



1 SOMACH, SIMMONS & DUNN
 A Professional Corporation
 2 KRISTEN T. CASTAÑOS (#198672)
 JACQUELINE L. MCDONALD, ESQ. (# 226803)
 3 813 Sixth Street, Third Floor
 Sacramento, California 95814
 4 Telephone: (916) 446-7979

5 Attorneys for Northern California Water
 Association and California Rice Commission

6 SACRAMENTO VALLEY WATER QUALITY COALITION
 7 455 Capitol Mall, Suite 335
 Sacramento, California 95814
 8 Telephone: (916) 442-8333

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.**
)

17
 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

23
 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
21

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
23

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.)

20 ///

21 ///

22 ///

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

