

Comments on the Irrigated Lands Waiver

California Sportfishing Protection Alliance

Deltakeeper Chapter of Baykeeper

San Joaquin Audubon

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Staff Is Playing “Hide the Data”

- Over the last 10 months, we have repeatedly requested that staff provide Irrigated Lands Program monitoring results in a simple tabular form; i.e., site name, date, results, and water quality standard.
 - Include U.C. Davis Phase I & II and available coalition results.
 - Current data sets are in multiple unwieldy formats that include metadata making it difficult for the general public or decision makers to decipher and understand.
 - Recently, staff released partial pesticide and sediment results.
 - Yesterday, they posted metal results (astonishing number of violations).
 - We still lack field parameters, pathogens, full pesticide and toxicity, etc.
 - Consequently, the Existing Conditions Report included virtually no data collected under the Irrigated Lands Program.
- Frankly, we don't understand how the Board can make an informed decision regarding waiver renewal without reviewing and understanding the results from the last three years of program monitoring.

Data Doesn't Tell the Whole Story

- EPA aquatic life standards are based upon a never to exceed more than once in three years to prevent irreparable damage to the ecosystem.
- Toxicity tests do not identify all toxicity.
- Toxicity tests do not reveal sub-lethal impacts that can have population level effects.
- Water quality standards don't consider multiple stressors, additive or synergistic effects or breakdown byproducts.
 - For example, OP pesticides are additive in toxicity to copper, cadmium and/or zinc.
- Monthly monitoring represents less than a six-hour snapshot of a year's flow; i.e., 0.14 or about one-tenth of one percent.
 - Consequently, any exceedance of a water quality standard is statistically significant: virtually ensuring that other violations occur.

San Joaquin County-Delta Coalition

- 2005 Monitoring. **No approved plan.** 187 total exceedances of standards. Failed to report exceedances 19% of the time. **Only 11.7% of irrigated acres monitored.** (from data tables attached to staff's 17 May 06 AMR review)
 - French Camp Slough at Airport: EC, E-coli, TDS, chlorpyrifos, diazinon, **toxicity to selenastrum**
 - Grant Line Canal at Arnando: DO, EC, E-coli, turbidity, chlorpyrifos, **toxicity to hyalella**
 - Grant Line Canal at Calpack Rd: DO, EC, E-coli, TDS, chlorpyrifos and **toxicity to ceriodaphnia, selenastrum and hyalella**
 - Kellogg Creek at Hwy 4: pH, EC, E-coli, TDS, chlorpyrifos, permethrin and **toxicity to ceriodaphnia, pimephales, selenastrum and hyalella**
 - Little Johns Creek at Jacktone Rd: E-coli, turbidity, and **toxicity to pimephales and selenastrum**
 - Lone Tree Creek at Jacktone & Bernnan Rds (2 sites): DO, pH, E-coli, turbidity, chlorpyrifos, diazinon, cyhalothrin, cypermethrin and **toxicity to pimephales and selenastrum**
 - Marsh Creek at Balfour Ave: pH, EC, E-coli, TDS, Turbidity, and **toxicity to ceriodaphnia, pimephales and hyalella.**
 - Mokelumne River at Bruella: pH, TDS and **toxicity to ceriodaphnia and selenastrum**
 - Potato Slough at Hwy 12: pH and **toxicity to ceriodaphnia and pimephales**
 - Terminous Tract area (3 sites): DO, EC, E-coli, TDS and **toxicity to pimephales, selenastrum and hyalella**

Three Years After Adoption of the Irrigated Lands Waiver

- We know that virtually every agriculturally dominated waterway exceeds water quality standards - most are toxic.
- Coalitions have flagrantly failed to comply with the explicit requirements of the adopted waiver.
- Coalitions have refused to identify their members.
- No coalition has documented a single source of pollution, a single implemented on-the-ground BMP or the effectiveness achieved.
- Despite massive noncompliance, the Regional Board has failed to initiate a single enforcement action against a coalition or discharger.
- The Board has failed to require coalitions to develop Management Plans to address violations (with two exceptions).

By any objective standard, the Irrigated Lands Waiver has been a dismal failure.

It cannot point to a single documented improvement in water quality.

Under the tentative order, there is little likelihood of improvement over the next five years.

The Responses to Our Comments Simply Defy Logic

- In response to our 47 pages (plus attachments) of comments, staff reiterates ad nauseam:
 - The waiver requires compliance with Basin Plan and water quality standards.
 - The waiver requires implementation of BMPs.
 - The waiver is enforceable.
 - The Executive Officer may require preparation of Management Plans where standards are violated.
 - There are no significant changes since 2003 requiring a new CEQA document.
 - A coalition approach is the most efficient means of regulating large numbers of farms.

Contrary to Staff Claims

Compliance is an Illusion

- Unsupported claims without implementation mechanisms are simply disingenuous.
 - Robbery and murder are prohibited but without an elaborate criminal justice system there is no compliance.
- Board files contain documentation of thousands of violations.
- However, the Board doesn't know who is discharging, what pollutants are being discharged, where they are being discharged, the localized impacts of discharges, who is participating in the waiver program or who has or has not implemented BMPs.
 - Coalitions have refused to provide required information.

Contrary to Staff Claims

Implementation of BMPs is not Required

- Again, conclusory claims lack creditability.
- Contrary to specific waiver requirements, coalitions have refused / failed to provide the Board with information on:
 - Who is, or is not, implementing BMPs.
 - What, if any, BMPs are being implemented.
 - Historical application of BMPs within a watershed.
 - What BMPs are available for implementation.
 - The effectiveness of implemented BMPs.
- Coalitions have no authority to require farmers to implement BMPs.
- Small education gatherings cannot be represented as BMPs in the absence of on-the-ground implementation & quantification.
- As the Board doesn't know who is required to implement BMPs, whether BMPs have been implemented or if they are effective; it cannot pretend that BMP implementation is a requirement.

Contrary to Staff Claims

The Waiver is Not Enforceable

- Coalitions, as legally fictitious entities, are not dischargers. How do you issue an ACL, C&D or C&A order against a non-discharger?
- The Board cannot issue an enforcement order against actual dischargers because it doesn't know who they are or what they're discharging.
- As the state's NPS Control Program Policy points out, “..under the Porter-Cologne Act, the RWQCBs cannot take enforcement actions directly against non-discharger third parties.”
- Despite massive noncompliance with fundamental waiver requirements, not one enforcement action has been initiated against a discharger or coalition.
- Any claims of enforceability succumb to the reality of the Board's failure/refusal to enforce waiver requirements.

Contrary to Staff Claims

Management Plans are Not Required

- Despite hundreds of water quality exceedances, the Executive Officer has only required two management plans to be prepared.
 - A Management Plan was the only way the Board could compel the Sac Valley Coalition to keep monitoring a site near Woodland where frequent toxicity had been observed.
 - A Management Plan was required to implement the Sac-Feather Diazinon TMDL (Classic catch-22, TMDL provides for a prohibition if standards not met unless a waiver had been adopted. Of course the waiver is toothless.
- Regardless of claims that Management Plans “may” be required, the reality is that the Executive Officer refuses to do so except on very rare occasions.

There are Significant Changes Requiring Preparation of a New CEQA Document

- Since the waiver was adopted in 2003:
 - Coalitions have failed to comply with explicit waiver requirements. Board has failed to initiate enforcement.
 - Changing chemical application has led to pervasive sediment toxicity throughout the Valley.
 - New species have been listed pursuant to Endangered Species Acts. New Critical Habitat has been designated.
 - The Delta is experiencing a catastrophic crash in pelagic species. Poor water quality has been identified as one of the principal causes.
 - The renewed waiver is weaker than the one it replaces.
 - Water quality monitoring will be significantly reduced.

Reductions in Monitoring are a Significant impact

- The U.C. Davis monitoring contracts are expiring and will not be renewed.
 - Consequently, the most comprehensive, independent and scientifically defensible monitoring program is being phased out.
- Many monitoring sites will either be abandoned or never monitored.
 - Coalitions have stated that they will not add new sites if required to keep monitoring present sites.
 - Because coalitions have failed to comply with requirements to monitor all major drainages, 20% of intermediate drainages (yearly rotating basis) and minor drainages where downstream problems are identified many crucial sites will never be monitored.
- A number of crucial water quality parameters are eliminated in Phase II.
 - For example, testing for pathogens, TOC and toxicity (both water column and sediment) are eliminated under Phase II.

Contrary to Staff Claims

Coalitions are Ineffective Mechanisms for Controlling Pollution

- Are legally fictitious entities.
 - Not subject to Board enforcement.
 - Cannot require farmers to implement BMPs.
 - Have no authority to enforce against violators.
- Have operated to impede staff efforts, hide the farmer, and shield recalcitrant dischargers from potential Board enforcement.
- Their intransigence has forced the Board to expend far greater resources than would be required under a general order.
- Large unwieldy coalitions cannot effectively evaluate, monitor and manage pollution control efforts within a watershed.
- As self-appointed undemocratic oligarchies, they do not represent the dirt-under-the-nails farmer in the field.

Eastside San Joaquin Coalition

- Regional Board AMR Evaluation, 19 May 2006:
 - “Monitoring efforts were incomplete. The Coalition did not meet the minimum monitoring requirements for flow, sediment toxicity, 303(d) pollutants, and prohibited pesticides.”
 - “The Coalition did not meet the minimum requirements for follow-up sampling after significant toxicity was observed.”
 - “The Coalition did not meet the requirements for load calculations.”
 - The Coalition did not submit Exceedance Reports for many of the water quality exceedances that occurred in 2005.”
 - “Actions taken to identify and address water quality issues identified through monitoring were inadequate.”
 - “The Coalition discontinued monitoring at a site with known water quality problems, despite staff direction otherwise.”
 - “The Coalition did not meet the requirement to submit a summary and valuation of management practice surveys conducted during the SAMR time period.
 - “The Coalition’s evaluation of progress towards meeting the five objectives of the Coalition Monitoring Program, which are listed in the SAMR, was inadequate”

Contrary to Staff Claims, The Waiver Violates the Nonpoint Source Control Program

- Staff has selectively mischaracterized elements of the NPS Control Program.
 - Key Element 2 states “An NPS control implementation program **shall include a description of the MPs** (BMPs) and other program elements that are expected to be implemented to ensure attainment of the implementation program’s stated purpose(s), **the process to be used to select or develop MPs**, and the **process to be used to ensure and verify proper MP implementation**.”
 - Key Element 3 states “Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program **shall include a specific time schedule**, and corresponding **quantifiable milestones** designed to measure progress toward reaching the specified requirements.”
 - Key Element 4 states “An NPS control implementation program **shall include sufficient feedback mechanisms** so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional MPs or other actions are required.”
 - Key Element 5 states “Each RWQCB **shall make clear, in advance, the potential consequences for failure** to achieve an NPS control implementation program’s stated purposes.”
- Management Plans are the NPS control program. However, the reluctance of the Board to require Management Plans where violations are identified makes a mockery of any claim that the waiver is consistent with the state’s NPS policy.

The Waiver Misconstrues the Concept of Iterative Process

- An iterative process does not mean endless repetition of doing nothing.
- An iterative process requires:
 - Identification of a problem through monitoring.
 - Identification of the source or cause of the problem.
 - Implementation of on-the-ground BMPs that have a reasonable likelihood of eliminating the problem.
 - **Must include specific time schedules and quantifiable milestones, feedback mechanisms and consequences for failure.**
 - Site specific monitoring to verify and evaluate the effectiveness of the BMPs.
 - If problems persist, implementation of additional BMPs followed by additional monitoring to evaluate success.
- The iterative process requires aggressive implementation and evaluation of BMPs to ensure that problems are solved within a reasonable timeframe.
- Coalitions are using the iterative process as smoke and mirrors - like a Hollywood storefront that creates an illusion of substance where little exists.
- The Board has identified hundreds of problems.
- Unfortunately, it has no documented instances of actual on-the-ground implementation of BMPs or reductions of a single ounce of pollutants.
- Note: Education does not necessarily translate into changes in behavior.

Contrary to Staff Claims

The Waiver is Not Like an MS-4 Permit

- Municipal stormwater permits require:
 - Statistically significant end-of-pipe monitoring
 - Implemented BMPs to be identified and included as part of the permit.
- Most importantly, MS-4 permits are backstopped by the construction and industrial general orders requiring, among other things, that individual dischargers within the city must monitor discharges, maintain a SWPPP and iteratively implement BMPs on a yearly basis.
- A better case could be made if the Board required individual farmers to prepare, maintain and update on-the-farm pollution prevention plans.

Voluntary Programs Don't Work

- We have repeatedly challenged the Board to provide a single instance of a voluntary program achieving significant, quantifiable, documented reductions in pollutant loading.
- The only successful agricultural programs in the Central Valley have been driven by regulatory certainty.
 - Rice Herbicide Program was based upon a prohibition.
 - Grasslands Program was based upon WDRs.
- Does anyone believe that society would be better served if compliance with our civil & criminal codes, building & zoning ordinances, educational & professional certifications were made voluntary?

The Waiver Undermines Water Quality Protection

- Porter-Cologne makes clear that discharging wastes into waterways is a privilege and that everyone must:
 - Ask permission
 - Identify the constituents to be discharged
 - Monitor the discharge to evaluate impacts
 - Comply with limits or implement BMPs to reduce or eliminate problems
- The Board has applied this to everyone - cities, industry, mom-and-pop businesses - except farmers.
- Waivers should only be used for de minimus discharges that do not pose a threat to the state's waters. They're inappropriate for the largest source of toxic pollution.

The Bottom Line

- In issuing a waiver, the Board has essentially ceded its statutory responsibility to protect waterways to industry advocacy groups.
- Pollution isn't free. Someone always pays - in health, cleanup costs, utility fees or a degraded environment.
- The waiver is simply a subsidy transferring the costs of pollution from the discharger to the public.
- Its time to hold agriculture to the same regulatory requirements applicable to virtually every other segment of society.
- Its time for this Board to show as much compassion for the victims of agricultural pollution as it does the polluter.
- The Board must decide whether it will protect the environment or continue to protect agriculture. **It cannot do both.**

Recommendations

- The surest way of avoiding the impending train wreck is to instruct staff to prepare a revised order comparing the waiver to a general order and incorporating suggestions long recommended by the environmental community.
- If the Board elects to proceed with waivers:
 - Dischargers should file “notices of intent” and reports of waste discharge.
 - Enrollees must prepare farm-based pollution prevention plans.
 - Coalitions must prepare management plans addressing all violations of water quality standards.
 - The monitoring component must provide for independent third-party monitoring.
 - Specific timelines, performance measures & yardsticks must be included.
 - Groundwater should be protected.
 - A new environmental review must be prepared
 - Any new waiver should sunset upon completion of the EIR that is presently being developed.