimizing degradation. Any regulatory program adopted will rely on implementation of practices and treatment technologies that constitute BPTC, based to the extent possible on existing data, and require monitoring of water quality to ensure that the selected practices in fact constitute BPTC where degradation of high quality waters is or may be occurring.” *Id.*, p. 66
However, staff’s recommended alternative abandons any effort to implement staff’s own admonition. See *supra*, Section C.2.

3. The “recommended alternative” cannot ensure that the Regional Board can enforce program requirements.

As discussed above, any enforcement efforts by the Regional Board will be hampered by staff’s recommendation. See *supra*, Section F.2. Staff’s concept that enforcement will be vigorous by not having information available in the form of FWQMPs and individual monitoring data to assist in prioritizing inspections and enforcement cannot be rationalized. Without this information, staff’s enforcement efforts will be as nominal as we have seen for the last seven years. Instead of enforcing water quality requirements, staff will be lead down a well-papered path of regional coalition monitoring – none of which will identify a single potential violator.

4. The “recommended alternative” is clearly inconsistent with the state’s Non-Point Source Control Policy.

For the same reasons discussed above, staff’s recommendation fails to comply with the NPS Policy. See *supra*, pp. Section F.2. Like the PEIR’s first four alternatives,

staff's recommendations falls well short of all five key elements required by the NPS Policy. *Id.*

5. The "recommended alternative" cannot be in the public interest.

Staff continues to treat irrigated agriculture as a privileged sector by allowing farmers to externalize adverse production impacts by transferring the costs of pollution from the polluter to the general public. The recommended alternative does not serve the interests of California's 35 million residents. It arguably does not even serve the interests of the discharger's it seeks to immunize from monitoring, reporting and permitting requirements applicable to everyone else.

Central Valley fisheries are experiencing catastrophic collapse. The team of federal and state scientists investigating the decline of fisheries has identified toxic pollutants as one of the three major suspected causes of the collapse of the Delta's pelagic fishery. This collapse has cost the recreational and commercial fishing communities tens upon tens of millions of dollars.

The degraded aquatic ecosystem in the Delta threatens the reliability of the delivery system that supplies water to 23 million Californians. Polluted waters have forced municipalities to spend hundreds of millions of dollars on increased wastewater and drinking water treatment. Degraded waters threaten public health and have diminished the aesthetic and recreational enjoyment of millions of individuals.

Central Valley agriculture is a relatively small part of the California community. According to the July 2010 (revised) employment data by the California Employment Development Department, total employment in the 34 Central Valley counties under the ILRP and analyzed in the PEIR's economic analysis is 3,509,620, of which farm labor comprises 237,000 or 6.758%. EDD, Employment by Industry Data at: <http://www.labormarketinfo.edd.ca.gov/?pageid=166>. Statewide, the agriculture production and processing industry directly accounts for approximately 4.3% of the state output, 3.8% of the jobs, 2.5% of labor income and 2.9% of value added in the state. The Measure of California Agriculture, 2006, Agricultural Issues Center, University of California, Chapter 5, Table 5.5, p. 10.

The PEIR's severely deficient economic analysis with its unrealistic assessment of the cost impacts of potential management measures, acknowledges that Alternative 5, despite being burdened with absurd administrative and monitoring requirements, would be of negligible cost to the overall economy. In fact the economic analysis predicts that, under Alternative 5: 1) jobs in the Central Valley would increase, 2) personal income and industrial output would increase in the Tulare Lake Basin, 3) personal income would only decrease by 0.013% in the Sacramento River Basin and by 0.019% in the San Joaquin River Basin and 4) industrial output would only decrease by 0.045% in the Sacramento River Basin and by 0.043% in the San Joaquin River Basin. And the economic analysis inexplicably failed to analyze the cost benefits of reduced pollution. Had the advantages of better water quality been evaluated, implementation of

Alternative 5 would be shown to result in significant economic benefit across the spectrum for the entire Central Valley.

The recommended alternative will not reduce agricultural pollution any time in the near future. Nothing in the recommended alternative precludes agricultural dischargers from continuing the historic trend to discharging wastes into the foreseeable future. At its core, the recommended alternative will perpetuate substantial discharges of wastes from thousands of farms to impaired waters throughout the Central Valley, causing irreversible and substantial harm to degraded and stressed ecosystems, threatening public health and imposing increased costs to millions of Californians.

It cannot be in the public interest to exempt one small segment of the California economy from regulatory requirements applicable to everyone else. It clearly cannot be in the public interest, as the recommended alternative does, to exempt farmers from having to monitor their discharges in order to establish compliance with water quality standards and BPTC requirements.

6. CSPA agrees ILRP must restrict groundwater pollution but unfortunately staff's proposed reliance upon regional efforts is unlikely to be more successful than existing programs that have chaperoned groundwater degradation.

Groundwater pollution is a serious problem and relying upon regional efforts is unlikely to address site-specific sources of groundwater pollution. The staff alternative of requiring farmers to participate in a regional groundwater program once every five years ignores the obvious protective step of requiring individual farms to monitor their own wells to evaluate groundwater pollution. The staff recommendation also contains no specific measures to identify and prevent contamination of groundwater from management measures implemented to prevent surface water pollution.

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. Dawson, B., USGS, "Shallow Ground-Water Quality Beneath Rice Areas in the Sacramento Valley, California 1997" (2001). 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 explains that holding irrigation waters on the fields in order to protect surface water may be allowing more recharge containing the pesticides 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. 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 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, staff's proposed alternative relying upon regional monitoring efforts is unlikely to identify impacts from implementation of management measures and specific monitoring requirements must be included to prevent redirected impacts of management measures employed to protect surface waters.

VI. CONCLUSION.

After seven years of the irrigated lands program, the Central Valley Regional Water Quality Control Board still does not know who is actually discharging pollutants, the points of discharge, the constituents discharged, receiving water impacts, whether management measures (or BMPs) have been implemented or if those BMPs have been effective in reducing pollutant discharges. The Board cannot enforce against recalcitrant dischargers because it cannot know who they are and dischargers have little incentive to comply because they know that monitoring far downstream cannot produce the evidence to hold them accountable. The PEIR continues the theme of not providing the Regional Board the necessary information to make a decision that will protect water quality and human health. Staff proposes an alternative that perpetuates the existing program's flaws, including basic compliance with the NPS Policy and Resolution No. 68-

16. On the other hand, CSPA's alternative sets forth a reasonable program that would comply with statutory requirements, protect water quality and, where it is consistent with those two goals, reduce the potential burden on the farming community. CSPA respectfully requests that the Regional Board instruct staff to redraft their recommended program, send the PEIR back to be supplemented with necessary elements and include detailed analysis of an improved staff recommendation, CSPA's recommendation, and other required elements. We appreciate staff's and the Regional Board's consideration of these comments.

Sincerely,



Michael R. Lozeau
Lozeau Drury LLP



Bill Jennings
California Sportfishing Protection
Alliance

Encls.

EXHIBIT 2

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

RESOLUTION NO. R5-2011-0017

CERTIFICATION OF THE FINAL PROGRAM ENVIRONMENTAL IMPACT REPORT
FOR
THE LONG-TERM IRRIGATED LANDS REGULATORY PROGRAM

WHEREAS:

1. Resolutions R5-2006-0053 and R5-2006-0054 adopted by the Central Valley Water Board approved two conditional waivers applicable to discharges from irrigated agriculture to surface waters. The waivers were to serve as an interim regulatory program until a long-term program was developed. When the Board approved the conditional waivers, it directed staff to begin developing a long-term irrigated lands regulatory program (ILRP) and also to continue preparation of an environmental impact report pursuant to the California Environmental Quality Act (CEQA) that would evaluate alternatives for the ILRP.
2. In 2007, the California Sportfishing Protection Alliance and San Francisco Baykeeper filed a petition for writ of mandate challenging the Central Valley Water Board's issuance of the waivers. (*California Sportfishing Protection Alliance v. California Regional Water Quality Control Board, Central Valley Region*, Case No. 07CS00807, Sacramento County Superior Court). Without any admission of liability, the Central Valley Water Board consented to the entry of a stipulated action to resolve all of the claims of the action. One of the conditions to the stipulated judgment is that the Regional Board staff shall, by April 8, 2011,¹ present and recommend that the Regional Board certify a final environmental impact report addressing any impacts associated with any action that the Regional Board may take to implement a long-term ILRP.
3. The Central Valley Water Board served as the lead agency under the California Environmental Quality Act (CEQA) for the preparation of the Final Program Environmental Impact Report (Final Program EIR) for a waste discharge regulatory program for irrigated lands within the jurisdictional boundaries of the Central Valley Region.
4. A Notice of Availability (NOA) was circulated that notified interested parties of a 60-day public review and comment period (from 28 July 2010 until 27 September 2010) for the "Irrigated Lands Regulatory Program" Draft Program Environmental Impact Report (Draft Program EIR). Copies of the NOA were transmitted to or made available to all agencies and persons known to be interested in these matters.
5. During the public comment period, the Central Valley Water Board received written comments on the Draft Program EIR. It also received informal feedback at four public workshops held in Chico, Modesto, Rancho Cordova, and Tulare during the public comment period and received additional informal feedback at a September 22 Board

¹ The original deadline was March 31, 2011. However, the parties to the action established a new deadline of April 8, 2011 pursuant to the terms of the stipulated judgment.

Meeting. The Central Valley Water Board has considered the written comments and the informal feedback. It has provided written responses to the written comments received on the Draft Program EIR and has prepared a Final Program EIR.

THEREFORE BE IT RESOLVED, that:

1. Pursuant to § 21080, et seq. of the California Public Resources Code, the Central Valley Water Board, after considering the entire record, including written and oral testimony at the hearing, certifies that:
 - a. The Final Program EIR has been completed in compliance with CEQA.
 - b. The Central Valley Water Board has reviewed and considered the information in the Final Program EIR.
 - c. The Final Program EIR reflects the independent judgment and analysis of the Central Valley Water Board.

CERTIFICATION

I, PAMELA C. CREEDON, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Central Valley Region on 7 April 2011.

original signed by

PAMELA C. CREEDON, Executive Officer

EXHIBIT 3

Water Quality Coalition Contact Information

8/16/2010

Coalition Group Name	Contact Person	Contact Address	Phone Number	Email Address	Brief Watershed Coverage	Regional Board Staff Contact
California Rice Commission	Tim Johnson Roberta Firoved	8801 Folsom Blvd. Suite 172 Sacramento, CA 95826	(916) 387-2264	tjohnson@calrice.org	Rice production in the Sacramento River basin (covers Butte, Colusa, Glenn, Placer, Sacramento, Sutter, Tehama, Yolo, and Yuba counties). 500,000 rice acres.	Margaret Wong (916) 464-4857
				rfiroved@calrice.org		
East San Joaquin Water Quality Coalition	Wayne Zipser (Stanislaus County Farm Bureau)	Stanislaus County Farm Bureau PO Box 3070 Modesto, CA 95353-3070	(209) 522-7278	Waynez@stanfarmbureau.org	Farmlands encompassed by the lower Stanislaus, Tuolumne and Merced River subwatersheds (primary eastside tributaries to the San Joaquin River) and that fall into Stanislaus, Merced, Madera, Calveras, Mariposa and Tuolumne counties. 1,187,000 irrigated acres.	Dania Huggins (916) 464-4843
	Parry Klassen (CURES)		(559) 646-2224 (559) 288-8125 (cell)	pklassen@unwiredbb.com		
Goose Lake Water Quality Coalition	Herb Jasper	PO Box 212 New Pine Creek, OR 97635	(530) 946-4196	bry.jasper@oregonstate.edu	Goose Lake watershed: border of northeastern California and south central Oregon at the north, eastern edge of the Great Basin Province. Bounded by Warner Mountain Range in Modoc County.	Ben Letton (530) 224-4129
Pleasant Valley Water Quality Coalition	Rod Stiefvater	2985 Airport Drive Madera, CA 93637	(559) 994-7784	rstiefvater@speccrop.com	Pleasant Valley WQC is bound by Anticline Ridge on the north, the Jacalitos and Kreyenhagen Hills on the west, and the Gujarral and Kettleman Hills to the east. Los Gatos, Wathan, Jacalitos and Zapato Chino Creeks have their headwaters west of the District. 23, 772 irrigated acres.	Brent Vanderburgh (559) 488-4382
Sacramento Valley Water Quality Coalition	Bruce Houdesheldt	Northern California Water Association 455 Capitol Mall, Suite. 335 Sacramento, CA 95814	(916) 442-8333	bruceh@norcalwater.org	Irrigated Lands within Sacramento River Basin (includes all or portions of Amador, Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Lake, Napa, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Siskiyou, Solano, Sutter, Tehama, Yolo, and Yuba counties). 2,145,000 irrigated acres. For a list of subwatershed group coordinators, go to: http://www.svwqc.org/pdf/SVWQC_subwatershed_coordinators.pdf	Mark Cady (916) 464-4654
	David Guy (NCWA)					
San Joaquin County & Delta Water Quality Coalition	John Brodie (San Joaquin County RCD)	3422 W. Hammer Lane Suite A Stockton, CA 95219	(209) 472-7127 ext 118	rvanglr@yahoo.com	Includes San Joaquin County and the eastern portion of Contra Costa County, and a small area in the notheastern portion on Alameda County along with a small portion in Calaveras County. There are three major tributaries: the San Joaquin, Mokelumne, and Calaveras rivers. 548,362 irrigated acres.	Chris Jimmerson (916) 464-4859
	Mike Wackman (San Joaquin County RCD)		(916) 684-9359	info@sjdeltawatershed.org michaelkw@msn.com		
Southern San Joaquin Valley Water Quality Coalition	David Orth (Kings River Conservation District)	4886 East Jensen Avenue Fresno, CA 93725	(559) 476-0539 or (559) 237-5567	dorth@krcd.org	The SSJVWQ encompasses the entire Tulare Lake Basin (4.4 million acres) and is comprised of 4 subwatershed groups (Kings, Kaweah, Tule, and Kern River Subwatershed Groups). (Fresno, Kings, Tulare, and Kern counties).	Brent Vanderburgh (559) 488-4382
	Bill Thomas		916-325-4000	william.thomas@bbklaw.com		
Westlands Water District	Susan Ramos	P.O. Box 6056 Fresno, CA 93703	(559) 241-6215	sramos@westlandswater.org	Area on the westside of Fresno and Kings counties that encompasses 600,000 acres of farmland located at the base of the Diablo Range of the California Coast Mountain Range from Mendota to Kettleman City.	Brent Vanderburgh (559) 488-4382
	Orvil McKinnis		(559) 241-6242	omckinnis@westlandswater.org		
Westside San Joaquin River Watershed Coalition	Joseph McGahan (Summers Engineering)	887 N. Irwin Street (P.O. Box 1122) Hanford, CA 93232	(559) 582-9237	jmcgahan@summerseng.com	Area primarily on the west side of the San Joaquin River from the Stanislaus River on the north to 10 miles south of Mendota on the south. This area covers approx. 550,000 acres and includes irrigated agriculture as well as private, state and federal wetlands areas. (Stanislaus, Merced, Madera, and Fresno counties).	Mark Commandatore (916) 464-4624