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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

CALIFORNIA SPORTFISHING)	Case No.:
PROTECTION ALLIANCE, a non-profit)	
corporation, and BAYKEEPER, a non-profit)	VERIFIED PETITION FOR WRIT OF
corporation,)	MANDATE (Code Civ. Pro. § 1094.5) Based
)	On Porter-Cologne Water Quality Control Act,
Petitioners,)	Water Code § 13000 <i>et seq.</i> and California
v.)	Environmental Quality Act, Pub. Res. Code
)	§ 21000 <i>et seq.</i>
CALIFORNIA REGIONAL WATER)	
QUALITY CONTROL BOARD –)	
CENTRAL VALLEY REGION, a state)	
agency,)	
)	
Respondent.)	
_____)	

INTRODUCTION

California Sportfishing Protection Alliance and Baykeeper (“Petitioners”) respectfully seek the issuance of a writ of mandate (1) ordering Respondent California Regional Water Quality Control Board - Central Valley Region (“Regional Board”) to vacate and set aside the “Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands” and accompanying monitoring programs as set forth in Order No. R5-2006-0053 and Order No. R5-2006-0054, and (2) ordering the Regional Board to vacate and set aside a negative declaration prepared in conjunction with the Waiver and issued pursuant to those orders. By

issuing the Waiver and by failing to perform its duties under the California Environmental Quality Act, the Regional Board has violated the Porter-Cologne Water Quality Control Act (“Porter-Cologne”), Water Code § 13000 *et seq.* and the rules, regulations, and policies issued there-under and has failed to comply with the California Environmental Quality Act (“CEQA”), Public Resources Code § 21000 *et seq.*

These waivers are also contributing to damage to threatened and endangered fish. Section 2080 of the Fish and Game Code prohibits "take" of any species that the commission determines to be an endangered species or a threatened species. There is “take” occurring in the Bay/Delta of species at the present time. The Bay/Delta ecosystem is presently in crisis as pelagic fish populations are experiencing an unprecedented level of decline. The state and federally listed Delta smelt, steelhead, and the winter and spring runs of salmon are all experiencing substantial population losses and habitat declines. Recovery goals for these species are not being met. Delta water pumping, exotic species, and toxic water have been identified by state and federal scientific reports as probably causing the decline in habitat value that has resulted in declining populations. These scientific reports also say that agricultural chemicals, salts, metals, elevated water temperatures, and dams and flow reductions for agriculture affect fish and other beneficial uses of the state’s waterways.

- 1) It is estimated by the Regional Board that approximately 25,000 farms are operating within the Central Valley. These agricultural operations apply more than 200 million pounds of toxic pesticides to their lands annually. They also apply millions of pounds of fertilizers to their lands throughout the Valley. Large amounts of excess pesticides, fertilizers, sediment, and other pollutants contaminate irrigation waters and storm water flowing over these lands. Many of these farming operations discharge the resulting polluted waters directly or indirectly into waters of the State. Unless carefully regulated, pollution discharges from agricultural lands will cause and/or contribute to violations of

water quality objectives in hundreds of miles of Central Valley waterways and hundreds of thousands of acres of the Sacramento River/San Joaquin River Delta in the future.

2) Under Porter-Cologne, any person proposing to discharge pollution to any waters of the State must submit a report of waste discharge (“RWD”) and obtain a permit known as waste discharge requirements (“WDRs”) authorizing their pollution releases. A RWD provides the information necessary to determine who proposes to discharge what pollutant at what volume and concentration into waters of the state and nation and the likely effects to receiving waters from that waste discharge. WDRs set forth specific requirements restricting pollution levels to assure compliance with water quality objectives, requiring specific monitoring, and requiring detailed monitoring and compliance reports to be submitted to the regional board and available to the public. The regional boards are authorized to waive RWDs and WDRs where such waiver is in the public interest and consistent with applicable water quality control plans. However, the regional boards must ensure compliance with the conditions pursuant to which waivers are granted and must, at a hearing, determine whether the discharge for which the waiver policy was established should be subject to general or individual WDRs. Water Code § 13269. The Regional Board Orders No. R5-2006-0053 and R5-3006-0054 set forth two “Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands” and accompanying monitoring programs (hereinafter collectively referred to as the “Waiver”). The Waiver unlawfully exempts tens of thousands of irrigated agricultural operations that are discharging substantial pollution to public waterways throughout the Central Valley from having to comply with the reporting requirements, permitting requirements, and water quality objectives that otherwise would apply to these discharges of pollutants under Porter-Cologne.

3) Because the Waivers exempt agricultural operations from having to submit RWDs, the Regional Board does not know how many discharges it is waiving, where they are located, what pollutants they are discharging, how much they are discharging, who controls the discharges, what management measures or pollution reduction measures they have applied, if any, whether such measures work, and other basic information necessary to substantiate the Regional Board's finding that the Waivers are in the public interest. The Waivers do not preclude farms from increasing their pollution discharges in the future.

4) Because the Regional Board does not know what measures or best management practices, if any, will be applied by agricultural operations pursuant to the Waiver conditions, the Waiver does not assure that agricultural pollution discharges will be restricted to levels protective of water quality.

5) The administrative record of the waivers is pregnant with examples of blatant, massive noncompliance with the explicit conditions of the previously adopted waivers and the failure of the Regional Board to enforce the conditions of the waiver. The discharger coalitions have failed to comply with fundamental monitoring and reporting requirements in the waiver. They have refused to identify the best management practices that are in place or quantify their effectiveness.

6) Despite the Water Code's requirements that the Regional Board ensure compliance with waiver conditions, there has been no enforcement in the face of massive noncompliance. Indeed, there is nothing in the present waiver that will enable the Regional Board to enforce waiver conditions against legally fictitious coalitions of dischargers, other than the draconian and unpalatable step of decertifying an entire coalition comprising thousands of farmers. No coalition has ever been decertified, despite massive noncompliance with the last waiver. The Regional Board's enforcement options can only be employed against actual dischargers, and the coalitions act as a shield that prevents the

Regional Board from knowing who is discharging what pollutants at what concentrations or whether measures to reduce or eliminate pollution are in place.

7) Any adopted waiver must comply with California's Anti-degradation Policy.

Resolution No. 68-16 states that, "Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained." By waiving requirements to identify who is discharging what concentration of what pollutants and without being able to identify who is or isn't employing best management measures, the Regional Board cannot comply with Resolution 68-16.

8) Any adopted waiver must comply with California's Non-point Source Control Policy. In 1999, the State Board, in its continuing effort to control non-point source pollution in California, adopted the Plan for California's Non-point Source Pollution Control Program. In 2004, the State Board adopted the Policy for the Implementation and Enforcement of the Non-point Source Pollution Control Program, which explains how the NPS Program will be implemented and enforced and, in so doing, fulfilling the requirements of CWS § 13369(a)(2)(B). The Policy has a number of Key Elements including, among other requirements, that implementation plans must: (1) address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses; (2) contain a description of management measures expected to be implemented to ensure attainment and the process to be used to select or develop Management measures, and the process to be used to ensure and verify proper implementation; (3) include a specific time schedule and corresponding, quantifiable milestones designed to measure

progress toward reaching the specified requirements; (4) include sufficient feedback mechanisms so that the regional boards, dischargers and the public can determine whether the program is achieving its stated purpose(s) or whether additional or different management measures or other actions are required. The adopted waiver fails to comply with any of the above-enumerated Key Elements.

9) Any adopted waiver must comply with Porter-Cologne's Bay Protection and Toxic Cleanup requirements. Water Code § 13390 et seq. The program required the state and regional boards to establish programs that identify and provide remedial action at toxic hot spots in California's bays and estuaries. CWC § 13394 required the adoption of cleanup plans for identified toxic hot spots. The Regional Board identified toxic hot spots in the Central Valley to include: 1) mercury in the Delta and tributaries, 2) low dissolved oxygen in the San Joaquin River, 3) Diazinon in the Sacramento and San Joaquin Rivers and Delta, 4) pesticides in irrigation return flows in the Delta and its tributaries. The State Board approved the Regional Board's proposal to implement the cleanup plans through total maximum daily load ("TMDLs") pollution loading calculations required by Section 1313(d) of the Federal Water Pollution Control Act, 33 U.S.C. § 1313(d). Unfortunately, the program has been undermined by the Regional Board not knowing who is discharging what pesticides when or in what concentrations or who has or has not implemented management measures or if any specific management measures have been effective. Further, CWC § 13395 requires that the Regional Board initiate a re-evaluation of waste discharge requirements for dischargers who have discharged all or part of the pollutants that caused the toxic hot spot. The re-evaluations are for the purpose of ensuring compliance with water quality control plans and were required to be completed with one year of ranking. The Regional Board was required to revise waste discharge requirements of those identified as discharging pollutants into the toxic hot spot. The Regional Board has never

complied with this mandate, in part because it was unable to identify the specific dischargers causing or contributing to the toxic hot spots. The waiver is fundamentally inconsistent with Bay Protection because of guarantees that the Regional Board will never know who is discharging the pollutants causing toxic hot spots or whether or not the discharger has implemented management measures to prevent continued pollution of the toxic hot spot. In fact, the Regional Board cannot even implement its adopted TMDLs because it is unable to assign load allocations to specific agricultural dischargers because it has waived WDRs and, consequently, does not know who they are, the quantities discharged, or whether any management measures have been implemented.

10) The adopted waiver fails to comply with the Regional Board's Water Quality Control Plan for the Sacramento and San Joaquin River Basin and numerous specific Regional Board policies including: the Controllable Factors Policy, Water Quality Limited Segment Policy, Anti-degradation Implementation Policy, and the implementation policy for Pesticide Discharges from Non-point Sources.

11) Any adopted waiver must protect groundwater. Unfortunately, the waivers exempt groundwater from coverage. The exclusion of coverage of polluted discharges to groundwater violates Porter-Cologne, which applies broadly to all state waters, including surface waters, wetlands, and groundwater. Indeed, it covers waste discharges to land as well as to surface and groundwater. The problems and the extent of groundwater contamination from agriculture have been documented for years.

12) The Regional Board adopted Orders No. R5-2006-0053 and R5-2006-0054 and also approved an Initial Study and adopted a Negative Declaration resolving that the Waiver's authorization of pollution discharges from millions of square miles of irrigated agricultural lands would not have a significant effect on the environment. The administrative record contains substantial evidence that a waiver of regulation of these discharges may have a

significant effect on the environment, requiring the preparation of an environmental impact report (“EIR”).

13) By engaging in the preceding actions, Respondent acted without and in excess of its jurisdiction and prejudicially abused its discretion by failing to proceed in the manner required by law, by issuing and approving Resolutions and Orders not supported by the findings, and by relying on findings not supported by the evidence, including but not limited to: (1) Respondent’s unauthorized waiver of farmers’ obligation to comply with water quality objectives; (2) Respondent’s finding that it is in the public interest to authorize thousands of farmers to discharge massive quantities of pollutants that will violate water quality objectives and impair beneficial uses of vast stretches of Central Valley waters; (3) Respondent’s finding that the Waiver is consistent with the state and federal anti-degradation policies; (4) Respondent’s finding that the Waiver is consistent with the Water Quality Control Plan (Basin Plan) for the Sacramento River and San Joaquin River Basins (fourth ed., 1998) (“Basin Plan”); (5) Respondent’s conclusion that the agency has complied with CEQA by issuing a negative declaration rather than an EIR, and (6) Respondent’s finding that the agency has complied with the California Endangered Species Act and the state public trust.

14) Therefore, Respondent’s actions are invalid under the California Code of Civil Procedure (“CCP”) section 1094.5 or, in the alternative, CCP section 1085, and Petitioners request this Court to issue a writ of mandate ordering the Regional Board to vacate and set aside the Waiver and negative declaration.

PARTIES

15) Petitioner California Sportfishing Protection Alliance (“CSPA”) is a non-profit, public benefit fishery conservation organization with its main office in Woodland, California. Incorporated in 1983, CSPA works for the restoration and conservation of the state’s fishery resources and their aquatic ecosystems. CSPA works to ensure these fishery resources are conserved and managed on a sustainable basis to enable their use by the sportfishing public now and in the future. As an alliance, CSPA currently represents

several thousand members from over a dozen affiliated fishing organizations that reside in California.

16) Petitioner Baykeeper is a non-profit public benefit corporation organized under the laws of the State of California with its main office in San Francisco, California. Baykeeper has approximately 2500 members who live and/or recreate in and around the San Francisco Bay and Delta watershed. Baykeeper is dedicated to the preservation, protection, and defense of the environment, wildlife, and natural resources of the San Francisco Bay and Delta watersheds. Baykeeper maintains boats and volunteer-based patrols throughout the Bay and Delta watersheds. To further its mission, Baykeeper actively seeks federal and state agency implementation of state and federal water quality laws and, where necessary, directly initiates administrative challenges and enforcement actions on behalf of itself and its members.

17) Members of Petitioners reside near the myriad waterways making up the Bay and Delta watershed, including the San Joaquin River, Sacramento River and the Delta, and use and enjoy those waters for recreation and other activities. Members of Petitioners use and enjoy the waters into which agricultural operations are discharging and will discharge pollution and which Respondents have excluded from the requirements of California's water quality control laws. Members of Petitioners use those areas to drink, fish, sail, boat, kayak, bird watch, view wildlife and engage in scientific study including monitoring activities. Numerous members of Petitioners have swum or drunk from, or would like to swim and drink from the San Joaquin River, Sacramento River and Delta, but are seriously concerned and fearful about the health effects of consuming or coming into contact with pesticides and other agricultural pollutants.

18) The discharge of pesticides and other pollutants from agricultural operations throughout the Central Valley into the Valley's rivers and streams has impaired the beneficial uses identified in the preceding paragraph and will again impair those beneficial uses in the future. Pursuant to the Waiver, agricultural operations' discharges of pesticides and other pollutants have significantly contributed to unacceptably high levels of pesticides and other pollutants in the San Joaquin River, Sacramento River, Delta, their tributaries,

and other waters of the Central Valley and will contribute impairing levels of those pollutants in the future. Those impairments likely will continue and be exacerbated by the implementation of the Regional Board's Waivers, Resolution No. R5-2006-0053 and R5-2006-0054.

19) On behalf of themselves and their members, Petitioners actively gather and distribute information in order to educate their members, the general public, and state and federal agencies regarding the environmental health of California's waters, including waters within the Central Valley. Petitioners publish regular newsletters, maintain websites, prepare comments on proposed regulatory actions, and monitor agency actions regarding water quality in the Central Valley. In order to carry out their educational and advocacy missions, Petitioners depend upon the agencies' full compliance with environmental assessment statutes such as CEQA.

20) The health, environmental, recreational, scientific, and informational interests of Petitioners and their members have been, are being, and will continue to be directly and adversely affected by the Regional Board's failure to comply with Porter-Cologne and with CEQA in issuing the Waivers under Resolutions No.R5-2006-0053 and R5-2006-0054, including the accompanying monitoring orders, and the Initial Study and Negative Declaration.

21) Pursuant to Water Code § 13269, Respondent Regional Board is the entity authorized to issue water pollution control permits and to waive certain reporting and permitting requirements when it is in the public interest.

22) Respondent Regional Board is the lead agency responsible under CEQA for evaluating the environmental impacts of the project.

STATUTORY BACKGROUND

Porter-Cologne and Associated Rules, Regulations and Policies

23) Porter-Cologne has the explicit goal to protect all California waters for use and enjoyment by the people of the state. Porter-Cologne maintains "that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable..." Water Code § 13000.

24) The highest level of water quality that is reasonable within the Central Valley is set forth in the Basin Plan. Pursuant to Porter-Cologne, the Regional Boards must develop basin plans to “ensure the reasonable protection of beneficial uses” of waters and setting forth “water quality conditions that could reasonably be achieved. . . .”. Water Code § 13241. The beneficial uses of Central Valley waters that must be protected include, but are not limited to, drinking water use, recreational use, and aquatic habitat use. Among other water quality objectives necessary to protect these uses, the Basin Plan prohibits “toxic substances in concentrations that produce detrimental physiologic responses in human, plant, animal, or aquatic life.” Basin Plan, p. III-8.00.

25) Porter-Cologne authorizes Respondent to issue permits, or waste discharge requirements (“WDRs”), for any discharge to the state’s waters by prescribing requirements to meet water quality objectives in order to protect the beneficial uses of those waters. Water Code § 13263(a).

26) The Regional Board may only waive reports of waste discharge (“RWDs”) and/or WDRs if the agency determines, after a hearing, that “the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest.” Water Code § 13269(a).

27) Respondent’s waiver authority is limited to waiving only two requirements: the filing of RWDs and the issuance of WDRs. Water Code section 13269 does not authorize Respondents to waive compliance with any water quality objectives, the state and federal anti-degradation policies, or the pesticide control provisions of the Central Valley Basin Plan.

28) Pursuant to California’s anti-degradation policy, as set forth in State Board Resolution No. 68-16 and as adopted in the Basin Plan, the state is required to maintain existing high quality water conditions. Respondent’s actions must ensure the maintenance of water quality from water found upstream or up-gradient of the discharge, unaffected by other discharges. The Basin Plan identifies all Central Valley waters as high quality waters. State Board Resolution No. 68-16 provides: “...existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum

benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.”

29) Resolution No. 68-16 requires specific steps to protect high quality waters, including mandating the use of Waste Discharge Requirements through specified technology-based effluent limitations. Resolution No. 68-16, ¶ 2. Both the Regional Board’s Basin Plan and Resolution No. 68-16 require dischargers to demonstrate that their proposed pollution discharges will not result in any degradation of water quality as set forth in Resolution No. 68-16.

30) Similar to the state anti-degradation policy, the federal anti-degradation policy mandates that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1).

31) Pursuant to the Basin Plan, all agricultural dischargers of pesticides were required to “implement management practices that result in full compliance with [water quality] objectives by 1 January 1993, unless required to do so earlier. . . .” Basin Plan, p- IV-34.00. “Dischargers will be given three years, with a possibility of three one year time extensions depending on the circumstances involved, to develop and implement practices that will meet the objectives.” Basin Plan, p. IV-35.00. Counting from the January 1, 1993 deadline for complying with standards, the Basin Plan required agricultural dischargers to have established and implemented practices that assure attainment of water quality objectives by January 1, 1999 at the latest. In addition, the Basin Plan requires the Regional Board, beginning in January 1993, to review and approve management practices addressing pesticide discharges.

California Environmental Quality Act

32) The California Environmental Quality Act (“CEQA”) was enacted to “ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.” Public Resources Code § 21001(d).

33) CEQA requires each state agency to conduct an Initial Study and prepare an EIR when the agency proposes to approve or carry out a discretionary project that may have a significant impact on the environment. Pub. Res. Code § 21100(a). The purpose of an EIR is to inform the public and the responsible officials of the environmental consequences of state agency decisions before those decisions are made. The agency must prepare an EIR whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur, even if contradictory evidence exists in the record. Pub. Res. Code § 21082.2(d).

FACTUAL AND PROCEDURAL BACKGROUND

The Waivers

34) Respondent Regional Board caused a draft “Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands” to be prepared and circulated for comment. On June 22, 2006 Respondent Regional Board held a public hearing on the Waivers and adopted them by Order No.R5-2006-0053 and R5-2006-0054.

35) Under Order No. R5-2006-0053 and R5-2006-0054, the Waiver exempts tens of thousands of agricultural operations in the Central Valley from complying with the fundamental discharge control, monitoring and reporting provisions required by Porter-Cologne. Under an established permitting program, such as Waste Discharge Requirements, which apply to most California industries that discharge into waters, individual dischargers must apply for permit coverage, fully characterize their waste discharges, submit periodic reports summarizing their discharges, pay an annual fee, ensure that their discharges do not exceed pollution levels set forth by the permit, and face penalties for exceeding pollution levels.

36) The Waivers include two categories of dischargers. The first category includes self-identified groups of dischargers referred to as Coalition Groups. The second group of dischargers includes individuals who are not associated with one of the Coalition Groups.

37) The Waiver does not provide any guidance regarding which dischargers and/or other entities may form a Coalition Group. The Waiver does not include any restrictions on

the size of a Coalition Group. The Waiver does not include any restrictions on the geographic scope of a Coalition Group.

38) The Waiver requires Coalition Groups to prepare various reports and submit them to the Regional Board by specified dates. Although their potential members are dischargers, the Coalition Groups themselves are not dischargers. The Waiver's conditions do not include a specific date by which dischargers must comply with water quality objectives

39) The Waiver provides for limited monitoring by Coalition Groups within the term of the Waiver. Monitoring requires analysis of general parameters (temperature, electrical conductivity, pH and dissolved oxygen), toxicity and certain impairing pollutants. "Major drainages" must be sampled the first year. Twenty percent of "intermediate drainages" must be sampled in subsequent years, beginning in 2005. "Small drainages" must only be sampled if water quality problems are identified in intermediate drainages. The Coalition Groups were allowed to determine which drainages within their claimed areas constitute major, intermediate, or small drainages.

Initial Study and Negative Declaration

40) With regard to a CEQA analysis, the agency project complained against is the Regional Board's approval of discharges of massive amounts of agricultural pollutants from approximately seven million acres of irrigated agricultural lands throughout the Central Valley region resulting in broad violation of water quality standards at a period of time when the Delta smelt may be going extinct partly because of the agricultural pollutants discharge herein authorized by the Boards.

41) Re-issuing a negative declaration, after receiving and reviewing, over the last waiver period, coalition information reflecting wide-spread and consistent violation of water quality regulations and basin plan water quality objectives by agriculture, at a time when agricultural pollution is suspected as a cause of the on-going Pelagic fish population crash in the Bay/Delta, without requiring a full-scale EIR, is a violation of CEQA. In our comment letters, petitioners cited studies that demonstrated discharges from agriculture are frequently toxic to aquatic life and critical food-web components of the estuary's

ecosystem. Now, additional monitoring by U.C. Davis staff has established that nearly all agricultural water-bodies in the Central Valley are toxic to aquatic life in violation of water quality standards.

42) Even according to the Regional Board's Coalition monitoring results, thousands of miles of rivers and streams in the Central Valley, including the Sacramento and San Joaquin Rivers and Delta, are so polluted by agricultural discharges that they are unsafe for fishing, swimming, and drinking. It is clear that the make-shift program the Board developed for the last waiver period in order to give agriculture Conditional Ag Waivers is a failure. The earlier waiver program did not compel compliance with its own requirements, lacked accountability by failing to require dischargers to identify themselves, and sent the wrong message to agricultural dischargers by failing to require that they control their waste water discharge just as the state requires thousands of other dischargers to the public's waters to control their discharges. The proposed Waivers do not remedy the problems revealed during the prior waiver period.

43) Unfortunately, over the last waiver period the Delta ecosystem has gone from bad to catastrophically bad. Today, key pelagic organisms seen as indicator species for the Bay/Delta are on the verge of collapse. Experts point to degraded water quality in the Delta as one of the probable principal causes. Given the condition of the estuary, the numerous species of fish now listed under the state and federal Endangered Species Acts, and the long term declines of water quality and many other species, it time to stop destroying the public's fishery resources by allowing these huge amounts of toxic flows to be discharged from agricultural lands into the rivers and streams of California.

44) The agency may issue a Negative Declaration only when "a proposed project will not have a significant effect on the environment and does not require the preparation of an

environmental impact report.” Pub. Res. Code § 21064. The agency must prepare an EIR whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur, even if contradictory evidence exists in the record. Pub. Res. Code § 21082.2(d).

PETITIONERS’ EXHAUSTION OF ADMINISTRATIVE REMEDIES

45) The Resolutions and Orders issuing the Waiver and negative declaration were the result of proceedings in which hearings were required to be given and evidence was required to be taken pursuant to Water Code section 13263.

46) Petitioners, other agencies, interested groups, and individuals provided timely oral and written comments on the drafts of the Waiver during all public comment periods and hearings and raised each of the legal deficiencies asserted in this petition. On July 24, 2006 Petitioners filed a timely administrative appeal with the State Board challenging Respondent Regional Board’s Resolution adopting the Waiver. On May 17, 2007 the State Board summarily refused to hear Petitioners’ petition for review.

47) Petitioners, other agencies, interested groups, and individuals made timely oral and written comments on the Initial Study and the Negative Declaration to both the Regional Board and State Board and raised each of the legal deficiencies asserted in this petition.

48) Petitioners performed all conditions precedent to filing this action by complying with the requirements of Public Resources Code section 21167.5 in filing notice of this action on June 15, 2007. A true and correct copy of petitioners’ notice of intent to file a CEQA petition is attached hereto as Exhibit A.

49) A petition for writ of mandate seeking review of a final decision by the Regional Board and State Board must be filed not later than 30 days from the date of service of a copy of the order by the State Board. Water Code § 13330(a). On May 17, 2007, the State Board served a copy of an order of dismissal on Petitioners. This action is timely filed.

50) On June 15, 2007, Petitioners requested that Respondent Regional Board prepare a true and correct copy of the administrative record. A copy of that request is attached as Exhibit B.

51) Petitioners have exhausted all administrative remedies provided by Respondent. Petitioners have no other plain, speedy, or adequate remedy in the ordinary course of law in that, unless the Court grants the requested writ of mandate to require the Regional Board to comply with its legal obligations, Respondent will continue to proceed in violation of the law.

STANDARD OF REVIEW

52) Pursuant to Code of Civil Procedure section 1094.5, the inquiry for claims under Porter-Cologne extends to the question of whether Respondent has proceeded without or in excess of its jurisdiction and whether, in connection with the challenged Resolutions and Orders, there was any prejudicial abuse of discretion. Abuse of discretion is established where Respondent has not proceeded in the manner required by law, where the Resolutions and Orders are not supported by the findings, or where the findings are not supported by the evidence. Pursuant to Water Code § 13330(d), in its review of findings in a Regional or State Board order, “the Court shall exercise its independent judgment on the evidence.” Code Civ. Pro., § 1094.5(c) provides that in cases such as this “in which the Court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the Court determines that the findings are not supported by the weight of the evidence.”

53) Pursuant to Code of Civil Procedure section 1094.5, the inquiry for claims under CEQA extends to the question of whether Respondents have proceeded without or in excess of their jurisdiction and whether, in connection with the challenged Resolutions and Orders, there was any prejudicial abuse of discretion. Abuse of discretion is established where Respondents have not proceeded in the manner required by law, where the Resolutions and Orders are not supported by the findings, or where the findings are not supported by the evidence. CCP section 1094.5(c) provides that in cases such as this “abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.” The agency must prepare an EIR whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur, even if contradictory evidence exists in the record. Pub. Res. Code § 21082.2(d).

CLAIMS FOR RELIEF
FIRST CAUSE OF ACTION
(Failure to Comply With Porter-Cologne)

Count 1
(Failure to Meet Water Quality Objectives)

54) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

55) The Regional Board's finding that waiving reporting and permitting requirements for discharges of agricultural waste that are causing and/or contributing to existing violations of water quality objectives is without authority because the legislature did not authorize the Regional Board pursuant to Section 13269 to waive compliance with water quality objectives or the establishment of schedules to comply with such objectives. Through the Waiver, Respondent Regional Board provided no timelines or benchmarks for achieving water quality objectives, waived the requirement to comply with fundamental water quality objectives, and is allowing these discharges to further cause or contribute to exceedences of water quality objectives. The Regional Board has no authority to take these actions under section 13269 of the Water Code.

Count 2
(No Waiver Authority for Substantial Waste Discharges)

56) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

57) The Regional Board's finding that it can waive reporting and permitting requirements for the largest identified source of pollution and impairment in California, discharges of agricultural waste, is without authority and contrary to law because it directly conflicts with the Legislature's intent in enacting Section 13269 that waivers not be available for such substantial discharges of waste.

Count 3

(Failure to Comply With State and Federal Anti-Degradation Requirements)

58) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

59) The Regional Board's finding that issuing the Waiver is consistent with State Board Resolution No. 68-16 is contrary to law, not supported by the weight of the evidence, and inconsistent with other findings. Respondent's finding that the waters of California affected by these waivers are not high quality waters under the anti-degradation policy is not supported by substantial evidence. The Waiver is contrary to Resolution No. 68-16's mandate that any activity that may produce waste or an increased volume or concentration of waste that discharges to high quality waters must be required to meet waste discharge requirements. The weight of the evidence in the record does not support a finding that the Waiver's conditions assure that pollution or nuisance will not occur and maintain the highest water quality consistent with the maximum benefit to the people of the State. The absence of evidence is due, in large part, to the Regional Board's failure to comply with Resolution No. 68-16's mandate that dischargers to high quality waters meet the burden of showing that no further degradation of water quality would occur from their discharges. Respondent State Board erred in affirming the Regional Board's actions for the same reasons.

60) The Regional Board failed to include a defensible anti-degradation analysis regarding the likely increased degradation caused by what is proposed in the Waivers. Substantial change has occurred since the adoption of the last waiver that has resulted in increased degradation of the state's waters caused by new chemicals, new cropping patterns and changing farming practices. The Waiver contains no analysis of these new effects on fish and the Bay/Delta environment, and recent scientific evidence indicates that chemical effects may have been enhanced by these changes on the ecosystem. The Basin Plan requires programs addressing pesticide discharges to comply with the federal anti-degradation policy. 40 C.F.R. § 131.12. Respondent failed to adequately consider the state and federal anti-degradation policies in adopting and affirming the Waivers and misconstrued their meaning and requirements. These policies require an evaluation of

increases in pollutant loads constituent by constituent and water body by water body. In failing take these required steps, Respondent has failed to adequately address the state and federal anti-degradation policies and therefore has abused its discretion.

Count 4

(Regional Board's Public Interest Finding Is Contrary to Law
and Not Supported by Weight of the Evidence)

61) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

62) Respondent's action in adopting the Waivers constitutes a prejudicial abuse of discretion in that Respondent's authorizing discharges of toxic and other pollutants from 25,000 agricultural operations throughout the Central Valley without complying with Porter-Cologne's reporting and permitting requirements is contrary to law and not supported by the weight of the evidence as follows:

- a. The Regional Board's finding that waiving reporting and permitting requirements for discharges of agricultural waste is not against the public interest is contrary to law and not supported by the weight of the evidence. For example, the Regional Board has in the last waiver period failed to gather complete evidence regarding, among other relevant topics, the number of agricultural dischargers, the location of discharges, the volume of discharges and their constituents, what, if any, management practices are being applied to mitigate or eliminate the pollution, whether those practices actually control any pollutants, and the availability of other management practices that would be more effective.
- b. The Regional Board's finding that the inadequate reporting and permitting requirements in the Waivers for discharges of agricultural waste is not against the public interest is contrary to law and not supported by the weight of the undisputed expert evidence that the monitoring program applicable to Coalition Groups has not gathered sufficient data to determine that agricultural dischargers are complying with water quality objectives; that

such dischargers are not increasing their pollution discharges (indeed partial evidence in coalition reports indicate that they are increasing discharges); or that such dischargers are implementing appropriate management practices; and,

- c. The Regional Board's finding that the inadequate monitoring, reporting and permitting requirements for discharges of agricultural waste is not against the public interest is contrary to law and not supported by the weight of the evidence. The Regional Board has inadequate staff in place in order to effectively implement the Waiver, and fees charged under the waivers fail to supply enough money to support the program.

Count 5

(Failure to Meet the Basin Plan's Pesticide Discharge Control Requirements)

63) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

64) The Regional Board's finding that the Waiver is consistent with the Central Valley Basin Plan is contrary to law and not supported by the weight of the evidence. By issuing the Waiver, Respondent Regional Board authorized agricultural discharges of pesticides that are inconsistent with the Basin Plan's express deadline for agricultural operations to comply with water quality objectives. The Waiver's delegation of management practice evaluation to the dischargers also conflicts with the Basin Plan requirement for the Regional Board to review and approve management practices relating to pesticide discharges. The Regional Board has no authority to take these actions in violation of the Basin Plan's pesticide discharge control provisions.

Count 6

(Failure to Comply with the Non-point Source Control Program and Policy)

65) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

66) This Policy has a number of Key Elements including, among other requirements, that implementation plans must: (1) address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, (2) provide a description of management measures expected to be implemented to ensure attainment and the process to be used to select or develop Management measures, and the process to be used to ensure and verify proper implementation, (3) include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements, (4) include sufficient feedback mechanisms so that the regional boards, dischargers and the public can determine whether the program is achieving its stated purpose(s) or whether additional or different management measures or other actions are required. The adopted waiver fails to comply with any of the above-enumerated Key Elements. The Regional Board has no authority to take these actions in violation of the Basin Plan's pesticide discharge control provisions.

Count 7

(Failure to Comply with the Bay Protection and Toxic Cleanup Requirements)

67) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

68) Porter Cologne law requires the Regional and State Board to comply with Porter-Cologne's Bay Protection and Toxic Cleanup requirements. Water Code § 13390 et seq. The program required the state and regional boards to establish programs that identify and provide remedial action at toxic hot spots in California's bays and estuaries. CWC § 13394 required the adoption of cleanup plans for identified toxic hot spots. The Regional Board identified toxic hot spots in the Central Valley to include: 1) mercury in the Delta and tributaries, 2) low dissolved oxygen in the San Joaquin River, 3) Diazinon in the Sacramento and San Joaquin Rivers and Delta, 4) pesticides in irrigation return flows in the Delta and its tributaries. The State Board approved the Regional Board's proposal to implement the cleanup plans through TMDLs. Unfortunately, the program has been undermined by the Regional Board not knowing who is discharging what pesticides when

or in what concentrations or who has or has not implemented management measures or if any specific management measures have been effective.

69) The adopted waiver fails to address cleanup plan issues adequately. The Regional Board has no authority to take these actions in violation of the Basin Plan's adoption of cleanup provisions.

Count 8

(Failure to Address Groundwater Impacts in Waivers)

70) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

71) Any adopted waiver must protect groundwater. Unfortunately, these waivers exempt groundwater from coverage. The exclusion of coverage of polluted discharges to groundwater violates Porter-Cologne; which applies broadly to all state waters, including surface waters, wetlands, and groundwater. Indeed it covers waste discharges to land as well as to surface and groundwater. The problems and the extent of groundwater contamination from agriculture have been documented for years. Any adopted waiver must protect groundwater. Unfortunately, the waivers exempt groundwater from coverage.

72) The Regional Board has no authority to take these actions in violation of the Basin Plan's adoption of cleanup provisions, and to do so in this Waiver is an abuse of their discretion.

SECOND CAUSE OF ACTION

(Failure to Comply With CEQA)

73) Petitioners incorporate by reference the allegations in the paragraphs set forth above.

74) Respondent's action adopting the Initial Study and the Negative Declaration and failure to prepare an environmental impact report constitutes a prejudicial abuse of

discretion in that Respondent failed to proceed in the manner required by law and its decision is not supported by substantial evidence as follows:

- a. Respondent's finding that "Coalition groups have the *potential* for identifying and correcting water quality impairments without the need for . . . WDRs". Partial evidence collected by the Coalitions (emphasis added) is inconsistent with Respondent's finding that the project could not have a significant effect on the environment. That finding acknowledges that a fair argument exists that the project may have a significant environmental effect.
- b. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on the environment is not supported by substantial evidence in the record. The Regional Board has no evidence in the record to show that the proposed waiver will likely reduce discharges of agricultural pollutants to the state's waters. There is substantial evidence in the record that previous waivers have resulted in increased discharges. Whether the project will result in increases or decreases in pollutant loadings from agricultural discharges is based on Respondent's conjectures and conclusory assertions. For example, Respondent's administrative record does not contain factual information regarding the number of farms, the location of agricultural discharges, their volume and constituents, what if any management practices are being applied, whether those practices actually control any pollutants, the availability of other management practices, the identity of the parties, if any, who will form watershed programs, or whether they will be adequately funded.
- c. The Initial Study and Negative Declaration is not substantial evidence that the project could not have a significant effect on the environment because it fails to disclose the evidence relied upon by

the study and asserts conclusory statements unsupported by any evidence or factual information. None of the exhibits attached to the Initial Study documenting adverse impacts to water quality by discharges of agricultural wastes can be linked to the conclusory assertions contained in the Initial Study that discharges authorized by the Waiver will comply with water quality objectives or otherwise not possibly result in significant adverse impacts.

- d. The uncontradicted opinions of qualified experts that the project may lead to increased loadings of pollutants are substantial evidence of a fair argument that the project may have a significant environmental effect. For example, G. Fred Lee, Ph.D. and other experts provided consistent expert opinions that the project would not reduce the levels of pollutants currently being discharged by agricultural operations in the Central Valley and that, in some watersheds, the project likely would lead to increases in pollutant loadings and more severe water quality impacts. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on the environment is not supported in that plaintiffs and others presented substantial evidence of a fair argument that the project may have a significant environmental effect.
- e. Other responsible and trustee agencies besides the Regional Board provided substantial evidence of a fair argument that the project may have a significant environmental effect on many estuarine species and their habitats. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on the environment is not supported in that petitioners and others presented substantial evidence of a fair argument that the project may have a significant environmental effect.

- f. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on the environment assumes that the project's vague conditions are sufficient and will prove effective. There is no factual information in the record from which Respondent fairly evaluated the effectiveness of the Coalition programs. Nor is there any factual information in the record regarding the effectiveness of existing or future management practices throughout the project area.
- g. The project may increase agricultural pollution discharges to Central Valley ground water. Respondent failed to consider the potential significant impacts of potential impacts to ground water caused, for example, by management measures designed to pond waste. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on the environment is not supported in that petitioners and others presented substantial evidence of a fair argument that the project may have a significant environmental effect.
- h. Agricultural dischargers, petitioners, and others submitted substantial evidence that the project's watershed approach as adopted is not feasible. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on the environment is not supported in that petitioners and others presented substantial evidence of a fair argument that the project may have a significant environmental effect because its primary enforcement mechanism has not worked. Coalitions have no authority under Porter-Cologne to require farmers to do anything; and the Boards cannot initiate enforcement actions (Cease and Desist Orders and Clean Up and Abatement orders) against the Coalitions because they are not dischargers. Therefore, there is no real enforcement mechanism

against the actual dischargers because the Boards do not know the discharge locations, type and quantity of pollutants discharged, water quality impacts in the vicinity of the discharge, whether any management measures are being employed to mitigate or eliminate the adverse impacts, or the effectiveness of implemented management measures, if any.

- i. The Initial Study and Negative Declaration's finding that the project would not degrade the quality of the environment is not supported in that petitioners and others presented substantial evidence in the record of a fair argument that the project may degrade the quality of the environment.
- j. The Initial Study and Negative Declaration's finding that the project would not substantially reduce the habitat of a fish or wildlife population or cause populations to drop below self-sustaining levels, threaten to eliminate a plant or animal community, or reduce the number or restrict the range of a rare or endangered plant or animal is not supported by substantial evidence in the record since petitioners and others presented a fair argument that the project may result in such impacts to many species of fish, including those protected pursuant to state and federal endangered species laws. Since the first edition of the Initial Study and Negative Declaration supporting the previous waiver was approved, many environmental changes have taken place in the Bay/Delta ecosystem. New fish species have been listed as threatened or endangered, new critical habitat has been designated in the Central Valley, the Pelagic Organism crash has been identified, and in the three years since the original waiver, pyrethroid insecticides have led to wide-spread sediment toxicity throughout the Central Valley, and none of these significant changes

was adequately disclosed or analyzed in the re-issuance of the Initial Study and Negative declaration for the new waiver.

- k. The Initial Study and Negative Declaration's finding that the project would not have impacts that are individually limited but cumulatively considerable is not supported by substantial evidence in the record since petitioners and others presented a fair argument that the project may result in such cumulative impacts to both species populations and habitat.
- l. The Initial Study and Negative Declaration's finding that the project would not have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly, is not supported by substantial evidence in the record since petitioners and others presented a fair argument that the project may result in adverse effects on human beings, including, for example, degradation of potable water sources.
- m. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on water quality is not supported by substantial evidence in the record since petitioners and others presented a fair argument that the project may result in water quality impacts. Evidence in the record and statements by members of the Regional Board confirm that individual discharges governed by the project may not comply with water quality standards and that cumulative discharges governed by the project will violate applicable water quality standards.
- n. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on biological resources is not supported by substantial evidence in the record since petitioners and other presented a fair argument that the project may result in impacts to biological resources.

- o. The Initial Study and Negative Declaration's finding that the project could not have a significant effect on air quality is not supported by substantial evidence in the record since petitioners and others presented a fair argument that the project may result in air quality impacts from both ground and air applications of toxic chemicals.
- p. The Initial Study and Negative Declaration fail to set forth an adequate description of the project. The Initial Study and Negative Declaration do not describe the specific or even general locations of discharges that would be governed by the Waiver. The Initial Study and Negative Declaration do not describe the number of discharges at issue. The Initial Study and Negative Declaration do not describe the volume of such discharges. The Initial Study and Negative Declaration do not describe the pollutants found in such discharges. The Initial Study and Negative Declaration do not describe the nature of any pollution control measures that may already be in place. The Initial Study and Negative Declaration do not describe other pollution control measures that would be applied. The Initial Study and Negative Declaration do not describe the effectiveness of any existing or future pollution control measures.
- q. The Initial Study and Negative Declaration fail to adequately describe the environmental setting of the project. For example, the Initial Study and Negative Declaration do not describe the condition of surface waters into which discharges governed by the project occur. The Initial Study and Negative Declaration do not describe the condition of groundwater, which may be affected by implementation of the project. The Initial Study and Negative Declaration do not describe the condition of air quality in the vicinity of operations governed by the project. The Initial Study and Negative Declaration do not describe the proximity of operations

governed by the project to residential areas and schools. The Initial Study and Negative Declaration do not describe the proximity of operations governed by the project to sensitive recreation areas, including popular swimming and fishing areas.

- r. Respondent's analysis of potential impacts is contrary to law because it compares relative impacts of the current Waivers with the previous Waiver rather than comparing the impacts of the current Waiver to the environmental baseline.
- s. Respondent fails to provide a reasonable basis for its choice of an environmental baseline. Environmental conditions existing in 1982 are the appropriate environmental baseline for Respondent's CEQA analysis. When the Regional Board issued the first version of the waiver for agricultural discharges in 1982, the agency failed to prepare any environmental document pursuant to CEQA at the time. The lack of CEQA analysis on the 1982 version of the waiver resulted in drastic reductions in water quality from farming pollution between 1982 and now that was authorized by that version of the waiver and Respondent's most recent waiver. Respondent should not be allowed to treat water quality degradation caused by its previous violations of CEQA as part of the environmental baseline for the latest version of the Waiver.

75) Respondent thereby violated its duties by failing to conform to the requirements of CEQA and the CEQA Guidelines and by failing to prepare a full environmental impact report for the project.

REQUEST FOR RELIEF

WHEREFORE, Petitioners request entry of judgment as follows:

1. For a peremptory writ of mandate directing Respondent Regional Board:

- (a) To vacate and set aside the orders and resolutions adopting the Initial Study and Negative Declaration;
 - (b) To vacate and set aside Order No.R5-2006-0053 and Order No. R5-2008-0054 adopting the conditional waivers for agricultural discharges and the accompanying monitoring requirements;
 - (c) To prepare, circulate, and consider a legally adequate EIR and otherwise to comply with CEQA in any subsequent action to approve the project; and
 - (d) To prepare, circulate, and consider issuing Waste Discharge Requirements for discharges from irrigated lands in compliance with Porter-Cologne and the rules, regulations, and policies issued thereunder.
2. For their costs of suit. Petitioners have incurred substantial costs that will continue to accrue in an amount not yet determined and are recoverable pursuant to California Code of Civil Procedure section 1021.
 3. For an award of attorney's fees. Petitioners are entitled to an award of attorney's fees, if they prevail in this action, pursuant to California Code of Civil Procedure section 1021.5 because this action seeks to enforce important rights affecting the public interest which, if enforced, will confer significant benefits on the general public.
 4. For other equitable or legal relief that the Court considers just and proper.

Dated: June 15, 2007

Respectfully Submitted,

By: _____
Michael B. Jackson
Attorney for Petitioners

VERIFICATION BY ATTORNEY

I, the undersigned, say:

I am an attorney at law admitted to practice before all courts of the state of California and have my office in Plumas County, California, and am the attorney for Petitioners in the above-entitled action. Petitioners are unable to make the verification because they reside in other counties, and for that reason I make this verification on behalf of Petitioners. I have read the foregoing Verified Petition for Writ of Mandate and am informed and believe that the matters stated in it are true and on that ground allege that the matters stated in it are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on June 15, 2007 at Quincy, California.

Michael B. Jackson