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9
 10 BEFORE THE
 11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
 12

13 In the Matter of Consolidated Petitions for) SWRCB/OCC File Nos. A-1759,
 Review of Action and Failure to Act by) A-1759(a), and A-1759(b) (Consolidated)
 14 Central Valley Regional Water Quality)
 Control Board in Issuing Order No.) **RESPONSE TO PETITION FOR**
 15 R5-2006-0053) **REVIEW FILED BY CALIFORNIA**
) **SPORTFISHING PROTECTION**
 16) **ALLIANCE, ET AL.**
)

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 18 Northern California Water Association (in coordination with the Sacramento Valley Water
 19 Quality Coalition), and California Rice Commission (collectively referred to as "Sacramento Valley
 20 Coalitions")¹ submit this response to the Petition for Review in SWRCB/OCC File A-1759(b) and
 21 A-1760 (Petition) filed on July 24, 2006 by Petitioners California Sportfishing Protection Alliance,
 22 Deltakeeper Chapter of Baykeeper, and San Joaquin Audobon (collectively referred to as

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 24
 25 ¹ The Sacramento Valley Coalitions have participated in the Coalition Group Irrigated Lands Program since its
 26 inception and have vested interests in these consolidated proceedings as the Sacramento Valley Coalitions and those
 27 participating therein are regulated by and through the Irrigated Lands Program. California Rice Commission addresses
 28 discharges from rice lands within the Sacramento Valley and the Sacramento Valley Water Quality Coalition addresses
 discharges from other irrigated lands within the Sacramento Valley including, but not limited to, lands dedicated to
 tree crops, row crops, and managed wetlands. Northern California Water Association and Sacramento Valley Water
 Quality Coalition are petitioners in these consolidated proceedings before the State Water Resources Control Board
 (State Board).

1 “CSPA”).² CSPA challenges the Central Valley Regional Water Quality Control Board’s
2 (Regional Board) decision to grant a 5-year conditional renewal of the Irrigated Lands Program³ by
3 and through Order No. R5-2006-0053⁴ (2006 Renewal).

4 I. INTRODUCTION

5 The Irrigated Lands Program has a short, yet involved, history. Three years have passed
6 since this State Board last reviewed the Regional Board’s Irrigated Lands Program. Nearly four
7 years have passed since the legislature lifted the long-standing exemption for water quality
8 regulation of agricultural irrigation and stormwater discharges. In this time, the agricultural
9 Coalitions, the Regional Board staff, and the Regional Board members have dedicated extensive
10 resources to the creation and implementation of the Irrigated Lands Program. CSPA and other
11 interested parties have also spent considerable time informing the process through Regional Board
12 meetings and various technical and policy workshops. Unfortunately, CSPA has also continued to
13 challenge the regulatory tool, the “waiver” of waste discharge requirements under Water Code
14 section 13269, chosen by the Regional Board to regulate the discharges from irrigated agriculture.

15 The term “agricultural waiver” is now a misnomer. The Sacramento Valley Coalitions
16 acknowledge that from 1982 through 2002, this State “waived” water quality regulation for non-
17 point source discharges from irrigated lands. The Irrigated Lands Program, however, does not
18 today meet the common understanding of a waiver. California agriculture now has a regulatory
19 program. By design, this regulatory program aims to transition the agricultural community from an
20 industry to which, for the most part, federal or state non-point source regulations explicitly did not
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22 ² On September 27, 2006, the State Board provided notice that the Petition was complete and that interested parties
23 may file a written response. Until the Regional Board compiles and makes available a complete administrative record
24 for Order No. R5-2006-0053 and related matters, the Sacramento Valley Coalitions cannot possibly submit a
complete and thorough response or cite to all pertinent facts and testimony within the record. Thus, the Sacramento
Valley Coalitions reserve the right to file a supplemental response after the administrative record becomes available.

25 ³ “Irrigated Lands Program” herein refers to the Coalition Group Conditional Waiver of Waste Discharge
Requirements for Discharges from Irrigated Lands Within the Central Valley Region.

26 ⁴ The Sacramento Valley Coalition request administrative notice of the subsequent amendments to Order No. R5-
27 2006-0053 by and through Order No. R5-2006-0077 (attached hereto as Exh. A) adopted by the Regional Board on
28 August 3, 2006. Order No. R5-2006-0077: (1) mandates that the Executive Officer require management plans where
two exceedances of a water quality objective are identified within a three-year period unless the Executive Officer
determined that the requirement of a management plan would have no effect; and (2) created some reasonable
exceptions to the December 31, 2006 deadline for allowing irrigators to opt in to Coalition groups.

1 apply into an industry capable of complying with California's progressive non-point source
2 regulations for water quality. This transition is no excuse for ignoring water quality problems,
3 however, the Sacramento Valley Coalitions emphasize the importance of recognizing this transition.
4 (See, e.g., State Board Order WQO 2004-003 (2004 Order), p. 4 ["there can be no doubt that the
5 new Waiver and its requirements do result in a veritable 'sea change' in the manner in which the
6 discharges from irrigated agriculture are being regulated"].)

7 The agricultural community cannot, as a practical matter, immediately (or even in four years)
8 transform from an unregulated industry to an industry on par with point source dischargers who
9 have decades of experience developing management practices to comply with water quality
10 regulations. Moreover, non-point source discharges are inherently different from point-source
11 dischargers. With the benefit of nearly three years of monitoring data throughout the Central
12 Valley, the Regional Board and Coalitions have made significant progress in identifying impaired
13 waters and the problem constituents therein. However, management practices and source
14 identification tools take time to develop and implement.

15 The Irrigated Lands Program must be given time to function as the watershed-based,
16 information gathering phase for agricultural water quality regulation in the Central Valley. The
17 State Board itself endorsed, through the Policy for Implementation and Enforcement of the Non
18 Point Source Pollution Control Program, May 20, 2004 (State NPS Policy) and the precedential
19 2004 Order, the use of watershed-based monitoring and Coalition groups to identify water quality
20 impairments and develop management practices. In fact, in 2004, the State Board stated:

21 Of utmost concern to this Board is the need for an effective and efficient
22 regulatory program for discharges from irrigated agriculture. We note that
23 in the Central Valley there are an estimated 25,000 farming operations and
24 that, until now, this entire industry has been largely unregulated by the
25 Regional Board. We strongly believe that in light of this number of
26 operations, it is to the benefit of both the regulators and the regulated
27 community to encourage the formation of Coalition Groups. Not only will
28 communication and regulation be more simple with a smaller number of
regulated entities, but the monitoring requirements for Groups are much
greater and will provide much more useful information. . . . While we fully
support the inclusion of this important source of waste discharges in the
regulatory fold, we cannot ignore the fact that the federal government and
most other state governments have chosen to exempt irrigated agriculture
from the regulatory programs for waste discharges into public waters.

1 * * *

2 [W]e strongly encourage farmers to join Coalition Groups. . . . As we have
3 stated, this Waiver constitutes a *new regulatory approach* for irrigated
4 agriculture and it is appropriately flexible and based on a *lengthy* period of
5 monitoring. The monitoring requirements, which leave much discretion of
6 the design to the Coalition Groups, are appropriately comprehensive and
7 should lead to a *final product* that is based on the results of actual
8 monitoring of the farming operations. (2004 Order, pp. 9, 11, emphasis
9 added.)

10 The State Board's precedential 2004 Order and the Irrigated Lands Program were upheld
11 by the Sacramento Superior Court in *Deltakeeper, et al. v. Cal. Regional Water Quality Control*
12 *Board-Central Valley Region, et al.* (Super. Ct. Sacramento County, May 10, 2005, No.
13 04CS00235) (Superior Court Ruling). The Superior Court recognized the daunting task facing the
14 Regional Board in establishing the first agricultural water quality regulatory program. (Superior
15 Court Ruling, p. 1.) The Superior Court further recognized the unique nature of agricultural runoff
16 and its regulatory history.⁵ The Superior Court ultimately upheld the Regional Board's use of the
17 section 13269 waiver to develop the Irrigated Lands Program as a lawful and appropriate tool for
18 regulating discharges from irrigated lands.

19 The Irrigated Lands Program has been anything but stagnant since receiving affirmation
20 through the 2004 Order and Superior Court Ruling. Irrigated agriculture has moved into the
21 second phase of the three-tiered monitoring program designed to gather data for informing
22 agricultural water quality regulation. Moreover, the 2006 Renewal reflects considerable regulatory
23 tightening and the imposition of additional responsibilities on irrigated agriculture; as discussed

24 ⁵ “[A]gricultural runoff is markedly different from other types of regulated waste water discharges. Whether from
25 rainfall or irrigation, agricultural runoff is characterized by large volumes of water containing relatively low levels
26 of pollutants. In comparison, industrial discharges generally contain lower volumes of more concentrated
27 pollutants. In addition, industrial discharges are ‘point source’ discharges, which generally means wastewater
28 emanates from a pipe or other discrete conveyance. Agricultural runoff typically is a ‘non-point source’ discharge,
meaning the water runs off fields and is not conveyed in a pipe or other discrete conveyance. To the extent
agricultural runoff consists of nonpoint discharges, agricultural runoff is inherently more difficult to control and
regulate. As a result, agricultural discharges historically have not been subject to the same type of regulation as
other discharges of waste. For example, agricultural wastewater discharges are exempt from regulation under the
federal Clean Water Act and, until recently, were virtually exempt from regulation under California’s Water Code.
By adopting the conditional Waivers challenged in this action, however, the Regional Board and the State Water
Resources Control Board . . . have, for the first time in the history of California, adopted programs to regulate
agricultural wastewater discharges to the waters of the Central Valley. The case before this Court, therefore, is the
first of its kind.” (Superior Court Ruling, pp. 8-9, administrative record citations omitted; see also, *ibid*, p. 20.)

1 further herein, the Regional Board has included new measures to meet the new section 13269
2 requirements imposed by the legislature since the 2004 Order and the Superior Court Ruling.
3 (2006 Renewal, p. 8, ¶ 28.)

4 The Sacramento Valley Coalitions have also continued to mature and improve throughout
5 this regulatory process. Notably, the Sacramento Valley Coalitions had a jumpstart on the learning
6 curve as the California Rice Commission has for twenty years maintained, through the California
7 Department of Pesticide Regulation (prior to 1991, through the California Department of Food and
8 Agriculture), a rice pesticide monitoring program.⁶ This background is invaluable in helping others
9 within the Sacramento Valley agricultural community conduct monitoring and formulate
10 management practices to improve water quality. Additionally, the Sacramento Valley Water Quality
11 Coalition continues to see high percentages of landowner participation in their subwatersheds and
12 an increasing acceptance of the new responsibilities imposed through the Irrigated Lands Program.
13 The California Rice Commission maintains 100% participation in the Irrigated Lands Program. As
14 demonstrated to the Regional Board, the data gathered by the Sacramento Valley Coalitions has
15 allowed the Coalitions (in coordination with the Regional Board) to identify water quality issues in
16 their watersheds. Through management plans and management practices action plans,⁷ the
17 Coalitions are working with the Regional Board to address the priority water quality issues.

18 The Sacramento Valley Coalitions stress the importance of the 2006 Renewal to allow the
19 Irrigated Lands Program to continue as the appropriate regulatory tool to gather water quality data
20 and address water quality issues. Within the Petition, CSPA advocates its own policy preferences
21 and judges the Irrigated Lands Program's performance against its own goals rather than the stated
22 goals of the program. However, the Regional Board has lawfully exercised its authority, under
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24 _____
25 ⁶ The Rice Pesticide Program is a longstanding watershed effort whereby rice growers follow Regional Board
26 approved management practices imposed on the growers by permits obtained from Agricultural Commissioners for
27 the application of selected rice pesticides. To implement the program, the California Rice Commission monitors
28 Sacramento Valley agricultural drains and the Sacramento River and coordinates additional downstream monitoring
efforts with the cities of Sacramento and West Sacramento.

⁷ The Sacramento Valley Coalitions request administrative notice of all management plans and management
practices action plans submitted by Coalition groups to the Regional Board, including those submitted after the
June adoption of the 2006 Renewal. (Cal. Code Regs., tit. 23, § 648.2)

1 Water Code section 13269, to renew the Irrigated Lands Program. The Sacramento Valley
2 Coalitions respectfully urge the State Board to uphold the 2006 Renewal.

3 II. DISCUSSION

4 The Regional Board's 2006 Renewal to extend the Irrigated Lands Program for five more
5 years should be upheld because: (1) the 2006 Renewal was adopted as a lawful exercise of the
6 Regional Board's authority under Water Code section 13269; (2) the Regional Board complied
7 with the California Environmental Quality Act, Public Resources Code section 21000 et seq.
8 (CEQA) in adopting the 2006 Renewal; (3) CSPA's allegations are without merit; and (4) CSPA's
9 policy preferences for regulating agricultural discharges do not warrant State Board review of the
10 Regional Board's lawful exercise of its regulatory authority.

11 A. The 2006 Renewal Was Adopted As A Lawful Exercise Of The Regional Board's
12 Authority Under Water Code Section 13269.

13 Water Code section 13000 grants the Regional Board general authority to regulate
14 "activities and factors which may affect the quality of waters of the state" as necessary to "attain
15 the highest water quality which is reasonable, considering all demands being made and to be made
16 on those waters and the total values involved, beneficial and detrimental, economic and social,
17 tangible and intangible." Water Code section 13269 specifically authorizes the Regional Board to
18 conditionally waive waste discharge requirements. Effective January 1, 2004, section 13269
19 requires that waivers must: (1) be consistent with any applicable water quality control plans (basin
20 plans); (2) be in the public interest; (3) contain conditions, including a condition for monitoring;
21 and (4) not exceed a five-year term (but existing waivers can be renewed). As demonstrated by the
22 record before the Regional Board and set forth herein, the 2006 Renewal satisfies these
23 requirements.

24 1. The Record Contains Substantial Evidence To Support the Regional Board's
25 Finding That The Waiver Is In The Public Interest.

26 CSPA challenges the 2006 Renewal on the grounds that it is "not in the public interest."
27 By its very nature, the term "public interest" is subject to interpretation and personal priorities.
28 Thus, the legislature appropriately delegated this determination of "public interest" to the Regional

1 Board. (See Wat. Code, § 13269; see also Wat. Code, § 13000 [requiring the Regional Board to
2 consider various public values in regulating water quality].) Moreover, the legislature did not
3 impose stringent limitations on the Regional Board’s “public interest” determination.⁸ (See Wat.
4 Code, § 13269.) Water Code section 13269(a)(1) authorizes the Regional Board to issue a waiver
5 where the “[R]egional [B]oard determines, after any necessary. . . meeting, that the waiver is. . . in
6 the public interest.” Thus, the “Regional Board must be accorded discretion in determining what is
7 or is not in the public interest.” (Superior Court Ruling, p. 70; see also *Fukuda v. City of Angels*
8 (*Fukuda*) (1999) 20 Cal.4th 805, 812, 817.)

9 The Regional Board appropriately found that the waiver of reports of waste discharge and
10 waste discharge requirements established through the Irrigated Lands Program is in the public
11 interest. (2006 Renewal, pp. 9-10, ¶ 35 [“The Water Board has considered all the comments of
12 the public and finds that this Order waiving waste discharge requirements for dischargers of waste
13 from irrigated lands is in the public interest as further described”].) The unique nature of
14 agricultural discharges and historic regulatory treatment thereof demands an iterative approach to
15 reach the State’s water quality objectives. The Irrigated Lands Program creates a regulatory
16 scheme through which exceedances of water quality objectives may be identified and addressed
17 through several layers of monitoring and reporting. The 2006 Renewal also requires management
18 plans to address exceedances of water quality objectives; the Regional Board amended the 2006
19 Renewal to require Coalition groups to submit management plans for exceedances⁹ of water quality
20 objectives. (Order No. R5-2006-0077, Exh. A hereto.)

21 The record supports the Regional Board’s finding that this comprehensive process is in the
22 public interest because it allows the Regional Board and Coalitions to identify and prioritize water
23 quality impairments and focus efforts to develop appropriate best management practices to attain
24 water quality objectives. (See 2006 Renewal, p. 9, ¶ 35 [“Due to the large numbers of dischargers
25

26 ⁸ In fact, Water Code section 13269 anticipates that Regional Boards will determine that a waiver policy meets the
27 public interest requirement even where the discharge regulated therein poses a “significant threat to water quality.”
(See Wat. Code, § 13269(a)(3).)

28 ⁹ The Irrigated Lands Program now requires a Coalition to submit a management plan whenever a water quality
objective is exceeded more than once within a 3-year period, unless the Executive Officer determines such reporting
would not provide a benefit to water quality.

1 within the scope of the Board's jurisdiction, the lack of direct regulation in the past, the lack of
2 information about the specific sources of discharges of waste from such lands, and the
3 unprecedented scope of the program, it is reasonable to establish an interim conditional waiver that
4 sets forth a process to collect the necessary information and require management plans to control
5 the sources of discharges of waste as that information is developed"]; see also Regional Board
6 Summary of Comment Letters and Responses to Comments (Responses to Comments), p. 17.)

7 The 2006 Renewal tightens the regulatory program reviewed by this State Board in 2004.
8 At that time, the State Board not only upheld but also "agreed" with the Regional Board's finding
9 that the waiver for discharges from irrigated lands is in the public interest:

10 We agree with the Regional Board that *it is in the public interest* to regulate
11 the discharges from irrigated agriculture throughout the Central Valley
12 through a Waiver that employs best management practices, encourages a
13 watershed approach, and includes sufficient monitoring requirements. We
14 agree with the Regional Board that this is an appropriate interim regulatory
15 system pending receipt of further monitoring data from both the dischargers
16 and a study this Board is funding, as well as completion of the EIR that this
17 Board is also funding." (2004 Order, p. 13, emphasis added.)

18 Thus, the State Board should uphold the Regional Board's determination that the 2006
19 Renewal is in the public interest.

20 2. The Irrigated Lands Program Imposes Enforceable Conditions On The Waiver
21 And Includes The Statutorily Mandated Condition By Requiring Watershed-Based
22 Monitoring.

23 The legislature requires the Regional Board to include at least one condition in any waiver
24 under section 13269. "The conditions of the waiver shall include, but need not be limited to, the
25 performance of individual, group, or watershed-based monitoring" the results of which are made
26 available to the public. (Wat. Code, § 13269(a)(2).) By law, the Regional Board can enforce
27 waivers and waiver conditions in the same manner as other non-point source regulatory tools, such
28 as waste discharge requirements. (See Wat. Code, § 13350(1)(2); see also 2004 Order.) Regional
Boards have numerous options for enforcing the conditional waivers, including time schedule
orders, cease and desist orders, cleanup and abatement orders, and administrative civil liability.
(Wat. Code, §§ 13300, 13301, 13304, 13323; see also State NPS Policy, p. 6.) Further, the
Regional Board has conducted numerous investigations of irrigated lands throughout the Central

1 Valley by way of its authority to require technical reports under section 13267. (See e.g., 2006
2 Renewal, p. 4, ¶ 17; see also 2004 Order.) Thus, in order to enforce the waivers, the Regional Board
3 must be sure that the waiver conditions are clear and reasonable. (See State NPS Policy, p. 5.)¹⁰
4 The 2006 Renewal contains enforceable conditions and requires monitoring, the results of which
5 are publicly noticed on the Regional Board's website. (See 2006 Renewal, Att. B [Terms and
6 Conditions].)

7 3. The Irrigated Lands Program Is Consistent With The Basin Plans.

8 In 2004, this State Board determined that the Irrigated Lands Program was consistent with
9 the Basin Plans. (2004 Order, p. 13, fn. 29 ["[t]he environmental petitioners' claim that the
10 Waiver is not consistent with the Basin Plans is simply without basis".]) This 2006 Renewal has
11 only tightened the regulatory program for irrigated agriculture. (See e.g., 2006 Renewal, p. 8, ¶ 28.)
12 Further, the Regional Board found:

13
14 The Conditional Waiver is consistent with applicable Basin Plans because it
15 requires compliance with water quality standards, as defined in Attachment
16 A, and requires the prevention of nuisance. It requires implementation of a
17 monitoring and reporting program to determine effects on water quality and
18 implementation of management practices to comply with applicable water
19 quality standards. (2006 Renewal, p. 4, ¶ 20.)

20 In fact, the Basin Plans provide the Regional Board discretion to determine when it is
21 appropriate to require more stringent measures and the discretion to set schedules for achieving
22 improvements in beneficial use protection:

23 The [Non-Point Source] Plan describes three general management
24 approaches that are to be used to address nonpoint source problems. These
25 are 1) voluntary implementation of best management practices, 2) regulatory
26 based encouragement of best management practices and 3) adopted effluent
27 limitations. The approaches are listed in order of increasing stringency. In
28 general the least stringent option that successfully protects or restores water
quality should be employed, with more stringent measures considered if

24 ¹⁰ CSPA contends that the lack of information about individual dischargers prevents the Regional Board from
25 enforcing the conditional waiver. However, the terms of the 2006 Renewal can be enforced through the numerous
26 regulatory tools available to the Regional Boards and contact information for specific participants within a
27 Coalition is not in every instance necessary to enforce the waiver conditions. (See State NPS Policy; see also
28 Northern California Water Association and Sacramento Valley Water Quality Coalition's Petition for Review, filed
July 21, 2006, SWRCB/OCC File No. A-1759(a).) Regardless, CSPA's contentions are irrelevant since the 2006
Renewal requires the submittal of participant lists identifying individual dischargers and their contact information
by September 30, 2006. Moreover, the Sacramento Valley Coalitions request that the State Board take
administrative notice of the participant list submitted by the Coalition groups in compliance with the 2006
Renewal. (Cal. Code Regs., tit. 23, § 648.2; see also State Board Denial of Stays.)

1 timely improvements in beneficial use protection are not achieved. The
2 Regional Water Board will determine which approach or combination of
3 approaches is most appropriate for any given nonpoint source problem.
(Basin Plan for Sacramento River Basin and San Joaquin River Basin, p.
IV-10.00.)

4 Specific sources of nonpoint source pollution may be difficult to identify,
5 treat, or regulate. The goal is to reduce the adverse impact of nonpoint
6 source discharges on the Basin's water resources through better
management of these activities. (Tulare Lake Basin Plan, p. I-3.)

7 CSPA's allegations of inconsistencies with the basin plans are without merit. CSPA
8 attempts to impose more stringent regulations through the regulatory authority of section 13269
9 than what is available to the Regional Board through the section 13263 authority to impose waste
10 discharge requirements. For example, CSPA demands immediate compliance with water quality
11 objectives and rejects any notion of an "iterative process." Section 13263(c), however, authorizes
12 the use of time schedules to meet water quality objectives. Notably, the legislature demands that
13 waste discharge requirements "implement" the applicable basin plan whereas waivers must only be
14 "consistent with" the applicable basin plan. (See Wat. Code, § 13263; cf. Wat. Code, § 13269.)
15 This distinction must be interpreted to have some meaning. (*Curle v. Superior Court* (2001) 24
16 Cal.4th 1057, 1063, citing *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388.)
17 Section 13263(c) allows the Regional Board to give dischargers time to comply with water quality
18 objectives to "implement" the basin plan. Thus, the section 13269 waiver authority must allow the
19 Regional Board to work with Coalitions to bring discharges into compliance with water quality
20 objectives through monitoring, reporting, and development of management practices. (See, e.g.,
21 2006 Renewal, pp. 12-13, ¶¶ 52-53; see also Wat. Code, § 13269(a)(3) [expressly allowing the
22 Regional Board to issue a waiver for discharges that pose a threat to water quality].)

23 CSPA further contends that the 2006 Renewal is inconsistent with the pesticide policy within
24 the Basin Plan. However, the Superior Court affirmatively rejected this allegation against the
25 Irrigated Lands Program; no intervening changes within the Irrigated Lands Program or the Basin
26 Plan alter the Superior Court's consistency analysis:

27 The Basin Plan provides that when the use of a pesticide may result in
28 discharges to surface waters in violation of WQOs, the Board will consider
taking regulatory action such as the prohibition of a discharge or issuance of
waste discharge requirements to control discharges of the pesticide. Far

1 from being inconsistent with the Waiver, the Basin Plan's pesticide scheme
2 is remarkably similar to the structure of the Waiver. First, discharges are
3 notified of the applicable WQOs and instructed to implement management
4 practices to achieve compliance with such Objectives. Second, the Board
5 reviews monitoring results and considers approval of proposed management
6 practices for the control of pesticide discharges. Third, if compliance with
7 WQOs is not obtained within the timeframes allowed, the Board will
8 consider additional control options to achieve compliance. The Waiver
9 similarly requires persons who obtain coverage to prepare and implement
10 monitoring reports; evaluate, monitor and implement management practices
11 that result in attainment of receiving water limitations based on WQOs; and
12 then, if directed by the Board, implement additional measures to protect the
13 quality of waters. Therefore, there is no abuse of discretion based on the
14 Waiver's alleged inconsistency with the Basin Plan's existing requirements
15 for "Pesticide Discharges from NonPoint Sources." (Superior Court
16 Ruling, p. 71.)

17 The Regional Board properly determined that the 2006 Renewal is consistent with the
18 applicable basin plans. (2006 Renewal, p. 4, ¶ 20.)

19 4. The July Hearing To Consider The 2006 Renewal Was Conducted Lawfully.

20 The Regional Board complied with the restrictions the legislature imposed on the renewal of
21 existing waivers. The Regional Board must review the terms of the existing waiver policy and
22 determine whether the discharge for which the waiver policy was established should be subject to
23 general or individual waste discharge requirements. (Wat. Code, § 13269(f).) As demonstrated
24 within the record before the Regional Board and memorialized within the 2006 Renewal, the
25 Regional Board complied with these requirements:

26 The Central Valley Water Board has reviewed the 2003 Conditional Waiver
27 and has determined that additional conditions are required to implement
28 amendments to Water Code section 13269 that have occurred since adoption
of the 2003 Conditional Waiver and to assure protection of water quality.
(2006 Renewal, p. 8, ¶ 28.)

It is not appropriate at this time to adopt individual [waste discharge
requirements] to regulate discharges of waste from irrigated lands because
there are estimated to be more than 25,000 individual owners and/or
operators of irrigated lands who discharge waste from irrigated lands and it
is neither feasible nor practicable due to limitations of Central Valley Water
Board resources to adopt [waste discharge requirements] within a
reasonable time. The Central Valley Water Board supports the approach of
allowing Dischargers to be represented by Coalition Groups in that it can
provide a more efficient means to comply with many of the conditions
contained in the Conditional Waiver. (2006 Renewal, pp. 8-9, ¶ 33-34.)

1 The legislature did not restrict the Regional Board's determination with respect to whether
2 the discharge should be regulated through waste discharge requirements. (See Wat. Code, §
3 13269(f).) Rather, the legislature simply required that the Regional Board make this determination
4 when reviewing the terms of an expired or expiring conditional waiver. (*Ibid.*) Thus, the Regional
5 Board's determination of the appropriate regulatory tool for discharges from irrigated lands
6 warrants deference. (*Fukuda, supra*, 20 Cal.4th at pp. 812, 817.)

7 **B. The Regional Board Complied With CEQA In Adopting The 2006 Renewal.**

8 CEQA requires the Regional Board to consider potential environmental impacts of its
9 decision to adopt the 2006 Renewal. For purposes of this CEQA requirement, the "project"¹¹
10 under consideration is the 2006 Renewal of the Irrigated Lands Program, which waives waste
11 discharge requirements and extends the interim regulatory program for discharges from irrigated
12 lands. The Regional Board has appropriately determined that the 2006 Renewal is not a new project
13 under CEQA. Rather, the 2006 Renewal is an extension of the previously considered project, the
14 2003 Irrigated Lands Program, which the 2006 Renewal merely renews with modifications. (2006
15 Renewal, p. 14, ¶¶ 60-61.) Thus, CEQA requires that the Regional Board analyze whether the
16 existing environmental document, the initial study and negative declaration adopted in 2003
17 (Resolution No. R5-2003-0103)¹², adequately analyzes the potential impacts of the 2006 Renewal of
18 the Irrigated Lands Program. (Pub. Resources Code, § 21166; see also CEQA Guidelines¹³, §
19 15162.)

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23 _____
24 ¹¹ Under CEQA, "project" means "an activity which may cause either a direct physical change in the environment, or a
25 reasonably foreseeable indirect physical change in the environment," including an activity that "involves the issuance
26 to a person of a lease, permit, license, certificate, or other entitlement for use. . . ." (Pub. Resources Code, § 21065.)

26 ¹² CEQA affords the Regional Board a conclusive presumption of validity for the negative declaration adopted in
27 2003. (See *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1130.)
28 Moreover, CSPA is barred by *res judicata* to challenge the negative declaration because the 2004 Order and Superior
Court Ruling upheld the environmental review during the previous proceedings on the Irrigated Lands Program.

¹³ The Guidelines for the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, §
15000 et seq.), hereinafter "CEQA Guidelines."

1 In contrast to the standards for reviewing a lead agency's decision to prepare an
2 environmental impact report in the first instance¹⁴, CEQA limits the lead agency's duty to prepare
3 supplemental analysis to certain circumstances. (Pub. Resources Code, § 21166; CEQA
4 Guidelines, § 15162.) Public Resources Code section 21166 provides:

5 *[N]o* subsequent or supplemental environmental impact report shall be
6 required by the lead agency or by any responsible agency, *unless* one or
7 more of the following events occurs:

8 (a) Substantial changes are proposed in the project which will require major
9 revisions of the [negative declaration].

10 (b) Substantial changes occur with respect to the circumstances under
11 which the project is being undertaken which will require major revisions in
12 the [negative declaration].

13 (c) New information, which was not known and could not have been known
14 at the time the [negative declaration was adopted], becomes available. (Pub.
15 Resources Code, § 21166, emphasis added; see also CEQA Guidelines §
16 15162 [confirming that section 21166 triggers also apply to previously
17 adopted negative declarations].)

18 In evaluating the extension of the Irrigated Lands Program as required by Water Code
19 section 13269(f), the Regional Board complied with CEQA by conducting this evaluation of
20 "whether a subsequent environmental document is required" for the 2006 Renewal. (2006
21 Renewal, p. 14; Pub. Resources Code, § 21166; CEQA Guidelines, § 15162.) Pursuant to CEQA,
22 the Regional Board determined that this "further discretionary approval on the project" did not
23 involve: (a) substantial changes in the project; (b) substantial changes with respect to certain
24 circumstances under which the project is being undertaken; or (c) new information of substantial
25 importance to the project that became available after the adoption of the 2003 negative declaration.
26 (2006 Renewal, p. 14, ¶ 61; Pub. Resources Code, § 21166; CEQA Guidelines, § 15162; see also 1
27 Kostka and Zischke, Practice Under The Cal. Environmental Quality Act (Cont. Ed. Bar Nov 2005
28 Update) § 19.36, p. 913.)

14 As stated in *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1017-1018, the supplemental review requirements of section 21166 represent "a shift in the applicable policy considerations. The low threshold for requiring the preparation of an [environmental impact report] in the first instance is no longer applicable; instead, agencies are *prohibited from requiring further environmental review unless the stated conditions are met.*" (Emphasis added.)

1 The Regional Board recognizes that during the implementation of the 2003 renewal, the
2 Regional Board obtained monitoring data from Coalition groups and conducted its own processes
3 to gather information about discharges from irrigated lands. In fact, between the adoption of the
4 2003 Irrigated Lands Program and the 2006 Renewal, progress was made on the long-term
5 implementation plan and related environmental review as well as the release of a draft existing
6 conditions report to determine the current conditions in the Central Valley agricultural water bodies.
7 (See 2006 Renewal, p. 10, ¶ 37.) In addition, as raised by CSPA throughout the 2006 Renewal
8 process, the circumstances within the San Joaquin and Sacramento Delta continue to affect species
9 and various water bodies throughout the Central Valley remain on California’s section 303(d) list
10 of impaired water bodies.

11 This “new” information about the discharge subject to the Irrigated Lands Program and
12 the water quality circumstances in the Central Valley, however, does not constitute substantial
13 evidence that the Irrigated Lands Program and this 2006 Renewal thereof somehow causes
14 “environmental impacts” under CEQA. (See CEQA Guidelines, § 15162(a)(3)(A) [requiring
15 supplemental analysis if the new information shows that “[t]he project will have one or more
16 significant effects not discussed in the previous. . . negative declaration. . .”].) The record before
17 the Regional Board contains no evidence of any potential impact to the environment resulting from
18 the Irrigated Lands Program. CEQA does *not* require the Regional Board to engage in speculation
19 about potential impacts of potential management practices undertaken by individuals and Coalitions
20 regulated by the 2006 Renewal. (See CEQA Guidelines, §§ 15384(a), 15064(f)(5); see also Pub.
21 Resources Code, § 21082.2(c).) The Regional Board evaluated the 2006 Renewal and reasonably
22 concluded that, based upon the record before the Regional Board, the 2006 Renewal will not result
23 in any new significant impacts to the environment.

24 CSPA has raised no evidence to show that the implementation of the Irrigated Lands
25 Program actually resulted in new environmental impacts from the adoption of the 2003 Irrigated
26 Lands Program to the recent adoption of the 2006 Renewal. (See Superior Court Ruling, p. 74
27 [challengers must produce substantial evidence to show that the Waiver itself may “in fact lead to
28 increases in irrigated runoff” resulting in environmental impacts].) Rather, CSPA relies on

1 existing conditions of agricultural dominated water bodies in asserting that the Regional Board
2 failed its CEQA obligations.

3 CSPA attempts to use the historic or natural conditions of these water bodies as the CEQA
4 “baseline” to suggest that the discharges regulated through the 2006 Renewal all constitute
5 environmental impacts of the regulatory program. The CEQA baseline comprises the
6 environmental setting as it exists at the time the environmental analysis is performed. (CEQA
7 Guidelines, §§ 15125, 15126.2; see also *Save Our Peninsula Com. v. Monterey County Bd. of*
8 *Supervisors* (2001) 87 Cal.App.4th 99.)

9 “The baseline refers to the point of reference, also referred to as existing physical
10 conditions or the existing environment, against which changes are measured to determine if a
11 project may have a significant adverse effect.” (2004 Order, p. 16, quoting State Board WR 2001-
12 07, p. 3; see also *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1280.) The baseline
13 environmental conditions for the 2006 Renewal necessarily include the levels and types of irrigated
14 runoff and the existing polluted condition of the receiving waterbodies at the time of the 2003
15 adoption of the negative declaration. (See Superior Court Ruling, pp. 72-73.) The 2004 Order and
16 Superior Court Ruling previously rejected the notion that historic background conditions set the
17 CEQA baseline. (See, e.g., Superior Court Ruling, pp. 72-73 [“Because the Waiver does not allow
18 an increase in irrigated runoff from levels existing at the time of the environmental review [record
19 cites], and because the primary purpose of the Waiver is to impose requirements to monitor
20 discharges, implement best management practices, and improve water quality over time [record
21 cites], the Board properly had substantial evidence to support its determination that the project
22 would not have a significant effect on the environment”].) Thus, CSPA’s arguments must be
23 rejected. (*Cathay Mortuary, Inc. v. San Francisco Planning Commission* (1989) 207 Cal.App.3d
24 275, 280 [CEQA does not require an improvement beyond the baseline environmental
25 conditions”]; *Campbell v. Third Dist. Agri. Assn.* (1987) 195 Cal.App.3d 115, 118.)

26 The Regional Board complied with CEQA in adopting the 2006 Renewal. Moreover, the
27 record is replete with evidence suggesting that the 2006 Renewal will actually reduce environmental
28 impacts associated with discharges from irrigated lands.

1 **C. CSPA Et Al's Allegations Are Without Merit.**

2 1. The State Board Should Refuse To Consider CSPA's Allegations To The Extent
3 Previously Rejected By The State Board And The Sacramento County Superior
4 Court During The 2003-2004 Challenges To The Irrigated Lands Program.

5 CSPA raises, in large part by way of outline format and without substantive discussion,
6 numerous issues within the Petition. CSPA further references all materials provided to the
7 Regional Board within written comments and presentation materials. As specifically identified and
8 addressed within this response, in large part, the allegations raised by the Petition were previously
9 rejected and conclusively determined within the 2004 Order and the Superior Court Ruling. CSPA
10 is barred by res judicata and collateral estoppel from raising issues already addressed by the State
11 Board and Superior Court during the 2003-2004 challenges to the Irrigated Lands Program. Res
12 judicata bars and "prevents relitigation of the same cause of action in a second suit between the
13 same parties or parties in privity with them." (*Alpha Mechanical, Heating & Air Conditioning,*
14 *Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1326; (see also
15 *People v. Barragan* (2004) 32 Cal.4th 236, 252.) Further, collateral estoppel (or issue preclusion)
16 provides that even an adjudication which is not "a final judgment may ... be given preclusive
17 effect. ..." *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1560.)
18 When applied, the doctrine of "[r]es judicata bars not only the reopening of the original
19 controversy, but also subsequent litigation of all issues which were or could have been raised in the
20 original suit." (*Torrey Pines Bank v. Superior Court (White)* (1989) 216 Cal.App.3d 813, 821,
21 internal quotes omitted.) "[F]or purposes of issue preclusion, as opposed to res judicata, 'final
22 judgment includes any prior adjudication of an issue in another action that is determined to be
23 sufficiently firm to be accorded conclusive effect.'" (*Border Business Park, supra*, 142
24 Cal.App.4th at p. 1564, emphasis in original.) "[A]n 'issue' includes any legal theory or factual
25 matter which could have been asserted in support of or in opposition to the issue which was
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1 litigated. [Citation.]” (*Id.* at pp. 1565-1566.)¹⁵ Both aspects of res judicata, whether applied as a
2 total bar to subsequent litigation or as preclusion to certain issues, share the common goals of
3 preventing inconsistent results, and promoting finality and judicial economy by bringing an end to
4 litigation. (*Flynn v. Gorton* (1989) 207 Cal.App.3d 1550, 1554.) Specifically, they “prevent
5 vexatious litigation and...require the parties to rest upon one decision in their controversy.
6 [Citation.]” (*Torrey Pines Bank*, at p. 821.) The State Board should deny consideration of issues
7 raised by CSPA that the State Board and Superior Court have already reviewed and ruled upon.

8 2. CSPA’s Allegations Pertaining To Management Plans Are Moot Due To Regional
9 Board Actions Following The 2006 Renewal.

10 As explained *supra*, Regional Board Order No. R5-2006-0077 altered the 2006 Renewal to
11 require management plans for any exceedance of a water quality objective that occurs more than
12 once within a 3-year period, unless otherwise determined unnecessary by the Executive Officer.
13 This requirement is beyond appropriate or necessary and will ensure that management plans are
14 submitted to the Regional Board. The amended measure also allows the Executive Officer
15 appropriate discretion to waive the management report if, based on the circumstances, additional
16 management reporting will have no impact on water quality. For example, if a recurring problem
17 exists for a given constituent in a particular water body, no one or thing will benefit from repetitious
18 reporting until management measures are implemented and results can be evaluated. Thus, CSPA’s
19 allegations pertaining to the management plans are without merit and mooted by Order No. R5-
20 2006-0077.

21 3. CSPA’s Challenge To The Monitoring And Reporting Program Is Untimely.

22 CSPA contends that the “evidence shows that” the monitoring program for the Irrigated
23 Lands Program “is deficient.” (Petition, p. 4.) This challenge is simply not timely as the
24 Regional Board did not take action on the Monitoring and Reporting Program (MRP) within the
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26 ¹⁵ The prerequisite elements for applying the doctrine of res judicata to causes of action or issues are identical: “(1)
27 A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the
28 prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being
asserted was a party or in privity with a party to the prior proceeding. [Citations.]” (*Barragan, supra*, 32 Cal.4th
that p. 253.)

1 2006 Renewal. Rather, “[r]evisions to the current MRPs are being considered separately from the
2 renewal of the Conditional Waivers.” (Responses to Comments, p. 18.) The Regional Board has
3 held and continues to hold numerous Technical Issues Committee (TIC) meetings through which
4 CSPA, Regional Board staff, and the agricultural coalitions address technical issues, monitoring
5 challenges and “deficiencies,” as well as appropriate standards and management practices. The
6 monitoring requirements set forth in Order No. R5-2005-0833 remain as a condition of Order No.
7 R5-2006-0053. (2006 Renewal, pp. 16-17, ¶ 4.) CSPA did not timely challenge (and has not by its
8 petition challenged) the Regional Board action on Order No. R5-2005-0053. Thus, the State
9 Board should not consider CSPA’s allegations against the Regional Board’s monitoring
10 requirements.

11 Moreover, CSPA points to no authority or facts that suggest the monitoring program
12 established through a *prior* action of the Regional Board (Order No. R5-2005-0833) is deficient or
13 otherwise unlawful. In fact, as demonstrated by the record before the Regional Board at the time of
14 the 2006 Renewal and by the extensive monitoring data submitted to the Regional Board by the
15 Coalitions,¹⁶ the first two phases of the monitoring program have produced substantial information
16 about water quality. Evidence within the record explains that the phased monitoring approach
17 develops data and information over a period of time, which is necessary to focus monitoring efforts
18 on identified water quality problems. For example, this State Board itself stated that “[t]he entire
19 [phased] monitoring program *may last ten years.*” (2004 Order, p. 7, emphasis added.) This
20 tailored approach maximizes resources by monitoring streams with identified water quality
21 problems associated with discharges from irrigated lands. (See Wat. Code, § 13267.) Further, the
22 Regional Board should be awarded deference in its finding that the 2006 Renewal is expressly
23 conditioned upon the current MRP, including future revisions, to “determine the effects of irrigated
24 lands on water quality, to support the development and implementation of the Conditional Waiver,
25 to verify the adequacy and effectiveness of the Conditional Waiver’s conditions, and to evaluate

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27 ¹⁶ Monitoring results through April 2006 are posted on the Regional Board’s Website and, to the extent not included
28 within the administrative record prepared by the Regional Board, all monitoring results should be administratively
noticed herein (Cal. Code Regs., tit 23, § 648.2).

1 each Coalition Group's compliance with the terms and conditions of the Conditional Waiver."
2 (2006 Renewal, p. 3, ¶ 15; see Wat. Code, §§ 13267, 13269; see also *Fukuda, supra*, 20 Cal.4th at
3 pp. 812, 817.)

4 4. The Irrigated Lands Program Is Consistent With The State Board's Non Point
5 Source Policy.

6 The State Board's Non-Point Source Policy explains how the State's 1999 Non-Point
7 Source Program Plan will be implemented and enforced. (State NPS Policy, p. 1, citing Water
8 Code, § 13369(a)(2)(B).) The State NPS Policy explains how the Water Code "mandates and
9 authorities, delegated to the [State Board] and [Regional Board] will be used to implement and
10 enforce the NPS Program Plan." (State NPS Policy, p. 2.) The State NPS Policy expressly
11 recognizes the Regional Board's wide discretion to issue waivers of waste discharge requirements or
12 reports of waste discharge pursuant to Water Code section 13269. (State NPS Policy, p. 5 ["the
13 [Regional Board] retain[s its] prosecutorial discretion to decide how to ensure compliance. . .[t]here
14 are many different ways for the [Regional Board] to ensure compliance"].)

15 Though the State NPS Policy requires that waiver conditions should "be clearly specified"
16 to allow enforcement (State NPS Policy, p. 5), the Regional Boards are allowed to use "progressive
17 enforcement," which the State NPS Policy finds consistent with the State Board Enforcement
18 Policy and common Regional Board practice. (State NPS Policy, p. 6.) Thus, the Regional Board
19 may initially take "whatever level of enforcement is appropriate, considering the [Regional Board]
20 workload and the circumstances of the case," and apply increasingly severe remedies where
21 necessary to correct a problem." (State NPS Policy, p. 6; see also, State NPS Policy, p. 15.) Here,
22 the Regional Board has instituted a progressive enforcement policy while the Irrigated Lands
23 Program matures. Further, the 2006 Renewal contains various built-in levels of enforcement of the
24 waiver conditions (such as management plans, section 13267 orders, and dissolution of Coalition
25 groups or individual participants therein). Moreover, the Water Code authorizes the Regional
26 Board to enforce waiver conditions in the same manner as waste discharge requirements. (Wat.
27 Code, §§ 13300, 13301, 13304, 13323, 13350(1)(2).)
28

1 The State NPS Policy acknowledges the significant “challenges to implementing statewide
2 prevention and control of [non-point source] pollution discharges.” (State NPS Policy, p. 8.) The
3 policy gives Regional Board’s room to be “as creative and efficient as possible” and “innovative”
4 in devising approaches to prevent or control the wide extent and diversity of non-point source
5 pollution. (State NPS Policy, pp. 9-10.) “A Regional Board may use whatever mix of
6 organizational approaches it deems appropriate.” (*Ibid.*) Further, where another agency is
7 “constructively involved in [non-point source] efforts, the [Regional Board] should seek to take
8 those efforts into account and, where appropriate, take advantage” of those efforts. (State NPS
9 Policy, p. 10.) Put simply, the Regional Board has broad flexibility and discretion in using its
10 administrative tools to fashion non-point source programs. (State NPS Policy, p. 10.)

11 CSPA contends that the 2006 Renewal somehow violated the State NPS Policy. However,
12 the evidence before the Regional Board supports its application of various regulatory and
13 enforcement tools to continue the iterative and interim program within the 2006 Renewal. (See
14 2006 Renewal, p. 9, ¶ 34.) Moreover, the Regional Board is designing a long-term implementation
15 program to regulate discharges from irrigated lands. (See 2006 Renewal, p. 10, ¶ 37.) Thus, the
16 Regional Board followed the State NPS Policy in crafting the 2006 Renewal. (2006 Renewal, p. 5,
17 ¶ 22.)

18 5. The Irrigated Lands Program Is Consistent With The State And Federal
19 Antidegradation Policies.

20 The Regional Board appropriately found that the Irrigated Lands Program is consistent with
21 the State’s antidegradation policy (Resolution No. 68-16). (2006 Renewal, p. 6, ¶ 23.) Despite
22 CSPA’s contentions, the antidegradation policy simply does not apply to all waters of the state.
23 Rather, the State antidegradation policy implements the federal antidegradation policy by imposing
24 an additional layer of protection for high quality waters (i.e., those waters “where the existing water
25 quality is higher than necessary for the protection of beneficial uses”). (Resolution No. 68-16; see
26 also Superior Court Ruling, p. 66.) Resolution No. 68-16 requires the Regional Board, in
27 regulating the discharge of waste, to maintain high quality waters of the State until it is
28 demonstrated that any change in quality will be consistent with the maximum benefit to the people

1 of the State, will not unreasonably affect beneficial uses, and will not result in water quality less
2 than that described in the Regional Board's policies. The Regional Board relied on information
3 within its records (compiled by the Regional Board, dischargers, educational institutions, and
4 others) that demonstrate many water bodies within the Central Valley are impaired for various
5 constituents. In fact, "many water bodies have been listed pursuant to Clean Water Act section
6 303(d)." (2006 Renewal, p. 6, ¶ 23.) As such, the Regional Board found that the impaired water
7 bodies "are not high quality waters" and it is not necessary for the Regional Board to conduct an
8 antidegradation analysis. (*Ibid.*)

9 In mandating that the antidegradation policy apply to impaired water bodies, CSPA
10 inappropriately asserts any degradation above historic "natural background levels" as unlawful.
11 This interpretation is expressly inconsistent with the Water Code, Resolution 68-16, and the prior
12 ruling on this issue. (See Wat. Code, § 13000; see, e.g., Superior Court Ruling, pp. 65-66 ["A
13 fundamental flaw in Deltakeepers argument is its assumption that the State Board Policy means
14 there can be no degradation from "natural" background levels . . . the Court interprets the Policy
15 consistent with its plain language, namely, that the purpose of the Antidegradation Policy is to
16 ensure that newly-permitted discharges do not degrade waters where the existing water quality is
17 higher than necessary for the protection of the applicable beneficial uses"].)

18 Further, Resolution No. 68-16 restricts *new* discharges to high quality waters. (See
19 Superior Court Ruling, p. 66:15-18; 2004 Order.) Even if the subject water bodies were of "high
20 quality" for purposes of Resolution 68-16, the 2006 Renewal expressly prohibits "new
21 discharges" from irrigated lands. (See, e.g., 2006 Renewal, p. 6, ¶ 23.) Moreover, the Regional
22 Board appropriately found that the 2006 renewal complies with Resolution 68-16 because persons
23 who obtain coverage through a Coalition must comply with applicable water quality objectives,
24 protect beneficial uses, and prevent nuisance by implementing monitoring and reporting programs,
25 evaluating the effectiveness of management practices, and where water quality exceeds water quality
26 objectives, by identifying and implementing additional management practices to comply with water
27 quality objectives. (2006 Renewal, p. 6, ¶ 23; see also Superior Court Ruling, pp. 64-66.) Thus,
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1 the Regional Board appropriately found that “[t]his Order does not authorize further degradation
2 of such waters.” (2006 Renewal, p. 6, ¶ 23.)

3 CSPA also argues that the Regional Board abused its discretion by failing to address the
4 federal antidegradation policy. However, the waivers do not violate the federal antidegradation
5 policy. “The federal antidegradation policy merely requires that states adopt antidegradation
6 policies that meet the criteria of the federal regulation.” (Superior Court Ruling, p. 68, fn. 7, citing
7 40 C.F.R. §§ 131.6(d), 131.12.) “California has complied with this requirement by incorporating
8 the federal policy into its own antidegradation policy.” (Superior Court Ruling, p. 68, fn. 7,
9 relying on *In the Matter of the Petition of Rimmon C. Fay*, State Board Order No. WQ 86-17
10 (Nov. 10, 1986) 1986 Cal.ENV LEXIS 19, 27.) “Because the waiver does not violate the State’s
11 antidegradation Policy, which incorporates the relevant provisions of the federal policy, the Waiver
12 also does not violate the federal policy.” (Superior Court Ruling, p. 68 fn. 7.) The federal
13 antidegradation policy requires the state to assure that there shall be achieved the highest
14 requirements for all cost-effective and reasonable best management practices for nonpoint source
15 control. To the extent the federal antidegradation policy applies to waters affected by discharges
16 from irrigated lands, the Regional Board appropriately found that the 2006 Renewal “requires
17 management practices to be implemented to achieve applicable water quality standards and to
18 prevent nuisance” and that through its preparation of a long-term regulatory program and related
19 environmental analysis, the Regional Board is “evaluating management practices and will require
20 implementation of practices to achieve best practicable treatment or control of discharges.” (2006
21 Renewal, pp. 6, ¶ 23.)

22 The federal and state antidegradation policies simply do not require instantaneous
23 compliance with “applicable water quality standards” or immediate creation and implementation of
24 best management practices. (2006 Renewal, pp. 6-7, ¶¶ 23-24; see also Superior Court Ruling, pp.
25 67-68.) Even Resolution 68-16 recognizes that some degradation may be appropriate where certain
26 conditions are met. (Resolution 68-16; see also Basin Plan, pp. IV-8.00, IV-16.00-18.00; Wat.
27 Code, § 13241.) The record is replete with evidence demonstrating that any degradation associated
28 with the Central Valley’s viable agricultural production during the maturation of the Irrigated Lands

1 Program is consistent with the maximum benefit to the people of the State. The Irrigated Lands
2 Program sets forth achievable interim goals, and will result in decreased discharges over time. (See
3 2006 Renewal, p. 7, ¶ 24 [“Changes in water quality that may occur as a result of the Conditional
4 Waiver will be to improve, over time, the quality of the waters, not to cause further degradation”].)

5 6. CSPA’s Challenges Scrutinize The Progress Of The Irrigated Lands Program
6 Without Regard To The Regulatory Goals Set Forth By The Regional Board.

7 The stated goals of the 2006 Renewal of the Irrigated Lands Program are “to improve and
8 protect water quality by reducing discharges of waste and by providing an interim program to
9 regulate discharges of waste from irrigated lands that cause or contribute to conditions of pollution
10 or nuisance (as defined in Water Code Section 13050) or that cause or contribute to exceedances of
11 applicable water quality standards until a long-term water quality regulatory program can be
12 developed for dischargers covered by this Conditional Waiver.” (2006 Renewal, p. 8; see also,
13 Amended Resolution No. R5-2003-0105; cf. State NPS Policy, p. 9 [“Each program brought
14 before a [Regional Board or State Board] must be individually judged on its merits [as to] its
15 potential to result in the implementation of actions to successfully prevent or control discharges of
16 nonpoint sources of pollution”].)

17 CSPA scrutinizes the success of the Irrigated Lands Program and the scope of the 2006
18 Renewal based on CSPA’s own goals rather than those regulatory goals established by the
19 Regional Board. For example, CSPA demands that the Regional Board immediately and stringently
20 enforce against any discharges from irrigated lands. CSPA further contends that the Regional
21 Board must regulate discharges to groundwater within this 2006 Renewal. The Regional Board has
22 appropriately focused the Irrigated Lands Program, since its inception and within the 2006
23 Renewal, on surface water.¹⁷ (2006 Renewal, Att. A, p. 17 [“The Conditional Waiver regulates
24 discharges of waste from the irrigated lands to surface waters”].)

25
26 ¹⁷ With respect to CSPA’s allegations about groundwater degradation in the San Joaquin Valley, the Sacramento
27 Valley Coalitions request that the State Board take administrative notice of the Executive Officer’s September and
28 October reports and the September 2006 and October 2006 groundwater workshops at the Regional Board. (Cal.
Code Regs., tit. 23, § 648.2.) As evidenced therein and noted at the June 2006 hearing, the Regional Board has
and will continue to investigate groundwater conditions throughout the Central Valley in order to inform the
creation of any appropriate regulatory program for groundwater.

1 Consistent with its stated goals, the Regional Board appropriately devised an iterative
2 program to gather monitoring data, establish water quality priorities, and develop management
3 practices rather than demanding immediate compliance with water quality objectives. (See 2006
4 Renewal, p. 7, §§ 29, 32 [reiterating the ultimate goal of using the data and management practices
5 gathered through the interim program to devise a “long-term water quality regulatory program to
6 ensure protection of water quality from discharges of waste from irrigated lands to waters of the
7 State”].) The 2006 renewal appropriately implements the Regional Board’s regulatory goals and
8 the record demonstrates that progress is being made to achieve the interim and long-term goals.
9 The 2006 Renewal should be judged against the regulatory goals the Regional Board intends it to
10 achieve, rather than by the independent goals of interested stakeholders such as CSPA. (See also
11 State NPS Policy, p. 5 [“the [Regional Board retains its] prosecutorial discretion to decide how to
12 ensure compliance with their conditional waivers; [t]here are many different ways for the [Regional
13 Board] to ensure compliance. . . .”], p. 9 [“Given the extent and diversity of NPS pollution
14 discharges, the [Regional Board] need to be as creative and efficient as possible in devising
15 approaches to prevent or control NPS pollution”].) Put simply, a Regional Board “may use
16 whatever mix of organizational approaches it deems appropriate” to regulate non-point sources.
17 (State NPS Policy, p. 9.)

18 The legislature and State Board have given the Regional Board a regulatory tool box and
19 wide discretion to take on non-point source pollution and, more specifically, discharges from
20 irrigated lands. The Regional Board appropriately exercised this discretion in renewing the
21 Irrigated Lands Program with the “ultimate goal” of creating a long-term regulatory program
22 designed to “protect the beneficial uses of the State’s waters.” (State NPS Policy, p. 9; see also
23 2006 Renewal, p. 8, §§ 29, 32.) Thus, CSPA’s desire to broaden the regulatory scope does not
24 constitute sufficient justification to overturn the 2006 Renewal.

25 7. The State Board Has Adopted The Fee Schedule For Regulating Discharges From
26 Irrigated Lands Throughout The State And, As Such, CSPA’s Fee Allegations Are
Irrelevant To The Regional Board’s Adoption Of The 2006 Renewal.

27 CSPA’s complaints about lack of funding and requests for additional fee requirements are
28 irrelevant. As stated numerous times throughout the record by members and staff of the Regional

1 Board, the State Board has set a fee schedule to fund the Regional Board's Irrigated Lands
2 Program. The 2006 Renewal expressly provides:

3 Water Code Section 13269(a)(4)(A) authorizes the Central Valley Water
4 Board to include as a condition of a conditional waiver the payment of an
5 annual fee established by the State [Board]. On 16 June 2005, the State
6 [Board] adopted Order No. 2005-0049 *Adopting Emergency Regulation*
7 *Revisions to the Fee Schedule Contained in Title 23, Division 3, Chapter 9,*
8 *Article 1, Section 2200.3 of the CCR, approving a fee schedule for*
9 *agricultural waivers. This Conditional Waiver requires each Discharger who*
10 *participates in a Coalition Group, or the Coalition Group on behalf of its*
11 *participants, to pay an annual fee to the State [Board] in compliance with the*
12 *fee schedule in Title 23 of the California Code of Regulations. (2006*
13 *Renewal, p. 4, ¶ 18.)*

14 Moreover, section 13269, the State Board regulations, and the 2006 Renewal explicitly
15 provide for fees to fund waiver programs. (Wat. Code, § 13269; Cal Code Reg., tit. 23, § 2200.3.)
16 Despite CSPA's contentions, the conversion of this program to a general or individual waste
17 discharge requirement would not affect the resources available to the Regional Board for
18 implementation and enforcement of the program. (See, e.g., 2004 Order, p. 14.)

19 **D. CSPA's Stated Policy Preferences For Regulating Discharges From Irrigated Lands**
20 **Do Not Raise Allegations Sufficient To Warrant State Board Review Of The**
21 **Regional Board's Lawful Policy Decisions About The Irrigated Lands Program.**

22 CSPA sets forth various policy preferences for regulating agricultural discharges, which do
23 not rise to the level of allegations sufficient to justify State Board review of the 2006 Renewal. As
24 stated by this State Board in 2004, "[t]he Regional Board is granted discretion in adopting either
25 waste discharge requirements or a waiver to regulate discharges of waste that may affect waters of
26 the state." (2004 Order, p. 12.) The Superior Court similarly stated: "it is not for this Court to
27 speculate whether a different regulatory framework, such as [waste discharge requirements], would
28 be more efficient or more effective, assuming that the Board even would be able to regulate all
29 25,000 farms using general or area-wide [waste discharge requirements]." (Superior Court Ruling,
30 p. 69.) Thus, the State Board should defer to the Regional Board as the appointed decision-makers
31 for addressing agricultural water quality in the Central Valley.

32 The Sacramento Valley Coalitions recognize that the Central Valley has water quality
33 problems warranting attention. CSPA or any other interested observer may have a million
34 independent ideas on how to best improve Central Valley water quality. However, the Regional

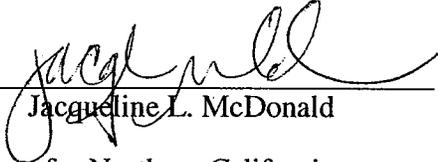
1 Board allowed ample opportunity for interested parties to voice their policy preferences before
2 taking action on the 2006 Renewal. (See, e.g., 2004 Order, p. 13 [“The Regional Board fully
3 explained its rationale and considered numerous factors including the need for a greater regulatory
4 program, the large number of dischargers within the region, the historical regulation of agriculture,
5 and the cost to both the regulated community and the state”].) The policy decisions of the
6 Regional Board warrant deference.¹⁸ (*Fukuda, supra*, 20 Cal.4th at pp. 812, 817; *Elizabeth D. v.*
7 *Zolin* (1993) 21 Cal.App.4th 347, 354.)

8 III. CONCLUSION

9 For the foregoing reasons, the Sacramento Valley Coalitions respectfully request that the
10 State Board deny CSPA’s petition to review the Regional Board Order No. R5-2006-0053.

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15 SOMACH, SIMMONS & DUNN
A Professional Corporation

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17 Dated: October 27, 2006

18 By 
Jacqueline L. McDonald

19 Attorneys for Northern California
Water Association and California Rice
Commission

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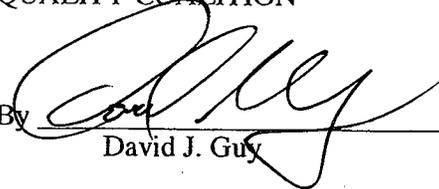
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27 ¹⁸ The Sacramento Valley Coalitions do not herein waive any rights to challenge any application of the 2006
28 Renewal by the Regional Board in a manner inconsistent with the Basin Plans, Water Code, federal Clean Water
Act, or other law, or in a manner detrimental to established privacy and private property rights. Further, the
Sacramento Valley Coalitions reserve the right to challenge the State Board and Regional Board’s characterization of
the Irrigated Lands Program as a quasi-adjudicative action of the Regional Board.

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SACRAMENTO VALLEY WATER
QUALITY COALITION

Dated: October 27, 2006

By 
David J. Guy

1 PROOF OF SERVICE

2 I am employed in the County of Sacramento; my business address is 813 Sixth Street, Third
3 Floor, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

4 On October 27, 2006, I served the following document(s):

5 **RESPONSE TO PETITION FOR REVIEW FILED BY CALIFORNIA**
6 **SPORTFISHING PROTECTION ALLIANCE, ET AL**

7 X (by mail) on the parties in said action, in accordance with Code of Civil Procedure §1013a(3),
8 by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail,
9 addressed as set forth below. At Somach, Simmons & Dunn, mail placed in that designated area is
10 given the correct amount of postage and is deposited that same day, in the ordinary course of
11 business, in a United States mailbox in the City of Sacramento, California.

10 Central Valley Regional Water Quality Control Board 11 11020 Sun Center Drive, Suite 200 Rancho Cordova, CA 95670	Mr. William J. Thomas, Jr. Best Best & Krieger LLP 400 Capitol Mall, Suite 1560 Sacramento, CA 95814 William.Thomas@bbkllaw.com
12 Bill Jennings California Sportfishing Protection Alliance 13 3536 Rainier Avenue Stockton, CA 95204 14 Fax: 209-464-1028	Mr. Waldo Holt San Joaquin Audubon 3900 River Drive Stockton, CA 95204
15 Michael R. Lozeau Law Office of Michael R. Lozeau 16 1516 Oak Street, Suite 216 Alameda, CA 94501 17 Fax: 510-749-9103	Ms. Carrie McNeil Deltakeeper Chapter of Baykeeper 445 Weber Avenue, No. 137B Stockton, CA 95203
18 Mike Jackson Law Office of Mike Jackson 19 P.O. Box 207 429 W. Main Street Quincy, CA 95971 20 Fax: 530-283-0712	

21 I declare under penalty of perjury that the foregoing is true and correct. Executed on
22 October 27, 2006, at Sacramento, California.

23 
24 Yolanda De La Cruz

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

RESOLUTION NO. R5-2006-0077

AMENDING
ORDER NO. R5-2006-0053
COALITION GROUP CONDITIONAL WAIVER
OF WASTE DISCHARGE REQUIREMENTS
FOR DISCHARGES FROM IRRIGATED LANDS
ATTACHMENT B

WHEREAS, the California Regional Water Quality Control Board, Central Valley Region (hereafter Central Valley Water Board) finds that:

1. On 22 June 2006, the Central Valley Water Board adopted Order No. R5-2006-0053, *Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges From Irrigated Lands* (Conditional Waiver).
2. On 23 June 2006, the Central Valley Water Board further discussed two conditions in Attachment B of the Conditional Waiver, Condition A.9 and Condition B.6.
3. Condition A.9 states: "After 31 December 2006, no additional Dischargers may join a Coalition Group to obtain coverage under this Order."
4. The prohibition in Condition A.9 could preclude several justifiable additions to Coalition Groups after the deadline, including but not limited to transfer of property to a new owner, "creation" of a new Discharger due to irrigation of previously non-irrigated lands, and transfer of participation from an existing Coalition Group to a newly-formed Coalition Group.
5. Condition B.6 states that when a discharge is causing or contributing to an exceedance of an applicable water quality standard, the Executive Officer can request that the Coalition Group or Discharger prepare a Management Plan.
6. On 23 June 2006, Central Valley Water Board members discussed requiring Coalition Groups or Dischargers to prepare a Management Plan(s) whenever an exceedance is determined instead of only at the request of the Executive Officer.
7. There are advantages and disadvantages to automatically requiring a Management Plan for each exceedance. In lieu of an automatic trigger, the Central Valley Water Board could direct the Executive Officer to make Management Plans a high priority. This would allow staff to consider all factors associated with an exceedance and set priorities for the water quality issues to be pursued.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

For purposes of adoption of this Resolution, the Central Valley Water Board is the lead agency pursuant to CEQA (Public Resources Code sections 21100 et seq.). On 11 July 2003, the Central

Valley Water Board adopted Order No. R5-2003-0103, which approved the Initial Study and adopted a Negative Declaration for the Conditional Waiver. On 22 June 2006, the Central Valley Water Board found that no subsequent environmental document was required for adoption of Order No. R5-2006-0053. The revisions to Attachments B of the Conditional Waiver as set forth herein do not require the Central Valley Water Board to prepare a subsequent or supplemental EIR or negative declaration because the revisions do not constitute substantial changes to the project as specified in Title 14 California Code of Regulations sections 15162 or 15163.

THEREFORE BE IT RESOLVED:

1. Order No. R5-2006-0053, dated 22 June 2006, is hereby amended based on the above findings.
2. Attachment B, Condition A.9 of Order No. R5-2006-0053, shall be amended to state:

“After **31 December 2006** no additional participants may join any Coalition Group unless one or more of the following conditions exists:

- a. The subject owner and/or property were not a “discharger” qualifying for coverage under the Coalition Group Conditional Waiver prior to 31 December 2006, but management or physical changes on the subject property, or on properties between the subject property and receiving surface waters to which the wastewater drains, have been modified such that the subject owner and property are now a “discharger” and qualify for Coalition Group membership.
- b. The owner/property were participants in one Coalition Group or covered under the Individual Discharger Conditional Waiver Order prior to 31 December 2006, but are transferring their participation to another Coalition Group.
- c. Coalition Group boundaries change or a new Coalition Group is formed, such that an area not previously covered by any Coalition Group now is covered, so growers in those areas should be able to join the new or revised Coalition Group.
- d. The property was transferred to a new owner after 31 December 2006.
- e. Water Board staff determines that an owner or operator is a discharger where the owner or operator reasonably asserts that he/she is not a discharger as defined by the Conditional Waiver.
- f. Other situations reviewed and approved by the Executive Officer on a case-by-case basis.

All additions of participants to a Coalition Group after **31 December 2006** must be approved by the Executive Officer.”

3. Attachment B, New Condition after Condition B.6 of Order No. R5-2006-0053, shall state:

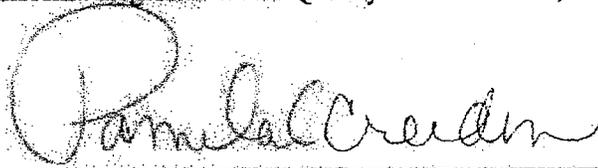
“The Coalition Group shall submit a management plan when there has been more than one exceedance of a water quality standard in three years, unless the Executive Officer determines that the exceedance is not likely to be remedied or addressed by a management plan.”

RESOLUTION NO. R5-2006-0077
AMENDING ORDER NO. R5-2006-0053
COALITION GROUP CONDITIONAL WAIVER
OF WASTE DISCHARGE REQUIREMENTS
FOR DISCHARGES FROM IRRIGATED LANDS
ATTACHMENT B

- 3 -

4. The Central Valley Water Board directs the Executive Officer to regularly include a report to the Central Valley Water Board that describes the actions taken to require management plans.

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 3 August 2006.

A handwritten signature in cursive script that reads "Pamela C. Creedon". The signature is written in dark ink and is positioned above a horizontal line.

PAMELA C. CREEDON, Executive Officer