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14
15 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
16 IN AND FOR THE COUNTY OF SACRAMENTO

17 DELTAKEEPER, et al.,	)	Case No. 04CS00235
)	
18 Petitioners,	)	PETITIONERS' NOTICE OF MOTION AND
19 v.	)	MOTION FOR PEREMPTORY WRIT OF
	)	MANDATE; MEMORANDUM OF POINTS
20 CALIFORNIA REGIONAL WATER	)	AND AUTHORITIES
21 QUALITY CONTROL BOARD –)	
22 CENTRAL VALLEY REGION, et al.,	)	Hearing Date: March 11, 2005
	)	Time: 10:00 a.m.
23 Respondents.	)	Department 16
)	
24 _____	)	The Honorable Judge Judy Holzer Hersher
25 CALIFORNIA FARM BUREAU)	
26 FEDERATION, et al.,	)	Action Filed: February 26, 2004
)	
27 Intervenors/Real Parties in)	
28 Interest.)	
)	
_____)	

1 PLEASE TAKE NOTICE THAT: Petitioners DeltaKeeper, WaterKeepers Northern
2 California, Environment California, Natural Resources Defense Council, Inc. and California
3 Sportfishing Protection Alliance (collectively "Petitioners"), through their attorney of record
4 herein, will on March 11, 2005 at 10:00 a.m., before this Court in Department 16, located at
5 720 Ninth Street, Sacramento, California, before Hon. Judge Judy Hersher, move pursuant to
6 Code of Civil Procedure § 1094.5 for the issuance of a peremptory writ of mandate 1) ordering
7 Respondent California Regional Water Quality Control Board - Central Valley Region
8 ("Regional Board") to vacate and set aside the "Conditional Waiver of Waste Discharge
9 Requirements for Discharges from Irrigated Lands" and accompanying monitoring programs as
10 set forth in Resolution No. R5-2003-0105, Order No. R5-2003-0826, and Order No. R5-2003-
11 0827 (hereinafter "Waiver"), 2) ordering the Regional Board to vacate and set aside a negative
12 declaration prepared in conjunction with the Waiver and issued pursuant to Resolution No. R5-
13 2003-0103, 3) directing Respondent State Water Resources Control Board ("State Board") to
14 vacate and set aside Order WQO 2004-0003 affirming the Regional Board's orders and
15 resolutions, and, 4) ordering Respondents to prepare, circulate, and consider a legally adequate
16 EIR and otherwise to comply with California Environmental Quality Act ("CEQA"), Public
Resources Code § 21000 *et seq.*, in any subsequent action to approve the Waiver project.

17 Said motion will be made upon the grounds that, by issuing the Waiver, Respondents
18 have violated Porter-Cologne and the rules, regulations, and policies issued thereunder because
19 the Waiver is inconsistent with Section 13269 of the statute, inconsistent with Respondents
20 water quality control plans, inconsistent with the state's antidegradation policies, inconsistent
21 with the Regional Board's findings, and based on findings that are not supported by the weight
22 of the evidence. Said motion also will be made upon the grounds that, by issuing the Waiver
23 and negative declaration, Respondents have failed to comply with CEQA by failing to prepare
24 an EIR and by relying on a negative declaration that is contrary to law and not supported by
25 substantial evidence. Said application is based on this Notice, the attached Memorandum of
26 Points and Authorities, the administrative record including several documents from the
27 administrative record inadvertently omitted from the copy served in this case that are attached
28

1 as exhibits to the Declaration of Michael R. Lozeau, Petitioners' Request for Judicial Notice,
2 and the complete files and records of this action.

3 DATED: October 21, 2004

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Michael R. Lozeau
Attorney for Petitioners

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40 C.F.R. § 131.1224

1 Petitioners DeltaKeeper, WaterKeepers Northern California, Environment California,
2 Natural Resources Defense Council, Inc. and California Sportfishing Protection Alliance
3 (collectively “Petitioners”) submit the following points and authorities in support of their motion
4 for a peremptory writ of mandamus:

5 **I. SUMMARY OF ARGUMENT**

6 This action challenges a controversial decision by Respondent California Regional Water
7 Quality Control Board, Central Valley Region (“Regional Board”) exempting polluted and
8 frequently toxic discharges of waste from as many as 25,000 agricultural operations to rivers and
9 streams throughout the Central Valley from the core reporting and permitting requirements of
10 California’s water pollution control law – the Porter-Cologne Water Quality Control Act
11 (“Porter-Cologne”), Water Code (“WC”) § 13000 *et seq.*

12 Petitioners respectfully seek the issuance of a writ of mandate 1) ordering Respondent
13 California Regional Water Quality Control Board - Central Valley Region (“Regional Board”) to
14 vacate and set aside the “Conditional Waiver of Waste Discharge Requirements for Discharges
15 from Irrigated Lands” and accompanying monitoring programs as set forth in Resolution No. R5-
16 2003-0105, Order No. R5-2003-0826, and Order No. R5-2003-0827 (hereinafter “Waiver”), 2)
17 ordering the Regional Board to vacate and set aside a negative declaration prepared in
18 conjunction with the Waiver and issued pursuant to Resolution No. R5-2003-0103, and 3)
19 directing Respondent State Water Resources Control Board (“State Board”) to vacate and set
20 aside Order WQO 2004-0003 affirming the Regional Board’s orders and resolutions. By issuing
21 the Waiver and negative declaration, the Regional Board and State Board have violated Porter-
22 Cologne and the rules, regulations, and policies issued thereunder and have failed to comply with
23 the California Environmental Quality Act (“CEQA”), Public Resources Code (“PRC”) § 21000
24 *et seq.*

25 Respondents violated Porter-Cologne by issuing a Waiver that authorized innumerable
26 discharges of highly polluting waste from possibly tens of thousands of agricultural lands
27 because the Regional Board knows the authorized discharges will violate water quality
28 objectives indefinitely into the future; the Waiver allows substantial discharges of waste,
contrary to the Legislature’s intent; the Waiver violates State and federal antidegradation
policies; the Waiver’s conclusions are inconsistent with their findings and findings are not
supported by the weight of the evidence, including the finding that unidentified management

1 practices are guaranteed to work to reduce pollutants; the Waiver’s monitoring requirements are
2 deficient; the Regional Board lacks staff and funding to implement the Waiver properly, and; the
3 Waiver is inconsistent with Basin Plan requirements.

4 In 1999, the Legislature gave the Regional Board three full years (until January 1, 2003)
5 to review its prior decision in 1982 waiving requirements for agricultural discharges before that
6 waiver and others were automatically terminated. During that three-year period, the Regional
7 Board failed to gather in information and data from the dischargers necessary for the Board to
8 make a reasoned decision on how best to control their extensive pollution discharges. No
9 information was requested regarding the dischargers’ operations, their pollution control
10 management practices, the volume or quality of their waste discharges and other relevant factors.
11 Instead, the Regional Board waited until the eve its outdated 1982 waiver was to automatically
12 terminate and rushed through a revised waiver without a proper evidentiary or legal basis.

13 This action also challenges the exemption because the Regional Board failed to comply
14 with CEQA by failing to prepare an environmental impact report (“EIR”) that discussed and
15 analyzed the potential significant environmental consequences of exempting thousands of
16 discharges that likely will contribute to or cause widespread violations of water quality
17 objectives throughout the Central Valley. Instead of using the three-year waiver review period to
18 prepare the requisite EIR, the Regional Board waited until the eleventh hour and prepared a
19 cursory negative declaration declaring that the exemption could not have any significant adverse
20 impact on the environment. Contrary to that finding, the administrative record is dominated by
21 evidence establishing a fair argument that the Regional Board’s approval of thousands of
22 discharges of irrigation return water and storm water laden with pesticides, nutrients, turbidity,
23 metals and other pollutants to the waters of the Central Valley, while waiving the main reporting
24 and permitting requirements of Porter-Cologne, may have a significant adverse effect, triggering
25 the Regional Board’s obligation to prepare an EIR prior to making its final decision.

24 **II. LEGAL BACKGROUND**

25 **A. Water Quality Objectives, Reports of Waste Discharge And Waste Discharge** 26 **Requirements Are The Primary Regulatory Program Established By The** 27 **Water Code To Protect Water Quality From Substantial Discharges of** 28 **Waste**

The California Legislature has declared that “the people of the state have a primary
interest in the conservation, control, and utilization of the water resources of the state, and that

1 the quality of all the waters of the state shall be protected for use and enjoyment by the people of
2 the state.” WC § 13000. In furtherance of that mandate, the Legislature declared that “activities
3 and factors which may affect the quality of the waters of the state *shall be regulated* to attain the
4 highest water quality which is reasonable.” WC § 13000 (emphasis added). The regional
5 boards, with the approval of the State Board, are mandated to establish water quality objectives
6 defining the reasonable levels of water quality. WC § 13241; *Waterkeepers Northern California*
7 *v. State Water Resources Control Board* (2002) 102 Cal.App.4th 1448, 1452. Hence, attainment
8 of water quality objectives is the primary objective of Porter-Cologne. Water quality objectives
9 are set forth in water quality control plans, generally referred to as “basin plans.” *Id.* See also
10 WC § 13240. Such plans are regulations, issued in compliance with the Administrative
11 Procedure Act. *State Water Resources Control Bd. v. Office of Administrative Law* (1993) 12
12 Cal.App.4th 697, 706. “The water quality objectives and implementation program established by
13 a water quality control plan are binding standards, not mere goals or guidelines.” *Id.* at 702 n.4.
14 Basin Plans are binding on all state offices, departments and boards. WC § 13247.

15 The key tools for implementing water quality objectives are the submission by
16 dischargers of reports of waste discharge (“RWDs”) and the issuance by the regional boards (or
17 state board) of waste discharge requirements (“WDRs”). “All discharges of waste into waters of
18 the state are privileges, not rights.” WC § 13263(g). Any person discharging waste, or
19 proposing to discharge waste, that could affect the quality of the waters of the state must file a
20 RWD, containing any required information, with the appropriate regional board. WC §
21 13260(a)(1). Dischargers must pay annual fees when they submit an RWD. WC § 13260(e).
22 After reviewing an RWD, and following any necessary hearings, the regional board has a
23 statutory obligation to prescribe WDRs (*i.e.* a permit) within 140 days. WC §§ 13263(a), 13264;
24 27 California Administrative Code (“CAC”) § 10302(b). WDRs “must implement any relevant
25 water quality control plans” including water quality objectives. WC § 13263(a). The Legislature
26 provided a limited exception to the broad RWD and WDR requirements of Porter-Cologne.
27 Boards may waive these requirements when they find a waiver is “not against the public
28 interest.” WC § 13269(a).¹ However, Section 13269 does not provide the regional boards

¹ Since the adoption of the Waivers, the Legislature clarified Section 13269 to require the Boards to find that any waiver is “in the public interest” and specifically requires that all waivers

1 express authority to waive a discharger’s compliance with water quality objectives and other
2 Basin Plan requirements, including, for example, California’s anti-degradation policy. WC §
3 13269. *See* Basin Plan, pp. IV-8.00; IV-16.00-17.00; IV-33.00-35.00; App. Item 2 (Exhibit A to
4 Petitioners’ Request for Judicial Notice) (“RJN”).

5 **B. CEQA Mandates That The Regional Board Prepare An EIR When A Fair**
6 **Argument Exists That A Project May Have A Significant Adverse Effect On**
7 **The Environment.**

8 “The purpose of an [EIR] is to provide public agencies and the public in general with
9 detailed information about the effect which a proposed project is likely to have on the
10 environment; to list ways in which the significant effects of such a project might be minimized;
11 and to indicate alternatives to such a project.” PRC § 21061; *see also* § 21002.1. An EIR
12 “serves not only to protect the environment but also to demonstrate to the public that it is being
13 protected.” 14 CAC § 15003(b). “The requirement of a detailed statement helps insure the
14 integrity of the process of decision by precluding stubborn problems or serious criticisms from
15 being swept under the rug.” *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122
16 Cal.App.3d 813, 820. “The EIR process protects not only the environment but also informed
17 self-government.” *Laurel Heights Improvement Ass’n v. Regents of the University of California*
18 (1988) 47 Cal.3d 376, 392. “The EIR process will enable the public to determine the
19 environmental and economic values of their elected and appointed officials thus allowing for
20 appropriate action come election day should a majority of voters disagree.” *People v. County of*
21 *Kern* (1974) 39 Cal.App.3d 830, 842.

22 “[CEQA] requires the preparation of an EIR whenever it can be fairly argued on the basis
23 of substantial evidence that the project may have a significant environmental impact.” *No Oil,*
24 *Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75. *See Friends of “B” Street v. City of*
25 *Hayward* (1980) 106 Cal.App.3d 988, 1002; PRC § 21080(c)-(d). The “fair argument” standard
26 establishes a low threshold for requiring the preparation of an EIR. *No Oil, Inc., supra*, 13
27 Cal.3d at 75; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310. “Substantial
28 evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion
supported by facts.” PRC § 21082.2(c); 14 CAC § 15384. “Significant effect on the

must assure compliance with basin plans, including water quality objectives, and must require
monitoring, with a limited exception. *See* SB 923 Bill Analysis (Sept. 8, 2003) (RJN, Ex. B).

1 environment” means “a substantial, or potentially substantial, adverse change in any of the
2 physical conditions within the area affected by the project including land, air, water, minerals,
3 flora, fauna, ambient noise, and objects of historic and aesthetic significance.” 14 CAC § 15382.
4 Certain potential impacts, by definition, trigger a mandatory finding of significance. 14 CAC §
5 15065. These include project’s that have the potential “to substantially degrade the quality of the
6 environment, substantially reduce the habitat of a fish or wildlife species. . . , reduce the number
7 or restrict the range of an endangered, rare or threatened species” or “have possible
8 environmental effects which are individually limited but cumulatively considerable. . . .” *Id.*

9 To determine whether a project may have a significant adverse impact on the
10 environment, the agency must conduct an initial study. 14 CAC § 15063. The initial study must
11 include a description of the project, its environmental setting and information identifying the
12 project’s environmental effects. 14 CAC § 15063(d). An initial study must “disclose data or
13 evidence upon which the person(s) conducting the study relied. Mere conclusions simply
14 provide no vehicle for judicial review.” *Citizens Ass’n for Sensible Development of Bishop Area*
15 *v. County of Inyo* (1985) 172 Cal.App.3d 151, 171. Based on the initial study, where “[t]here is
16 no substantial evidence in light of the whole record before the lead agency” that a significant
17 effect on the environment may occur, the agency prepares a negative declaration. PRC §
18 21080(c)(1).

19 CEQA requires EIRs and negative declarations to be prepared ‘as early as feasible in the
20 planning process to enable environmental considerations to influence project program and design
21 and yet late enough to provide meaningful information for environmental assessment.’ 14 CAC
22 § 15004(b). “[O]ne of the purposes of the impact statement is to insure that the relevant
23 environmental data are before the agency and considered by it prior to the decision to commit . . .
24 resources to the project.” *No Oil, Inc., supra*, 13 Cal.3d at 84.

25 **III. PROCEDURAL AND FACTUAL BACKGROUND**

26 During the 1970’s, the Regional Board required monitoring of discharges from irrigated
27 lands in order to determine whether those discharges were of concern to the Regional Board. AR
28 372 (monitoring conducted during 1975-76). Because that monitoring did not turn up any
significant issues and the Regional Board had no evidence that farming discharges posed a threat
to water quality, no further action was taken by the Board. *Id. See also* AR 395; 403; 427. In
1982, Respondent Regional Board issued a general waiver exempting 32 categories of discharges

1 from the reporting and permitting requirements throughout the Central Valley, including both
2 irrigation return waters as well as storm water discharges from agricultural fields which it
3 deemed “low threat.” *See* AR 196; 7859.

4 Starting in the late 1980’s, the Regional Board began observing large expanses of Central
5 Valley waters being impaired each year by pollutants discharged by agricultural operations. AR
6 390-91. *See* AR Addendum 33-824-835. *See also* AR 428-29; 313; 371; 385; 7855; 15930
7 (Findings 2 & 3); 15937 (Finding 40); AR 21650-51 (State Board order). Studies by the United
8 States Geological Survey (“USGS”) and others show that agricultural pollution of the San
9 Joaquin and Sacramento Rivers regularly violate numeric criteria for protecting aquatic life. *See*
10 AR 2167, 2174 (in 1998, 97 of 143 samples from San Joaquin River exceed at least one criteria
11 for protecting aquatic life); AR 2355 (numerous exceedances of criteria at major river sites);
12 AR 2096 (30% of samples from 1999-2000 study in Sacramento River exceeded criteria for
13 protecting aquatic life); AR 2262 (Sacramento River exceedances of pesticide criteria); AR
14 2355 (San Joaquin River pesticide exceedances in 2000 study); AR 2048 (USGS study from
15 2001 documenting pesticides in groundwater beneath rice fields in Sacramento River basin);
16 AR 2545-56 (California Urban Water Agencies 1997 report summarizing extensive toxicity in
17 Valley); AR 10326.²

18 ² *See also* AR 10921 (Department of Pesticide Regulation report describing chronic and
19 acute toxicity results from pesticide discharges); AR 12475 (discusses elevated levels of *E. coli*
20 from farms); AR 12475-76 (discusses impacts of nutrient discharges from farms in San Joaquin
21 River); AR 14324 (2000-2001 monitoring of Sacramento River tributaries show very high
22 concentrations of pesticides); AR 16062 (pesticides from orchard spraying may impact most of
23 Delta some rainy seasons); AR 16087 (identifying chlorpyrifos toxic hot spots in Delta); AR
24 16242-43 (algae toxicity observed in Sacramento and San Joaquin tributaries); AR 16405
25 (discussing San Joaquin River violations from excessive salt and boron from agriculture); AR
26 17112; AR 17428-31 (potential impacts of pesticides to threatened Delta smelt); AR Addendum
27 33-0745 (Regional Board study discusses potential impacts of agricultural pesticide discharges to
28 listed trout and salmon); AR 33-1260 (discussing toxic pesticide concentrations in 1993); AR
33-1301 (1994 USGS study documenting toxic levels of diazinon in San Joaquin tributaries);
AR 33-1335 (UC Davis study describing toxicity in 1998-99 samples from Delta); AR 33-1510
(USGS study documenting high pesticide levels during storm events in San Joaquin and Merced
Rivers); AR 33-1590-94 (Regional Board study observing significant toxicity from pesticides in
San Joaquin River and tributaries); AR 33-2099-2100 (1994 Regional Board study showing
extensive pesticide toxicity in Sacramento and San Joaquin River watersheds); AR 33-2284
(1995 Regional Board study discussing impacts of observed toxicity in Delta); AR 33-2508-09
(Regional Board study of 1994 toxicity in Sacramento River from insecticides discharges); AR

1 Despite the Regional Board’s awareness of massive pollution of Central Valley waters by
2 agricultural water pollution, the Board did not review or reconsider the 1982 waiver. In late
3 1999, in response to the extensive, unaddressed pollution of California’s waters and the failure of
4 the Regional Board (as well as other regional boards) to update their earlier waiver decisions, the
5 legislature stepped in and adopted legislation, sponsored by several of the Petitioners, which
6 sunset all existing waivers as of January 1, 2003. AR 10225-33 (SB 390, amending WC §
7 13269(b)). The more than three year period was provided to give the regional boards ample time
8 to review their existing waivers and prepare the necessary documents, including environmental
9 documents pursuant to CEQA, in order to replace the outdated waivers. *See* AR 10226.

10 Fearing that the Regional Board might not act in a timely manner, on November 28,
11 2000, several of the Petitioners petitioned the Regional Board to immediately rescind the 1982
12 waiver as it applied to irrigation return flows and stormwater from agricultural operations. AR
13 11-33 (original attachments at AR 33-0608-3100). On January 26, 2001, the Regional Board
14 held a workshop on the petition. On July 27, 2001, the Board held a hearing to consider various
15 staff recommendations for responding to the petition. The staff reports prepared for that hearing
16 acknowledged the local and cumulative impacts of agricultural discharges. AR 313; 371; 378;
17 384-85. Staff also estimated that a new waiver would require 20 staff, where as areawide WDRS
18 would only require 6 staff. AR 319; 431. *See* AR 418-19 (description of areawide WDRs).
19 Almost one year from the date of the petition, on September 7, 2001, the Regional Board
20 rejected the petition to terminate the 1982 waiver, instead directing its staff either to secure from
21 the agricultural community voluntary monitoring programs assessing the environmental impacts
22 of its pollution discharges or, if such programs were not forthcoming, order the dischargers to
23 conduct the necessary monitoring. AR 929-931. Both staff and agricultural dischargers
24 emphasized the need to complete monitoring in order to make a rational decision regulating
25 agricultural waste discharges. *See* 1403; 1459. Despite optimistic assessments by Regional
26 Board staff and members of the Board as late as March 2002 that monitoring would be in place
27 that year and available prior to the expiration of the 1982 Waiver, no monitoring was ever
28 conducted or ordered pursuant to the Regional Board’s directive. *See* AR 1297, 1300; 1348;
8269.

33-2638 (1998 Dow Agrochemical study documenting both acute and chronic toxicity “events”

1 Despite having failed to gather in any monitoring data or other information about
2 individual dischargers, on October 16, 2002, the Regional Board staff released a proposed
3 renewal of a conditional waiver for agricultural discharges as well as a notice of the Regional
4 Board's intent to adopt a negative declaration for the waiver. AR 1804-1880. By the comment
5 deadline of November 21, 2002, more than one hundred organizations and thousands of
6 individuals submitted comments, most requesting that the Board not adopt the proposed waiver.
7 AR 7976. On December 5, 2002, the Regional Board held a public hearing to consider the
8 waiver proposal. AR 8072. The December 2002 waiver relied on the concept of "experimental"
9 watershed groups and general guidance for monitoring. *See* AR 8080 (with regard to watershed
10 groups, "we [Regional Board staff] don't have entities that we are working with at the present
11 time"); AR 8248 (staff describing watershed groups as experimental); AR 8090-91; AR 8107
12 ("So at this point there is some general guidance, but there is no requirements to monitor on
13 certain frequency for specific chemicals or other constituents"). Staff also noted that the Board
14 left itself no options to prepare anything but a negative declaration, even if an EIR was required,
15 if it intended to act by January 1, 2003. AR 8246 ("In the near future a negative declaration is
16 your only option because doing an EIR, getting contract money, getting money, getting the
17 contracts, getting it written and all that, we are talking two to three years"). Despite the Board's
18 own misgivings, it nevertheless voted 5 to 1 to adopt the proposed waiver. *See* AR 8271; 8285-
19 86; 8315. *See also* AR 10070-83 (Resolution No. R5-2002-0201). However, the Board did
20 direct staff to prepare responses to concerns raised by the environmental petitioners and the
21 agricultural community and to bring the Waiver back to the Board in March 2003. *See* AR 8314.
22 The Regional Board's directions also included reference to preparing an EIR for their
23 agricultural discharge program. *Id.* The very next day, Board members' misgivings prompted a
24 vote on a motion to reconsider and vacate Resolution No. R5-2002-0201 adopted the previous

25 On February 19, 2003, the Regional Board issued a notice of preparation of an
26 environmental impact report addressing its agricultural waste discharge program. AR 12860.
27 The notice contemplated issuance of a draft EIR by June 1, 2004 and completion of an EIR by
28 February 2005. AR 12879. Although petitioners and others provided comments on the scope of

from discharges of pesticides through aerial drift and irrigation return flows).

1 the contemplated EIR, as of the filing of this brief, Petitioners are unaware of any additional
2 progress on a draft EIR.

3 On April 24, 2003, the Regional Board held a public meeting to review and provide
4 direction to staff on responses to the concerns raised by various parties in December 2002 and
5 proposed modifications to the recently adopted waiver. AR 13038. Of particular note was a
6 proposal for a monitoring program prepared by staff based on their best technical judgment.
7 Staff also proposed that the Regional Board assess fees. AR 12964-90. Although staff agreed
8 with the Petitioners that “[g]reat benefits can result from developing and implementing site-
9 specific [farm pollution management] plans,” staff did not recommend inclusion of such plans.
10 AR 12845. Despite staff’s proposals, a majority of the Regional Board directed staff to eliminate
11 any fees and scale back the proposed monitoring program. AR 13250-51.

12 Considerable controversy arose from the Regional Board’s deliberations on the staff’s
13 proposals at the April meeting. *See, e.g.* AR 14733-37. These included a formal finding that one
14 Board member, Beverly Alves, had a direct conflict-of-interest. AR 14738-44. Hence, after
15 having served on the original Regional Board subcommittee that drew up the December 2002
16 waiver and actively participating in the April 2003 deliberations, Ms. Alves was instructed to
17 recuse herself from future actions on agricultural discharges by the Attorney General and the
18 Regional Board’s counsel. AR 14745; 15443.

19 On July 10 and 11, 2003, the Regional Board once again held a series of hearings on the
20 agricultural waiver. *See* AR 14758-74 (staff report). On July 10, 2003, the Regional Board
21 adopted an order that rescinded its previous decisions in December 2002 adopting both the
22 negative declaration and the Waiver. AR 15494; AR 15923-25. This action was to resolve any
23 appearance of conflicts raised by Ms. Alves’ previous participation. *Id.* That same day and
24 continuing to the next day, the Regional Board took up a new revised Waiver proposal prepared
25 by staff pursuant to the Board’s direction in April, 2003. The Board also reconsidered its
26 previous Initial Study, albeit with a list of studies (most of which were originally submitted to
27 the record by Petitioners) included as an attachment. *See* AR 15926-29. At the conclusion of the
28 hearing, on a 4-2 vote, the Regional Board adopted Resolution No. R5-2003-0105, Order No.
R5-2003-0826, and Order No. R5-2003-0827 setting forth the Waiver, including the
accompanying monitoring programs. AR 15930-16018. The Regional Board also adopted

1 Resolution No. R5-2003-0103 re-approving the Initial Study and Negative Declaration for the
2 Waiver project. AR 15926-29.

3 Under Resolution No. R5-2003-0105 the Waiver authorizes tens of thousands of
4 agricultural pollution discharges in the Central Valley and waives their compliance with the
5 fundamental discharge control, monitoring and reporting provisions required by Porter-Cologne.
6 The final adopted Waiver includes two categories of discharges. AR 15934 (Finding 20). The
7 first category includes self-identified groups of dischargers referred to as Coalition Groups. AR
8 15977-82 (“Coalition Group Waver”). The second group of dischargers includes individuals
9 who are not associated with one of the Coalition Groups. AR 15983-88.

10 The Waiver does not provide any guidance regarding which discharges and/or other
11 entities may form a Coalition Group. *See* AR 15979 (¶ 2). The Waiver does not include any
12 restrictions on the size of a Coalition Group. *Id.* The Waiver does not include any restrictions
13 on the geographic scope of a Coalition Group. *Id.*

14 The Waiver requires Coalition Groups to prepare various reports and submit them to the
15 Regional Board by specified dates. *See* AR 15982. These reports include a Notice of Intent to
16 participate and a General Report outlining the Coalition Group’s lead agency (AR 15978-79),
17 funding sources and a map by November 1, 2003 (AR 15979); a monitoring and reporting
18 program due on April 1, 2004 (AR 15979; *see also* AR 15942-56); an annual report by April 1,
19 2005 (AR 15955); and, if requested by the Regional Board Executive Officer, a management
20 plan (AR 15979-80). Although their potential members are dischargers, the Coalition Groups
21 themselves are not dischargers. *See* AR 15539; 12795. The Waiver’s conditions do not include
22 a specific date by which dischargers must comply with water quality objectives. *See* AR 15937
23 (Finding 40). The Waiver also fails to assess fees on the Coalition Groups based on the Regional
24 Board’s costs of implementing the Waiver. *See* AR 15536-37. The Regional Board’s only
25 enforcement options against Coalition Groups is to terminate the Waiver and does not include
26 administrative penalties or cease and desist orders. *See* AR 14766.

27 The Waiver provides for limited monitoring by Coalition Groups within the term of the
28 Waiver. Monitoring is divided into three phases, only the first of which will occur within the
term of the Waiver, and then only for a subset of waters within a Coalition Groups’ geographic
area. Phase I monitoring must begin by July 1, 2004 and requires analysis of general parameters
(temperature, electrical conductivity, pH and dissolved oxygen), toxicity and certain impairing

1 pollutants. AR 15945-46, 15948. “Major drainages” must be sampled the first year. AR 15951.
2 Twenty percent of “intermediate drainages” must be sampled during the first year, with another
3 20% beginning each year thereafter. *Id.* “Small drainages” must only be sampled if water
4 quality problems are identified in intermediate drainages. *Id.* A Phase I monitoring report must
5 be submitted by April 1, 2005. AR 15982. The Coalition Groups will determine which
6 drainages within their claimed areas constitute major, intermediate or small drainages. AR
7 15951.

8 Only a portion of Phase I is required before the Waiver expires on December 31, 2005.
9 As of the Waiver’s expiration date, the only data that will have been collected by the Coalition
10 Groups pursuant to the Waiver is some general ambient data collected from “large drainages”
11 and similar data from 20% of the “intermediate drainages.” AR 15951. The Waiver does not
12 require any edge-of-field or near-field pollution discharge monitoring. *See id. Compare* AR
13 18705. The Waiver does not require the Coalition Groups to characterize or monitor all of the
14 pollutants discharged by agricultural operations within the Coalition Group, especially during the
15 first phase. *See, e.g.* AR 18700-02. The second and third phases of monitoring described in the
16 Waiver are not required prior to the expiration of the Waiver. AR 15946-47.

17 The conditions applicable to individual farmers are more detailed than the conditions
18 applicable to Coalition Groups. AR 15983-88. Those individual farmers who wish to obtain a
19 waiver but choose not to join a Coalition Group are required to prepare site-specific pollution
20 control and monitoring strategies. AR 15985 (Att. C, ¶¶ 2(b)-(c), 4, 6); 15996-16005. To obtain
21 an individual Waiver, a farm must provide the Regional Board with detailed information
22 regarding their operation, including the pollutants that they are likely to discharge. *Id.* (¶ 2(c)).
23 Violations may result in enforcement action under the Water Code, including Regional Board
24 orders, the imposition of civil liability, cessation of coverage under this Waiver, or referral to the
25 Attorney General. The monitoring program must include a sufficient number of monitoring sites
26 and flow monitoring for each farm to allow calculation of the loads discharged to Central Valley
27 waters for each pollutant monitored. AR 16002. A farm evaluation report and a monitoring and
28 reporting program plan must be submitted by April 1, 2004 and annual monitoring reports by
March 1 of each year. AR 16003-04.

On January 22, 2004, Respondent State Board adopted Order No. WQO 2004-0003
upholding the Waiver. AR 21649.

1 **IV. STANDARD OF REVIEW**

2 Pursuant to Code of Civil Procedure (“CCP”) § 1094.5, the inquiry for claims under
3 Porter-Cologne and CEQA extends to the question of whether Respondents have proceeded
4 without or in excess of their jurisdiction and whether, in connection with the challenged
5 Resolutions and Orders, there was any prejudicial abuse of discretion. Abuse of discretion is
6 established where Respondents have not proceeded in the manner required by law, where the
7 Resolutions and Orders are not supported by the findings, or where the findings are not
8 supported by the evidence. Under Porter-Cologne, pursuant to WC § 13330(d), in its review of
9 findings in a Regional or State Board order, “the Court shall exercise its independent judgment
10 on the evidence.” Section 1094.5(c) of the CCP provides that in cases such as under Porter-
11 Cologne “in which the Court is authorized by law to exercise its independent judgment on the
12 evidence, abuse of discretion is established if the Court determines that the findings are not
13 supported by the weight of the evidence.” For cases under CEQA, section 1094.5(c) provides
14 that “abuse of discretion is established if the court determines that the findings are not supported
15 by substantial evidence in the light of the whole record.” The agency must prepare an EIR
16 whenever substantial evidence in the record supports a “fair argument” that significant impacts
17 may occur, even if contradictory evidence exists in the record. PRC § 21082.2(d). Determining
18 the sufficiency of the evidence to support a fair argument is a question of law. *Sierra Club. v.*
19 *County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318. Legal issues are reviewed de novo. *See*
20 *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169.

21 **V. ARGUMENT**

22 **A. First Cause of Action - The Regional Board Violated Porter-Cologne and**
23 **Abused its Discretion By Issuing A Waiver of Vast Quantities of River-**
24 **Impairing Waste From Tens of Thousands of Agricultural Dischargers in the**
25 **Central Valley.**

26 The Regional Board abused its discretion by waiving reports of waste discharge and
27 waste discharge requirements for the largest source of pollution to Central Valley waters.

28 **1. First Cause of Action, Count 1: The Regional Board’s waiver is**
without authority because the legislature did not authorize the
Regional Board to waive or delay compliance with water quality
objectives.

Through the Group Waiver, Respondent Regional Board authorized the discharge of
highly polluted waters, knowing full well that the allowed discharges will cause or contribute to

1 violations of water quality objectives, without providing any deadlines for achieving water
2 quality objectives. By allowing these discharges, the Board effectively waived their compliance
3 with the applicable objectives. The Regional Board has no authority to take these actions under
4 section 13269 of the Water Code.

5 **a. The Regional Board has no authority to establish a schedule
6 for compliance with water quality objectives within a waiver.**

7 The Regional Board only has authority to establish a time schedule for a discharger’s
8 compliance as a condition of waste discharge requirements. WC § 13263 sets forth the Regional
9 Board duty to issue waste discharge requirements, specifically providing that “[t]he requirements
10 may contain a time schedule, subject to revision in the discretion of the board.” *See also* 23
11 CAC § 2231(a) (regulations governing waste discharge requirements states that “[t]ime
12 schedules should be included in requirements for existing discharges when it appears the
13 discharger cannot immediately meet the requirements.”). The legislature did not include any
14 authority for the Boards to establish compliance schedules in a waiver. *See* WC § 13269.
15 “Where the Legislature has employed a term or phrase in one place and excluded it in another, it
16 should not be implied where excluded.” *Phillips v. San Luis Obispo County Dept. of Animal
17 Regulation* (1986) 183 Cal.App.3d 372, 380. The legislature’s omission of compliance schedule
18 authority from the waiver provision makes sense because the legislature never intended for
19 waivers to be issued to discharges that could not already meet applicable water quality
20 objectives.

21 **b. By including an open-ended schedule for irrigated dischargers
22 to comply with water quality objectives, the Regional Board
23 illegally waived thousands of dischargers’ compliance with
24 objectives for the duration of the Waiver and beyond.**

25 The Coalition Group Waiver waives compliance with water quality objectives by
26 including an open-ended compliance period for every individual discharger within a Coalition
27 Group. Section 13269 authorizes the Boards, under specified conditions, to waive two specific
28 provisions of Porter-Cologne: “On and after January 1, 2000, the provisions of subdivisions (a)
and (c) of Section 13260, subdivision (a) of Section 13263, or subdivision (a) of Section 13264
may be waived” WC § 13269. Those four subsections include, respectively, reports of
waste discharge for proposed new discharges, reports of waste discharge for proposed changes to
discharges, WDRs, and the prohibition on new discharges pending issuance of WDRs or a
waiver. WC §§ 13260(a), (c), 13263(a), 13264(a). “Under the maxim of statutory construction,

1 *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply
2 additional exemptions unless there is a clear legislative intent to the contrary.” *See Rojas v.*
3 *Superior Court* (2004) 33 Cal.4th 407, 424. Hence, no other provisions of Porter-Cologne may
4 be waived beyond those listed in Section 13269.³

5 The recent amendments to Section 13269 that went into effect on January 1, 2004 also
6 clarify the legislature’s intent that the public interest includes compliance with applicable Basin
7 Plans. The new clarifying language added to section 13269 provides that WDRs or RWDs may
8 be waived if the waiver “is consistent with any applicable state or regional water quality control
9 plan and is in the public interest.” Water Code § 13269. The Legislature also intended for the
10 clarification that waivers be contingent on complying with applicable Basin Plans to be
11 applicable to then pending proceedings before the regional and state boards to replace the older
12 waivers. As the September 8, 2003 Bill Analysis for SB 923 explains:

13 [t]he author feels that the clarifications provided by this legislation are also
14 particularly timely. SB 390 . . . sunset as of January 1, 2003 all existing waivers
15 on WDRs, many of which were decades old and based on the unfounded premise
16 that nonpoint pollution is not a significant threat to waters of the state. The
17 [Regional Boards] are still developing replacement regulatory mechanisms for
18 these discharges.

19 SB 923 Bill Analysis, p. 4 (Sept. 8, 2003) (RJN, Ex. B.).

20 The presence of a schedule to comply with water quality objectives, especially one with
21 no end date, guarantees that many discharges governed by the Coalition Group Waiver will not
22 comply with those objectives in the interim. *See* AR 1937 (Finding 40). Because the Regional
23 Board’s Waiver authorizes those discharges in violation of objectives indefinitely into the future,

24 ³ As the State Board’s own Office of Chief Counsel has stated, “[a] waiver may be issued
25 by a Regional Board when it finds *the proposed discharge will implement the applicable basin*
26 *plan* and that either the filing of a report of waste discharge or the issuance of waste discharge
27 requirements is unnecessary.” AR 12758. *See also* AR 12762 (“Can a Regional Board waive
28 the adoption of waste discharge requirements for a discharge which does not comply with the
applicable water quality control plan (basin plan)? No. If a Regional Board has evidence that a
discharge does not comply with the applicable basin plan, the Board generally cannot make the
required finding that a waiver ‘ is not against the public interest.’”). The Chief Counsel’s Office
identifies two potential exceptions to waiving a discharge that is violating water quality
objectives, including agricultural discharges: “Waivers for agricultural operations and domestic
waste discharges which are adequately regulated by another public agency, however, may be
exceptions to this general rule.” AR 12762. That exception cannot apply where, as in this case,
the discharges to surface water are not regulated by any other agency.

1 the Board effectively waives compliance with those objectives, exceeding its waiver authority
2 under Section 13269.

3 **c. The Waiver authorizes discharges that the Regional Board**
4 **knows will cause or contribute to violations of water quality**
5 **objectives for the duration of the Waiver and without any**
6 **deadline to comply with water quality objectives.**

6 In its Resolution adopting the Waiver, the Regional Board found that “[t]he Regional
7 Board does not expect that water quality objectives will be achieved in all waters of the State in
8 the Central Valley Region within the term of this Resolution. The conditions of the Waivers,
9 however, will require actions that will lead to achieving water quality objectives.” AR 15937
10 (Finding 40). The Board also concluded that “[n]either the California Water Code nor
11 Resolution 68-16 [state antidegradation policy] requires instantaneous compliance with water
12 quality objectives. The Waivers recognize that immediate compliance is not feasible in all
13 situations and provide for a time schedule to achieve compliance with water quality objectives
14 and protect beneficial uses.” AR 15933 (Finding 13). These findings make clear that the
15 Regional Board knew that discharges authorized by the Waiver would violate water quality
16 objectives and that the Board contemplated some period of time for compliance. Contrary to
17 these findings, however, a thorough inspection of the Waiver demonstrates that no specific time
18 schedule for achieving compliance with objectives was included by the Regional Board.
19 Moreover, the Regional Board errs in interpreting Section 13269 – the waiver provision – as
20 authorizing time schedules for compliance.

19 Nothing in the Coalition Group Waiver establishes any deadline for agricultural
20 dischargers to comply with water quality standards. The closest the Coalition Group Waiver gets
21 to requiring compliance with water quality objectives and the Basin Plan is at Condition A.5.
22 Condition A.5 states that “Individual Dischargers of a Coalition Group shall implement
23 management practices to improve and protect water quality and to achieve compliance with
24 applicable water quality objectives identified in Att. A.” AR 15977. However, this condition,
25 does not establish any timeframe by which individual dischargers must implement such
26 practices. Any potential changes to individual’s existing management measures under the
27 Coalition Group Waiver will only occur after a determination by the individual discharger or
28 Coalition that discharges are causing or contributing to violations of water quality objectives.
AR 15980 (Att. B, Section B.6.a). Those determinations would begin to occur only after

1 completion of the first round of monitoring in April 1, 2005, and only for 20 percent of the
2 intermediate drainages required to be monitored that first year. AR 15982. Upon the
3 dischargers' determination that waste discharges are contributing to violations of water quality
4 objectives and subsequent notice by the Executive Officer, the Waiver then requires the
5 Coalition Group to prepare and submit a "Management Plan" to the Regional Board. AR 15979
6 (Att. B. Section B.6). There is no express timeline for a Coalition to submit a Management Plan
7 established in the Waiver. *Id.* In the Management Plan, the Coalition must evaluate existing
8 management measures and "identify additional actions, including different or additional
9 management practice implementation or education outreach, etc. the Coalition proposes to
10 implement to achieve water quality objectives. *Id.* (Section B.6.a). In addition to those unknown
11 actions, the Management Plan also must include additional time, of unstated duration, for the
12 Coalition to implement the new actions. *Id.* (Section B.6.c).

13 The Waiver's leisurely pace for complying with standards also is reflected in the
14 receiving water limits included in the Coalition Group Waiver. Although the Coalition Group
15 Waiver purports to establish receiving water limitations for individual dischargers, it qualifies
16 compliance with those limits, stating:

17 Coalition Groups and/or their member individual Dischargers shall comply with
18 receiving water limitations. The Coalition Groups and/or individual dischargers
19 shall, through timely implementation of management practices, reduce wastes in
20 the discharges in accordance with the conditions of this Waiver, including any
21 modifications. Management practices shall be designed to improve and achieve
22 compliance with receiving water limitations, to protect water quality, and prevent
23 nuisance. If exceedance(s) of receiving water limitations persist notwithstanding
24 implementation of management practices and other requirements of this Waiver,
25 the Coalition Group shall submit a management plan as specified in part B
26 Technical Reports of this Waiver."

27 AR 15981-82 (Att. B, Section C.2). Again, "timely implementation" of management practices
28 contemplates a period of time but provides no express time limit. Exceedances of receiving
water limitations again depend upon the collection of meaningful monitoring data, which is not
required to be submitted until April 2005 and then only for a small subset of drainages. *Supra*,
pp. 15-16. Only in phase 3 of the monitoring program do the Coalitions have to evaluate
whether "statistically significant changes in waste concentrations result from the implementation
of various management measures." AR 15947. The third phase begins 2 years after the start of
phase 2, that is not later than July 1, 2008. *Id.* How long phase 3 may continue is anybody's

1 guess. *See id.* (determining success of management measures may take more than one year of
2 samples). Thus, in reality, the Waiver does not require compliance with water quality objectives
3 for the foreseeable future.

4 **2. First Cause of Action, Count 2: The Regional Board’s waiver is**
5 **without authority and contrary to law because it directly conflicts**
6 **with the Legislature’s intent in enacting Section 13269 that waivers**
7 **not be available for substantial discharges of waste.**

8 The Legislature’s intent in promulgating Section 13269 and the meaning of “the public
9 interest” is explained in the legislative history accompanying the original 1969 legislation. The
10 Regional Board’s Group Waiver directly conflicts with the Legislature’s express intent.

11 First, the Legislature did not intend for waivers to be applied to “substantial discharges of
12 waste.” The Legislature intended to codify the Regional Board’s practice at the time the statute
13 was enacted of not requiring RWDs or issuing WDRs for agricultural-related discharges “except
14 in cases such as feeder lots or dairies, involving *substantial discharges of waste.*” AR 12764
15 (emphasis added). There can be no reasonable dispute that perhaps as much as 1.7 billions of
16 gallons of irrigation return flows⁴ and billions of gallons of polluted storm water, from thousands
17 of operations throughout the Central Valley resulting in acute and chronic toxicity and other
18 impairments in large expanses of those waters amounts to substantial discharges of waste. *See*
19 *supra*, p. 6. The Legislature did not intend for such gross discharges to be governed by waivers
20 of RWDs and WDRs.

21 In addition, the Legislature also was clear to express its intent that waivers for agriculture
22 be limited to those situations where “reasonable practices are being observed.” AR 12765
23 (“Waiver provisions can and should also be used to relate to farming and other land use *as long*
24 *as reasonable practices are observed*”) (emphasis added); *See also id.* (“The legislative history
25 of Section 13269 suggests that appropriate factors to consider in determining whether a waiver
26 would conflict with the public interest would include: . . . if the discharge is from agricultural or
27 similar operations, whether the discharger is observing reasonable practices to minimize the
28 deleterious effects of the discharge”). As of the date of issuance of the Waiver, nothing in the
record demonstrates that the 25,000 estimated dischargers from irrigated lands or any identifiable
subset of those dischargers, were “observing reasonable practices to minimize the deleterious

1 effects of the discharge.” To the contrary, an expert report by Dr. G. Fred Lee of U.C. Davis,
2 commissioned by the Regional Board, explains that the opposite is true:

3 there have been few quantitative investigations of the amounts of pesticides,
4 nutrients, total organic carbon, salts, and other constituents of potential concern
5 that are removed by conventional agricultural water quality BMPs that are
6 applicable to the situation in the Central Valley of California.

7 * * *

8 The greatest information gap that exists now for controlling one of the major
9 water quality problems in the Central Valley occurs with approaches that could be
10 used to develop best management practices for nutrients (nitrogen and phosphorus
11 compounds) derived from agricultural lands.

12 * * *

13 A review of the literature on agricultural water quality BMPs shows that there is
14 limited quantitative information on the ability of various so-called “BMPs” that
15 are sometimes advocated as treatment technology to reduce the concentrations of
16 chemical constituents in agricultural land runoff/discharges nationally. This lack
17 of information is particularly acute in the Central Valley of California. . . .

18 * * *

19 There is need to understand the agricultural practices within the Delta watershed
20 and the Delta that lead to excessive concentrations of pollutants that impair the
21 use of Delta water for domestic water supply purposes, and develop management
22 practices to control the constituents of concern at their source. At this time, there
23 is essentially no information on the control of TOC [total organic carbon] in
24 agricultural and managed wetland stormwater runoff and discharges.

25 * * *

26 It has been found that while there are a number of potential management practices
27 that could reduce/eliminate the discharge of OP pesticides from agricultural lands,
28 at this time there is a lack of quantitative information on the efficacy and cost of
29 these management measures.

30 * * *

31 At this time, there is a limited understanding of the agricultural practices that lead
32 to elevated concentrations of *E. coli* and therefore the management practices that
33 need to be implemented to prevent the pollution of waterbodies by *E. coli* in
34 stormwater runoff and tailwater discharges from agricultural activities.

35 * * *

36 Studies have shown that one of the major sources of oxygen demand for the
37 DWSC [Deep Water Ship Channel] is algae that develop in the San Joaquin River

38 4 Staff has estimated that 5166 acre-feet of irrigation return flows are discharged in the
Central Valley. AR 378. One acre-foot equals 325,900 gallons.

1 watershed based on nutrient discharges from agricultural lands. There is need to
2 develop management practices that can be used to control nitrogen and
3 phosphorous discharges from agricultural lands that develop into algae that are
4 transported to the DWSC where they die and decompose, consuming oxygen in
5 the process.

6 AR 12471-74. *See also infra*, pp. 27-30. Nor did the irrigated lands dischargers or their
7 representatives submit any evidence of current management practices that are being employed or
8 their efficacy at removing pollutants of concern from their waste discharges. *See, e.g.* AR
9 14920. Accordingly, the Waiver is inconsistent with the Legislature’s intent that waivers be
10 reserved for those discharges that demonstrate that reasonable practices are being implemented.

11 **3. First Cause of Action – Count 3: The Regional Board’s finding that
12 issuing the Waiver is consistent with State Board Resolution No. 68-16
13 is contrary to law, not supported by the weight of the evidence and
14 inconsistent with other findings.**

15 The Regional Board’s finding that the Waiver was enacted in compliance with the State’s
16 “Statement of Policy With Respect to Maintaining High Quality of Waters in California” –
17 Resolution No. 68-16 (“Policy”) – ignores the Policy’s clear procedural mandates and relies on
18 conjecture, rather than evidence, to claim that the substantive goals of the Policy are met. AR
19 15932-33 (Finding 13).

20 The Policy, adopted by the State Board in October 1968, was adopted as a key
21 component of the Central Valley Region’s Basin Plan after enactment of Porter-Cologne. The
22 Policy provides that:

23 [w]henver the existing quality of water is better than the quality established in
24 policies as of the date on which such policies become effective, such existing high
25 quality will be maintained until it has been demonstrated to the State that any
26 change will be consistent with maximum benefit to the people of the State, will
27 not unreasonably affect present and anticipated beneficial use of such water and
28 will not result in water quality less than that prescribed in the policies.

Any activity which produces or may produce a waste or increase 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.”

Basin Plan, App. Item 2 (RJN, Ex. A). The Basin Plan provides that “[m]aintenance of the
existing high quality of water means maintenance of ‘background’ water quality conditions, *i.e.*,

1 the water quality found upstream or upgradient of the discharge, unaffected by other discharges.”
2 Basin Plan, p. IV-17.00. Thus, for example, the background concentration of pesticides, which
3 do not occur naturally, is zero for purposes of applying the Policy:

4 The State of California anti-degradation policy requires the maintenance of
5 existing high quality water, except under certain circumstances that are spelled
6 out in the policy. This means that the concentrations of contaminants should not
7 be increased above natural background levels, unless a change in water quality
8 will be consistent with maximum benefit to the people of the state and will not
9 adversely affect beneficial uses. The ‘natural background’ of chlopyrifos [sic]
and diazinon is ‘zero’ since chlorpyrifos and diazinon are not naturally occurring
substances. Therefore, the lower end of the range of pesticide concentrations that
can be considered by the Regional Board as allowable in surface waters should be
“zero” or “not detectable.”

10 AR 17111. *See also* AR 17065.

11 The Basin Plan also clarifies that dischargers are responsible for demonstrating
12 compliance with its terms and that they must submit necessary information before the Regional
13 Board can make a determination that their discharge will comply with the Policy:

14 Pursuant to [Resolution No. 68-16], a Report of Waste Discharge, or any other similar
15 technical report required by the Board pursuant to Water Code Section 13267, must
16 include information regarding the nature and extent of the discharge and potential for the
17 discharge to affect surface or groundwater quality in the region. This information must be
18 presented as an analysis of the impacts and potential impacts of the discharge on water
19 quality, as measured by background concentrations and applicable water quality
objectives. The extent of information necessary will depend on the specific conditions of
the discharge. . . . In addition the discharger must identify treatment or control measures
to be taken to minimize or prevent water quality degradation.

20 Basin Plan p. IV-16.00. Lastly, the Regional Board applies the Basin Plan’s water quality
21 objectives to ensure that beneficial uses are reasonably protected. Basin Plan, p. IV-17.00; AR
22 15932 (Finding 13).

23 Thus, the Policy requires that discharges from agriculture must maintain background
24 concentrations of water quality, unaffected by the agricultural discharges themselves or any other
25 discharge, unless 1) the dischargers demonstrate that the change from background will result in
26 maximum benefit to the public, that no unreasonable affect to beneficial uses will occur and that
27 the discharge will be in compliance with water quality objectives, 2) the discharges to high
28 quality waters are subjected to and meet waste discharge requirements and 3) those WDRs
implement the “best practicable treatment or control” that prevent pollution or nuisance and
assures the highest water quality consistent with the maximum public benefit. The Regional

1 Board does not dispute that Policy applies to the dischargers governed by the Waiver. However,
2 the Regional Board’s findings regarding the Policy either ignore key requirements or are not
3 supported by the weight of the evidence.

4 **a. Neither the dischargers nor the Regional Board have**
5 **demonstrated that agricultural discharges that add**
6 **concentrations of pollutants well above natural background**
7 **levels are to the maximum benefit of the public or will comply**
8 **with objectives.**

9 There is no demonstration in the record by either the Dischargers or the Regional Board
10 that the change from natural background levels of various pollutants that will result from waste
11 discharges from thousands of irrigated farms will be to the public’s maximum benefit, protective
12 of beneficial uses and in compliance with water quality objectives. No agricultural discharger
13 provided the prerequisite information designated by the Basin Plan for determining compliance
14 with the Policy. *See* Basin Plan, p. IV-16.00. To the contrary, not one iota of data was
15 submitted to the record by any agricultural discharger or their representatives. *See, e.g. infra*, pp.
16 28-30. Likewise, the Regional Board emphasizes its lack of knowledge regarding the discharges.
17 *See* AR 15934 (Finding 24) (“the Regional Board has limited facility specific information, and
18 limited water quality data on facility specific discharges”); AR 15935 (Finding 25) (“Although
19 there is information that discharges of waste from irrigated lands have impaired waters of the
20 state, information concerning the specific locations of impairments, specific causes, specific
21 types of waste and specific management practices that mitigate impairments, improve and
22 protect water quality is not generally available”).

23 There also is no doubt that changes to natural background concentrations of the long list
24 of wastes to be discharged post-Waiver from agricultural lands are expected to be significant.
25 The Regional Board admits that “[t]he Regional Board does not expect that water quality
26 objectives will be achieved in all waters of the state in the Central Valley Region within the term
27 of this Resolution.” AR 15937 (Finding 40). Contrary to Finding 40, the Regional Board
28 attempts to demonstrate compliance with the Policy by asserting in Finding 13 that:

[the Waivers] require persons who obtain coverage under the Waivers to comply
with applicable water quality objectives, protect beneficial uses, and prevent
nuisance by implementing monitoring and reporting programs, evaluating the
effectiveness of management measures, and where water quality exceeds water
quality objectives by identifying and implementing additional management
practices to comply with water quality objectives.

1 AR 15932. Of course, those are the very activities that the Policy and the Basin Plan required
2 dischargers to carry out prior to the Board authorizing discharges. As of the issuance of the
3 Waiver, and contrary to Finding 13, the Regional Board had no evidence about what, if any,
4 management practices might be effective, currently or in the future, in complying with
5 objectives. *See, e.g., supra.*, pp. 18-19. Moreover, the monitoring program for Coalition Groups
6 effectively pushes off any new management practices into the future, assuring that the status quo
7 of impairing discharges will continue for a number of years. *See supra.*, pp. 15-17. Relatedly,
8 nothing in the Coalition Group Waiver requires any dischargers ultimately to comply with water
9 quality objectives by any specific deadline. *Id.*

10 The Regional Board also claims consistency with the Policy based on its finding that
11 “changes in water quality that may occur as a result of this Waiver will be to improve, over time,
12 the quality of the waters, not to cause further degradation.” AR 15933 (Finding 13). However,
13 this finding is not responsive and is irrelevant to the Policy’s prerequisites. The Policy asks
14 whether any change from high quality waters, that is, natural background, should be allowed.
15 “This means that the concentrations of contaminants should not be increased above natural
16 background levels, unless a change in water quality will be consistent with maximum benefit to
17 the people of the state and will not adversely affect beneficial uses.” AR 17111. So, the Board’s
18 self-serving prediction that, over time, agricultural discharges will improve from their current
19 uncontrolled state says nothing about agricultural discharges that likely will still remain well
20 above background concentrations.⁵

21 The Regional Board also attempts to show compliance with the Policy by finding that,
22 “[n]either the California Water Code nor Resolution 68-16 requires instantaneous compliance
23 with water quality objectives. The Waivers recognize that immediate compliance is not feasible
24 in all situations and provide for a time schedule to achieve compliance with water quality
25 objectives and protect beneficial uses.” AR 15933 (Finding 13). Of course, this finding

25 ⁵ In addition, the Board’s finding that improvements over previous waste discharges by
26 agriculture “may occur” does not comply with the Policy. AR 15933 (Finding 13). The Policy
27 does not require steps that may result in adequate protections assuring the highest water quality
28 consistent with maximum public benefit. Rather, the Policy requires that high quality waters will
be maintained and that conditions will assure protection of beneficial uses and highest water
quality consistent with maximum public benefit.

1 essentially admits that it has not been demonstrated to the Regional Board that the agricultural
2 discharges authorized by the Waiver will either protect beneficial uses or meet water quality
3 objectives. Moreover, the notion that the Waivers provides a “time schedule to achieve
4 compliance with water quality objectives” is false. As discussed above, no such time schedule is
5 found in the Waiver. *See supra*, pp. 15-17. Nor does this finding shed any light on whether
6 allowing impairing discharges of agricultural waste pursuant to open-ended timelines provides
7 the maximum public benefit.

8 **b. The Waiver violates the high quality waters policy that WDRs
9 be issued to discharges triggering the Policy’s mandates.**

10 The Waiver is contrary to the Policy’s mandate that any activity that may produce waste
11 or an increased volume or concentration of waste that discharges to high quality waters must be
12 required to meet waste discharge requirements. The Regional Board does not attempt any
13 finding within the Waiver addressing the Policy’s clear call for the use of WDRs where the
14 Policy is triggered. *See AR 15932-33*. The Regional Board’s implicit effort to interpret the
15 Policy as allowing for waivers to implement its conditions is improper. The Policy has been
16 adopted into the Regional Board’s Basin Plan through formal rulemaking procedures. *See Basin*
17 *Plan, App. Item 2 (RJN, Ex. A)*. Where the plain meaning of an agency’s rules are clear on their
18 face, the agency may not change that meaning without formally amending the rule. *See SWRCB*
19 *v. OAL, supra*, 12 Cal.App.4th at 706. Given the Legislature’s intent that waivers be reserved for
20 insubstantial discharges of waste, the only reasonable interpretation of the Policy is by reference
21 to its plain language, mandating WDRs where waste discharges implicate high quality waters.

22 **c. The Regional Board does not know what control measures are
23 or may be implemented by agricultural discharges now or in
24 the future and has no evidence that “best practicable treatment
25 or control” is required by the Waiver.**

26 Again resorting to speculation, the Regional Board attempts to address the Policy’s “best
27 practicable treatment or control” requirement by assuming that everything will work out over
28 time: “The conditions that require evaluation and implementation of management practices in
the Waivers will result over time in best practicable treatment or control to assure that pollution
and nuisance will not occur and that the highest water quality is achieved.” AR 15933 (Finding
13). This Board finding is merely a guess. Given the Board’s admitted lack of knowledge
regarding current management practices, nevermind its obvious lack of information regarding
new, unknown practices it hopes may arise in the future, there is absolutely no evidence in the

1 record upon which the Board can base a finding that the Waiver requires agricultural dischargers
2 to meet conditions “which will result in the best practicable treatment or control of the discharge.
3 . . .” *See, e.g. supra.*, p. 18 (excerpts from Dr. G. Fred Lee’s report); *Infra*, pp. 27-30; AR
4 15897 (Board Member Longley) (“Only through good data and good science can we make a
5 judgment as to the health of our streams and if, in fact, best management practices, if they are, in
6 fact, having any. . . beneficial impact”); AR 15281 (Ca. Dept. of Agriculture) (“A recent study
7 sponsored by the State Water Resources Control Board concluded that there is a significant lack
8 of quantitative information on the effectiveness of management measures to control deterioration
9 of water quality in receiving waters. This applies to both nutrients and pesticides. . .”).

10 **4. First Cause of Action – Count 3: The Regional Board failed to
11 consider the federal antidegradation policy.**

12 The Basin Plan also requires programs addressing pesticide discharges to comply with
13 the federal antidegradation policy. 40 C.F.R. § 131.12 (RJV, Ex. C). The Regional Board made
14 no finding and did not consider the federal antidegradation policy in adopting and affirming the
15 Waiver. *See* AR 15932-33. By failing to address the federal antidegradation policy in its
16 entirety, respondents abused their discretion.

17 **5. First Cause of Action – Count 4, ¶ 67(a): Respondents’ finding that
18 waiving Porter-Cologne’s reporting and permitting requirements is
19 not against the public interest is contrary to law and not supported by
20 the weight of the evidence.**

21 The Regional Board’s finding that the Waiver is not against the public interest is not
22 supported by evidence in the record or is inconsistent with other findings made by the Board in
23 issuing the Waiver. The Regional Board set forth six specific findings as to why it believed the
24 Waiver was not against the public interest:

25 The adoption of this Resolution and Waivers is not against the public interest
26 because (1) it was adopted in compliance with CWC sections 13260, 13263 and
27 13269..., (2) it includes conditions that are intended to reduce and prevent
28 pollution and nuisance and protect the beneficial uses..., (3) it contains more
specific and more stringent conditions for protection of water quality compared to
either the 1982 Waiver or the 2002 Conditional Waiver..., and contains
conditions that are similar to the conditions of municipal stormwater NPDES
permits..., (4) given the magnitude of and number of persons who discharge
waste from irrigated lands it provides for an efficient and effective use of limited
Regional Board resources, and (5) it provides reasonable flexibility for the
Dischargers....

1 AR 15935 (Waiver, Finding 26). Each of these findings is either irrelevant to a reasonable
2 analysis of the public interest or is unsupported by the weight of evidence in the record.
3 Accordingly, the Regional Board’s determination that the Waiver is not against the public
4 interest was an abuse of discretion.

5 With regard to Finding 26(1), this statement by the Regional Board is equivalent to
6 reasoning that “the Waiver is in the public interest because it is in the public interest.” First of
7 all, the notion that issuing a waiver “complies” with Section 13260, requiring RWDs, and
8 Section 13263, requiring WDRs, makes no sense because the Waiver purports to waive
9 compliance with those very requirements. So the Regional Board made no effort to comply with
10 either Sections 13260 or 13263. Second, and equally uninformative, is the Regional Board’s
11 apparent reasoning that the Waiver is not against the public interest because the Board complied
12 with Section 13269, the Waiver provision. Of course, compliance with Section 13269 presumes
13 that the Regional Board made a rational finding that the Waiver is in the public interest. Such
14 circular reasoning only repeats the Board’s flawed public interest finding, it does not support the
15 finding.

16 With regard to Finding 26(2), the Regional Board’s determination of the public interest
17 cannot be evaluated based on the Board’s intentions. It must be evaluated based on the weight of
18 the evidence and applicable law. Section 13269, at the time of the Regional Board’s decision, or
19 as amended at the time of the State Board’s approval, does not say WDRs and RWDs may be
20 waived “if the waiver is not intended to be against the public interest.” *See* Water Code § 13269.
21 Prior to January 1, 2004, the Board had to find that the waiver was “not against the public
22 interest” and, after the date, the Board had to find that the Waiver was “in the public interest.”
23 *Id.*

24 Moreover, the Regional Board’s expression of its intention also directly conflicts with the
25 clear weight of the evidence in the record and the actual conditions of the waiver. As described
26 above, there is no condition within the Coalition Group Waiver that requires an individual
27 discharger to do anything regarding their discharges during the term of the waiver and for a
28 possibly very long time thereafter. *See supra*, pp. 15-17. Hence, the agricultural industry’s
massive, water quality degrading waste discharges that were observed prior to the issuance of the
Waiver undoubtedly will occur again after the Board’s issuance of the Waiver. *See supra*, p. 6.
Indeed, pollution discharges under the Coalition Group Waiver could very well increase. AR

1 14605 (Dr. Susan Kegley) (“Implementation of a waiver without an enforceable mandate of
2 pollution reduction is equally likely to result in *greater* pollution from agricultural sources . . .”).
3 The Regional Board concluded in the Waiver itself that, “[t]he Regional Board does not expect
4 that water quality objectives will be achieved in all waters of the State in the Central Valley
5 Region within the term of this Resolution.” Waiver, Finding 40 (AR15937). The Board’s
6 admission that discharges pursuant to the Waiver will violate water quality objectives, and the
7 clear evidence in the record and from the face of the Waiver that confirms impairing discharges
8 are authorized under the Waiver, is fundamentally at odds with its stated intention that the
9 Waiver’s conditions will protect beneficial uses.

10 With regard to Finding 26(3) that the Waiver improves upon previous waivers for
11 agriculture, the Regional Board vacated both the 1982 agricultural waiver and the December
12 2002 agricultural waiver presumably because it felt they were both contrary to the public
13 interest. Even assuming it was true that the Waiver improves upon grossly deficient prior
14 waivers, that fact says nothing about whether the Group Waiver is itself sufficient to protect the
15 public’s interest in clean water and protected beneficial uses.

16 The conclusory assertion in Finding 26(4) that the Waiver conditions are similar to
17 conditions in municipal storm water permits is just that, a conclusory assertion. *See* AR 15437.
18 No such permit is provided in the record. No comparison between the Waiver and such a permit
19 is found in the record. There is a vague reference to applying a “storm water model, but only to
20 show how different such a model was from the watershed group approach. AR 13059 (“Using
21 the stormwater model to regulate each [agricultural] discharger, staff has estimated that at least
22 73 PYs and \$9.5 million would be needed annually. Currently, six PYs have been allocated. . . .
23 even with the watershed group approach, existing resources are insufficient.”). As suggested by
24 staff’s analysis, there are vast differences between a municipal stormwater NPDES permit and
25 the Coalition Group Waiver. First, no municipality covers 7 million acres and 25,000
26 unidentified agricultural discharges of toxic and other pollutants. Second, cities are dischargers
27 that are directly accountable to the Regional Board. Watershed Groups are not dischargers and
28 disclaim any responsibility for the waste discharges of any of the individual dischargers, even
those who are members of their group. *See* AR 15539. Third, the conditions employed by
municipalities look nothing like conditions that could be applied to agricultural discharges. For
example, nothing in the record indicates that farmers will be employing street sweepers,

1 establishing programs to keep storm drains clear or enacting ordinances to enforce prohibitions
2 on discharges to their storm drain systems. Fourth, the Regional Board has information about
3 actual storm water control measures employed by municipalities where as in the case of the
4 Waiver, the Board did not bother to collect in any information regarding what, if any,
5 management practices are being employed, where they might be, who is employing them or
6 whether those measures work.

7 Perhaps on a more fundamental level, even assuming it is true that the Coalition Group
8 Waiver conditions are in some unspecified way similar to conditions in unidentified municipal
9 stormwater permits, that comparison still says nothing about whether the conditions applied in
10 the Waiver are sufficient to protect the public interest from the obvious adverse impacts of tens
11 of thousands of agricultural waste discharges in myriad quantities and levels of toxicity
12 throughout the Central Valley.

13 Lastly, agricultural dischargers' flexibility to devise their own regulatory program,
14 referenced by Finding 26(5), has nothing to do with the public interest and has everything to do
15 with private interests of the dischargers and the Regional Board's failure to obtain information
16 necessary to make defensible decisions regarding appropriate conditions and the public interest.

17 **6. First Cause of Action – Count 4, ¶ 67(a): In addition to not being**
18 **supported by its own findings, the Regional Board's finding that the**
19 **Waiver is not against the public interest is not supported by the**
20 **weight of the evidence.**

21 The record plainly demonstrates that, despite having had three years to gather and
22 analyze information and the constant prodding of Petitioners, the Regional Board gathered in
23 little if any information regarding individual agricultural discharges or types of dischargers.
24 Hence, at the time it issued the Waiver, the Regional Board knew practically nothing about the
25 agricultural dischargers whom they were purporting to regulate under the Waiver or the efficacy
26 of any on-the-ground agricultural management practices to successfully control the pollutants
27 discharged by irrigated agriculture in the Central Valley. As a result, their optimistic conclusion
28 that the Waiver would be effective at protecting water quality and serve the public interest is a
complete stab in the dark, uninformed by any real evidence.

Although the Regional Board, its staff and even the dischargers recognized the need to
gather in information regarding specific types of agricultural dischargers, including water quality
monitoring data, the Regional Board's staff never required the dischargers to provide any

1 relevant information or to conduct the necessary monitoring. In response to petitioner’s
2 original petition to vacate the 1982 waiver, the Regional Board adopted Resolution No. 5-01-236
3 in September 2001. In that decision, the Regional Board resolved “that site specific information
4 that can be used to evaluate compliance with waiver conditions must be available before a
5 renewed waiver policy can be considered. . . .” AR 931. *See also* AR 945-46 (Board Member
6 Longley) (“it is our full intent to have that information available so we can do the kinds of things
7 that you were suggesting we have to do. . . . And come the end of next year, we better be pretty
8 well ready to show you the results of 15 months, as you say, of effort”); AR 949 (Board
9 Member Chris Cabaldon) (“we [the Regional Board] need a couple of months where we have all
10 of the necessary information and for that to work the staff’s got to have the information about the
11 extent and sources of pollutants earlier than [February 2002]”). Regional Board staff agreed
12 with the necessity of site-specific information about the dischargers. AR 936 (“[The proposed
13 Resolution] recognizes the need for specific information on water quality in locations around the
14 Valley before renewed waivers can be considered”); AR 1403 (Resolution “recognizes need for
15 site specific information before renewed waiver policy can be considered”).⁶ The Board then
16 laid out a series of steps by which its staff was to make sure the necessary site-specific
17 information was obtained well prior to January 1, 2003 and the Board’s ultimate decision on
18 regulating agricultural discharges:

18 Be It Further Resolved, that staff is directed to request agencies and organizations
19 that work with drainage from irrigated lands to establish local water quality
20 monitoring efforts to identify sources of pollutants; and Be It Further Resolved,
21 that staff is directed to assist in and track the progress made by these voluntary
22 efforts to monitor and control discharges of pollutants from irrigated lands and to
23 prepare routine progress reports for the Board . . . Be It Further Resolved, that if
24 the Executive Officer determines by February 1, 2002 that satisfactory progress is
25 not being made in assessing the extent and sources of pollutants resulting from
26 agricultural activities, the Executive Officer is directed to issue orders under
27 Water Code § 13267 on appropriate parties to gather data needed for the Board to
28 evaluate this matter. . . .

26 ⁶ Other interested parties also underscored the importance of gathering specific information
27 before the 1982 Waiver sunset. *See* AR 534 (“The [Turlock Mosquito Abatement] District does
28 understand that testing should have been conducted before the conditional waiver sunsets”); AR
552-53 (Contra Costa Water District comments re: importance of monitoring as basis for review
of old waiver).

1 AR 931.⁷ On September 25, 2001, Regional Board staff sent out a request for dischargers and
2 their related organizations to establish voluntary monitoring programs, explaining that “[t]he
3 goal is to have a monitoring program in place by the 2002 irrigation season to assess the extent
4 and sources of pollutants resulting from agricultural activities[,]” that is, prior to the Regional
5 Board’s new agricultural decision. AR 991. *See* AR 961 (Executive Officer Gary Carlton)
6 (“What we’re trying to do is to have a start on it so there will be some basis to make some
7 decisions come January 2003”).

8 The Staff’s request was met with a resounding silence. Only a few interested parties
9 responded affirmatively but even then did not ultimately carry out any monitoring. *See* AR
10 1092; 1275. As of March 2002, one month after the Board’s deadline for determining whether
11 voluntary monitoring was feasible, Regional Board staff announced that “[a]t this time there is
12 no comprehensive monitoring program.” AR 1348. Regional Board staff did nothing to follow
13 up with the dischargers’ lack of response.⁸

14 Although at least one Regional Board member expressed frustration over the lack of
15 cooperation by the dischargers, the Board nevertheless ended up issuing the new waiver in July
16 2003 without having obtained any of the information that it clearly recognized was necessary to
17 reissuing a new waiver. *See* AR 8269 (Regional Board Member Cabaldon).⁹ The Regional

18
19 ⁷ Likewise, the Regional Board staff report prepared in response to the environmental
20 groups’ original petition in 2000, stated that, “[r]escinding the existing waiver programs would
21 leave the Board with an overwhelming task of preparing WDRs without sufficient information to
22 properly prioritize the effort. Because of this, staff recommends that the short-term focus be
23 placed on developing the local monitoring, the results of which can be used to establish
24 appropriate control programs at a local level. If the monitoring is initiated immediately the
25 Board would have the initial results in time to consider before the existing waivers sunset in
26 January 2003.” AR 320. *See also* 432 (in July 2001, staff recommends monitoring by areawide
27 groups in order to collect data necessary to review waiver by end of 2003).

28 ⁸ Regional Board staff eventually put together a conceptual proposal of 56 monitoring sites
in the San Joaquin and Sacramento River watersheds focusing on main drains in those regions,
which eventually formed the basis for the Regional Board’s joint monitoring effort with U.C.
Davis. AR 1156, 1161-69. However, that Regional Board monitoring was not completed at the
time of adoption of the Waiver. *See* AR 12802.

⁹ As Board Member Cabaldon observed, “When we rejected the petition for [the
environmental] organizations, we did so with an understanding that there would be a significant
amount of work around watershed groups and around monitoring all this which largely did not
occur. And when that came back, we said, “Well that didn’t happen. Darn. Now we will work

1 Board even includes a specific finding within the Waiver acknowledging its lack of information:
2 “Although there is information that discharges of waste from irrigated lands have impaired
3 waters of the state, information concerning the specific locations of impairments, specific causes,
4 specific types of waste and specific management practices that mitigate impairments, improve
5 and protect water quality is not generally available.” AR 15935 (Finding 25).

6 It also is clear that, because of its lack of evidence and the resulting reliance on uncharted
7 “coalition groups,” the Board and its staff, although perhaps optimistic, had no hard evidence
8 that these new entities and the waiver conditions would actually work to either improve water
9 quality or assure implementation of water quality objectives. *See* AR 8041 (describing
10 watershed groups as an “experiment”); AR 8248 (Board Member Longley) (describing
11 watershed groups as experimental); AR 15516 (“We don’t know yet how this will work, and we
12 are prepared to allow some time to see how well it does work”); AR 15844 (discussing lack of
13 knowledge of current efforts and lack of evidence regarding what will work). In the end, the
14 Regional Board decided that a waiver was in the public interest because it did not have and had
15 not required the information necessary to make a more objective, concrete regulatory decision.
16 The Regional Board was not acting in the public interest by issuing a waiver despite recognizing
17 how little it knew about the dischargers, especially after the agency had failed to make sure it
18 was informed for the previous three years.

19 **7. First Cause of Action – Count 4, ¶ 67(b): The Regional Board’s
20 public interest finding is contrary to law and not supported by the
21 weight of the undisputed expert evidence.**

22 In April, the Regional Board’s technical staff presented a monitoring program proposal
23 that was based on its best scientific judgment. AR 12964-77. In June, 2003, staff released a
24 watered-down version of its previous monitoring proposals. AR 14804-20. Not surprisingly,
25 many experts found the revised monitoring program to be entirely deficient. Dr. G. Fred Lee, the
26 U.C. Davis expert retained by the Regional Board to report on available management practices,
27 provided independent technical comments on the revised monitoring program which stated:

28 Upon review of the CVRWQCB final Agricultural Waiver water quality
monitoring program, I found that the CVRWQCB did not correct many of the
significant deficiencies in the water quality monitoring program that I had

it out – we will get another chance to deal with it again when the waivers come up. And we are
still in the same position.”

1 discussed in my comments on the draft Agricultural Waiver water quality
2 monitoring program. As a result, the currently adopted Agricultural Waiver water
3 quality monitoring program will result in developing substantial water quality
4 data that cannot be used to reliably evaluate the water quality characteristics and
impacts of the irrigated agriculture stormwater runoff and tailwater/subsurface
drain water discharges.

5 AR 18697. In addition, Dr. Susan Kegley submitted expert comments stating that:

6 “In my opinion, the latest proposed monitoring plan and is unlikely to provide
7 sufficient data of useable quality to effectively meet the stated objectives of the
8 monitoring plan. As such, the monitoring plan will in no way provide an accurate
9 picture of water quality in the highly-impacted Central Valley waterways, nor will
10 it provide a means to measure the effectiveness of any Best Management
Practices that might be implemented. Given the lack of data proposed to be
collected, it is likely that increased degradation to Central Valley waters could
occur and would go undetected.”

11 AR 15386. The record does not contain any evidence rebutting these expert comments. *See, e.g.*

12 AR 15572 (Board Member Longley) (“Read the comments from folks like Dr. Lee and others
13 that, I think, make a lot of sense about some of the principles of monitoring”). By rejecting their
14 own staff’s April proposal and the comments of reputable scientists, the Regional Board’s
15 monitoring conditions are not supported by the weight of the evidence.

16 **8. First Cause of Action – Count 4, ¶ 67(c): The Regional Board’s public**
17 **interest finding is contrary to law and not supported by the weight of**
18 **the evidence that the Regional Board must have staff in place and a**
19 **funding mechanism in order to effectively implement the Waiver.**

20 In issuing the Waiver, the Regional Board found that the adoption of any WDRs was not
21 practicable. AR 15935 (Finding 25). The Regional Board’s finding and resulting decision to
22 waive WDRs and RWDs for agricultural discharges is inconsistent with its own staff analyses.
23 According to its staff, the Regional Board does not have enough staff to implement the adopted
24 Waiver. Staff also showed that issuing WDRs would require fewer staff than waivers. Issuing
25 WDRs also would immediately assess fees that would be available to fund the necessary staff
26 and relieve the general taxpayers of the burden of funding the Waiver program. The Regional
27 Board’s finding and its assessment of the public interest fail to properly address those clear
28 public interests.

By the Regional Board’s own estimates, it does not have sufficient resources to
implement the Waiver. At the time the Regional Board issued the Waiver, the agency had only 5
staff positions available for developing and implementing the agricultural discharge program.

1 See AR 14767. The record is replete with staff statements explaining that foreseeable staffing
2 levels were entirely deficient. See AR 14766-67 (“It has become very clear that five person
3 years (PYS) are insufficient to adequately implement the program under either the 2002
4 Conditional Waiver or the proposed July 2003 Conditional Waiver”); AR 13059 (“...even with
5 the watershed group approach, existing resources are insufficient”); AR 15537 (“Additional
6 staff resources are needed to develop an effective program”).¹⁰

7 Evidence in the record indicates that the Regional Board’s current staffing levels would
8 have been better able to implement areawide WDRs. Regional Board staff compared the various
9 staffing levels necessary to establish and implement WDRs versus waivers. Staff originally
10 estimated that 20 staff would be necessary for a waiver option; 15 staff for general WDRs and
11 only 6 staff for areawide WDRs. AR 319; AR 322-33; AR 431. With respect to pesticides, the
12 Regional Board also has found that staff resources would be essentially the same for issuing a
13 waiver versus issuing WDRs for agriculture. AR 16073; AR 16095-96. Accordingly, the
14 weight of the evidence shows that the Regional Board refused to consider WDRs despite their
15 requiring no additional, and possibly less staff. As a result, the Board’s finding that the Waiver
16 was not against the public interest is not supported by the absence of sufficient staff to
17 implement the Waiver, especially in light of the evidence that there were sufficient staff to
18 implement areawide WDRs.

19 The record also demonstrates that by issuing a waiver rather than WDRs, the Regional
20 Board opted for a program that precluded the Regional Board from assessing fees on dischargers
21 that could be used to recover the costs of the program. The State has established a strong policy
22 that polluters should pay for the cost of regulatory programs necessary for the public to oversee
23 their pollution. See AR 14200, 14208. Under Porter-Cologne, that policy is manifested in the
24 requirement that all dischargers pay annual fees in an amount necessary to recover the costs of
25 the regulatory program. See Water Code § 13260(d)(1)(B). Had the Regional Board issued
26 general or areawide WDRs in December 2002, the Regional Board would have been gathering in

26
27 ¹⁰ See also AR 13060 (“On the conservative side, staff estimates that the existing waiver
28 [Dec 2002] would need about ten Pys or \$600,000, not including overhead”); AR 1193 (“While
discharges from irrigated lands can adversely impact beneficial uses and often dominate the
water quality in receiving waters, we do not have the resources needed to address this category
of dischargers”); AR 13264 (power point of staffing needs).

1 fees from dischargers for almost two years now.¹¹ Although fees collected into the Waste
2 Discharge Permit Fund must be appropriated by the Legislature, all of that money would be
3 earmarked for the State and Regional Boards. WC § 13260(d)(2)(A). Thus, not only did the
4 Regional Board select an option that it could not staff, the Board also selected the option that
5 currently directly conflicts with the recognized public interest that polluters should pay for the
6 cost of regulation.

7 In conclusion, by selecting a waiver that the Regional Board could not implement with
8 their available resources and which cut off the most direct means of funding the agricultural
9 discharge program, the Regional Board acted contrary to the public interest.

10 **9. First Cause of Action – Count 5: The Regional Board’s finding that
11 the Waiver is consistent with the Central Valley Basin Plan is
12 contrary to law and not supported by the weight of the evidence.**

13 The Waiver conflicts directly with the Basin Plan’s existing requirements for “Pesticide
14 Discharges from Nonpoint Sources.” Basin Plan, p. IV-33.00. Once approved by the State
15 Board, basin plans “are binding on all state offices, departments and boards whose activities may
16 affect water quality.” *City of Sacramento v. State Water Resources Control Bd.* (1992) 2
17 Cal.App.4th 960, 964. *See* Water Code § 13247. Because the Waiver is inconsistent with the
18 Basin Plan, the Regional Board’s issuance of the Waiver is an abuse of discretion and contrary to
19 law.

20 The Basin Plan sets forth a series of nondiscretionary actions designed to bring
21 agricultural discharges of pesticides into compliance with applicable water quality objectives.
22 These include, among others, a mandate that agricultural pesticide discharges “implement
23 management practices that result in full compliance with [water quality] objectives by 1 January
24 1993, unless required to do so earlier. . . .” Basin Plan, p. IV-34.00 (RJN, Ex. A).

25 The Basin Plan also sets forth specific responses where agricultural management
26 practices fail to comply with water quality objectives by the 1993 deadline, including:

27 Where the Board finds that currently used discharge management practices are
28 resulting in violations of water quality objectives, but the impacts of the discharge

11 At the time the Regional Board issued the Waiver, the Regional and State Boards had no
authority to assess fees for that waiver. Even now, although the Legislature amended Porter-
Cologne to require that fees be paid for waivers as well, such fees are only required once the
State Board establishes a fee schedule. Although claiming it plans on creating such a fee
schedule, the State Board has not established a fee schedule to date.

1 are not so severe as to require immediate changes, dischargers will be given three
2 years, with a possibility of three one year time extensions depending on the
3 circumstances involved, to develop and implement practices that will meet the
objectives.

4 *Id.*, p. IV-35.00. Hence, the Basin Plan only authorizes compliance schedules for agricultural
5 dischargers of pesticides to comply with water quality objectives until January 1, 1999, *i.e.* six
6 years from the initial deadline of January 1, 1993.

7 The Basin Plan also provides that, “[t]he [Regional] Board will conduct reviews of the
8 management practices being followed to verify that they produce discharges that comply with
9 water quality objectives. It is anticipated that practices associated with one or two pesticides can
10 be reviewed each year.” Basin Plan, p. IV-34.00. The Basin Plan then makes waivers
11 contingent on the Regional Board determining that management practices are adequate to meet
12 water quality objectives: “Waste discharge requirements will be waived for irrigation return
13 water per Resolution No. 82-036 if the Board determines that the management practices are
14 adequate to meet water quality objectives and meet the conditions of the waiver policy.” *Id.*, p.
IV-35.00.¹²

15 The Waiver conflicts with each of these Basin Plan requirements. Rather than the Basin
16 Plan’s straightforward mandate that agricultural dischargers implement management practices
17 that comply with water quality objectives not later than January 1, 1993, the Waiver allows
18 agricultural pesticide dischargers to discharge pesticides in violation of objectives for the
19 foreseeable future with no specific deadline in mind. *See supra*, pp. 15-16. Rather than
20 requiring pesticide dischargers with inadequate management measures to develop and implement
21 management practices that will meet objectives within three years, with a possibility of only
22 three additional one year extensions, the Waiver authorizes discharges that will violate objectives
23 without setting forth any particular compliance date. *Id.* Lastly, rather than implementing the
24 Basin Plan’s requirement that waivers be limited to those situations where the Regional Board
25 had determined that management practices are adequate to meet water quality objectives and the
conditions of the previous waiver policy that no water quality problems be contemplated, the

26
27 ¹² The conditions of the previous waiver are still actually Basin Plan requirements and they
28 included, for agricultural pesticide discharges, “[w]here no water quality problems are
contemplated . . . [and] [o]perating to minimize sediment to meet Basin Plan turbidity objectives

1 Regional Board issued the new waiver with basically no information about current management
2 practices except that their application to previous dischargers had resulted in widespread, serious
3 violations of water quality objectives throughout the Central Valley Region. *See supra*, pp. 6,
4 18, 27-30. Because the Board’s finding that the Waiver complies with its Basin Plan is at odds
5 with the evidence and inconsistent with the plain terms of the Basin Plan, the Board abused its
6 discretion by issuing the Waiver.

7 **B. Second Cause Of Action – Respondents Action Adopting The Initial Study**
8 **And The Negative Declaration And Failure To Prepare An Environmental**
9 **Impact Report Constitutes A Prejudicial Abuse Of Discretion.**

10 Respondents violated the California Environmental Quality Act by authorizing thousands
11 of agricultural waste discharges that will violate water quality objectives and result in other
12 significant environmental impacts without first preparing an environmental impact report or,
13 alternatively, an adequate initial study and negative declaration. CEQA mandates the
14 preparation of an EIR prior to agency’s decision whenever it can be fairly argued that the project
15 may have a significant environmental impact. *Supra*, pp.4-5.¹³

16 **1. Second Cause Of Action, ¶ 72(a) - Respondents’ finding that**
17 **“Coalition groups have the potential for identifying and correcting**
18 **water quality impairments without the need for . . . WDRs” is**
19 **inconsistent with Respondents’ finding that the project could not have**
20 **a significant effect on the environment.**

21 The Regional Board made a number of findings in the Waiver that are inconsistent with
22 its conclusion in the Negative Declaration and Resolution R5-2003-0103 (adopting the negative
23 declaration) that authorizing massive discharges of waste by tens of thousands of agricultural
24 dischargers pursuant to the Waiver’s conditions “COULD NOT have a significant effect on the
25 environment. . . .” AR 1856 (negative declaration) (emphasis supplied). *See also* AR 15927
(Res. No. R5-2003-0103). Despite the seemingly unequivocal nature of those findings, findings
26 within the Waiver itself acknowledge that there is a possibility that the Waiver may not result in
27 improvements to water quality. Finding 17 of the Waiver states that “These Coalition groups

28 and to prevent concentrations of materials toxic to fish or wildlife.” Basin Plan, pp. IV-22 thru
IV-23 (1982 Waiver is part of current Basin Plan).

¹³ As requested by the Court, the following tracks the issues as alleged in Petitioners’
petition with the exception of Paragraphs 72(l), 72(o), 72(r) and 72(s) pertaining to, respectively,
effects on human beings, air quality impacts and the environmental baseline. Petitioners opt not
to pursue those four specific issues.

1 have the potential for identifying and correcting water quality impairments without the need for
2 the third-tier process, which would be the issuance of WDRs.” AR 15930 (emphasis added).
3 Contrary to the overconfident assertion in its negative declaration that the project “could not
4 have a significant effect, Finding 17 clearly states that there is only a potential that the principle
5 mechanism established by the Waiver – the Coalition Groups – only have a potential of locating
6 and solving water quality problems. Finding 28 also is inconsistent with the finding in the
7 negative declaration, acknowledging that WDRs may prove necessary “if, for example, it is
8 determined that these Waivers are not effective in ensuring that water quality is protected.” AR
9 15936. Because the Regional Board’s conclusion in the negative declaration of no possible
10 significant environmental effects is inconsistent with findings in the Waiver, the Regional
11 Board’s adoption of the negative declaration was an abuse of discretion.

12 **2. Second Cause Of Action, ¶ 72(b) - The Regional Board’s finding in**
13 **the Initial Study and Negative Declaration that the project could not**
14 **have a significant effect on the environment is not supported by**
15 **substantial evidence in the record.**

16 The Regional Board’s finding of no significant effect is not supported by any substantial
17 evidence in the record demonstrating that the proposed waiver will likely reduce discharges of
18 agricultural pollutants to the state’s waters. Although Respondents repeat their conclusion that
19 the Waiver’s conditions can only lead to improvements in water quality, they cannot point to any
20 evidence that supports that optimistic prediction. During Section 13269’s three-year waiver
21 review period, the Regional Board could have been collecting relevant information to prepare for
22 its review of the 1982 Waiver. However, the Regional Board did not request and did not receive
23 any evidence regarding who the dischargers were, how many dischargers are out there, where
24 such discharger are located and which waters they discharge to, which pollutants they are
25 discharging and how much, what if any management practices are being applied, whether those
26 practices actually control any pollutants, the availability of other management practices, the
27 identity of the parties, if any, who will form watershed programs, or whether they will be
28 adequately funded. The Regional Board’s Waiver findings admit the Board’s lack of knowledge.
AR 15935 (Finding 25).

Of these notable gaps in the evidence, the most important omissions include the absence
of any evidence about the effectiveness of existing or potential future on-farm management
practices to control waste discharges to an extent that they assure compliance with water quality

1 objectives and protection of beneficial uses. For example, for some pesticides, there may be no
2 effective management practice that could prevent exceedances of objectives once the pesticide is
3 applied to a field. *See* AR 11655 (Dr. Charles Benbrook) (“Unfortunately, some pesticides
4 currently used in California will almost inevitably lead to adverse impacts on aquatic ecosystems
5 under some conditions of use because of their inherent toxicity and environmental fate
6 properties”). The record is clear that the Regional Board simply has no idea what, if any,
7 management measures are being used by the current unidentified dischargers or whether those
8 measures are effective in addressing all of their discharged waste. *Supra*, p. 18. *See also* AR
9 378 (“The extensive use of water for irrigation in the Central Valley demonstrates that return
10 flows have a significant potential to adversely impact water quality if pollutants are not managed
11 at the farm level”). Nor does the Regional Board know whether any future, as yet to be
12 identified management practices may prove effective. The Board’s findings of no significant
13 impact, although perhaps well-intentioned, are based not on evidence but a wing and a prayer.

14 Likewise, because the Regional Board did not gather in any evidence about the number
15 of dischargers, the size of their operations and the volume and concentrations of pollutants they
16 are discharging and their future plans, the Regional Board has no way of determining whether
17 discharges will or will not increase in volume or concentration under the Waiver. Indeed, the
18 Waiver continues neither to require this basic information nor any monitoring that would allow
19 the agency to detect any increases in discharges now occurring under the Waiver. *See supra*, pp.
20 15-17. Being ignorant of the current discharge levels of discharges, it is entirely arbitrary for the
21 Regional Board to believe it can assert without hesitation that those unknown discharges will
22 only get better under the Waiver.

23 Given these gaps in evidence that is fundamental to the Board’s analysis of a rational
24 pollution control program for agricultural pollution discharges, its finding of no potential adverse
25 environmental impacts is unsupported by evidence and inconsistent with the Regional Board’s
26 finding of how little, if any, information they have about the actual dischargers and management
27 practices.

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1 **3. Second Cause Of Action, ¶ 72(c) - The Initial Study is not substantial**
2 **evidence that the project could not have a significant effect on the**
3 **environment because it fails to disclose the evidence relied upon by**
4 **the study and asserts conclusory statements unsupported by any**
5 **evidence or factual information.**

6 Even a cursory perusal of the Initial Study adopted by the Regional Board demonstrates
7 that the Board did not attempt to marshal evidence in support of its numerous, cursory
8 conclusions set forth in that document. One of the purposes of the initial study is to “provide
9 documentation of the factual basis for the finding in a negative declaration that a project will not
10 have a significant effect on the environment.” 14 CAC § 15063(c)(5). “The Initial Study is
11 necessary in order to provide the factual and analytical basis for a Negative Declaration or to
12 focus an EIR on the significant effects of a project.” 14 CAC § 15063 (Discussion). “[T]he
13 individual conclusions reached by an initial study must be based on some evidence. *Id.* An
14 initial study that fails to disclose the data and evidence upon which it relies for its conclusions is
15 inadequate. *Sundstrom, supra*, 202 Cal.App.3d at 305-06; *Citizens Ass’n for Sensible*
16 *Development, supra*, 172 Cal.App.3d at 171 (the initial study must “disclose the data or evidence
17 upon which the person(s) conducting the study relied. Mere conclusions simply provide no
18 vehicle for judicial review”). *See* CEQA Guidelines, App. G, p. 3 (Environmental Checklist
19 Form) (“Supporting Information Sources: A source list should be attached, and other sources
20 used or individuals contacted should be cited in the discussion”) (RJN, Ex. D).

21 For example, the Initial Study checks off “no impact” for biological resources. AR 1865-
22 66. The initial study then includes the following very brief discussion:

23 The proposed project will have no impact on biological resources. The proposed
24 project requires development of management practices to control discharges of
25 waste and monitoring to evaluate existing conditions and the effectiveness of the
26 management practices. Any specific projects to implement new management
27 practices will be conducted at the local level and the merits of such a project will
28 be evaluated independent of this action.

29 AR 1866. To begin, there does not appear to be any dispute that waste discharges from irrigated
30 lands do in fact cause significant adverse effects on biological resources, albeit those impacts to
31 biological resources are not mentioned even in passing in the Initial Study. *See supra*, p. 6.
32 Compare AR 1851-80. On its face, the discussion of biological resources does not discuss or
33 explain how authorizing equally potent discharges in the future miraculously results in no impact
34 to biological resources. Assuming the Regional Board’s point is that the Waiver’s conditions are

1 guaranteed to at least reduce, if not eliminate, previously observed impacts to biological
2 resources, nothing in the discussion discusses data or other information that demonstrates that the
3 management practices to be developed will succeed in reducing all pollutants discharged under
4 the Waiver. *See supra*, pp. 18, 27-30. Lastly, the Regional Board’s cavalier assertion that
5 unidentified, potential future management practices would be analyzed at the “local level” is
6 meaningless. Nothing in the record suggests that farm specific management practices will be
7 reviewed under CEQA by any local entities. Nor again is there any indication of how that point
8 supports the Board’s conclusion that allowing thousands of discharges of polluted waste in the
9 future could not impact biological resources.

10 The Regional Board’s discussion of its conclusion that authorizing discharges from
11 irrigated agriculture pursuant to the Waiver would have no impact on hydrology or water quality
12 relies on similar vagaries. Again, the discharges authorized by the Waiver are guaranteed to
13 introduce vast amounts of waste to Central Valley waters in amounts that will violate water
14 quality objective and beneficial uses. *See supra*, p. 6.¹⁴ The Regional Board’s discussion again
15 does not explain how the Waiver conditions, supported by evidence in the record, would either
16 eliminate or even reduce those guaranteed impacts. The Regional Board discusses the “goal” of
17 the Waiver project to reduce impacts to water quality and states that the conditions are “intended
18 to achieve the goal of attaining water quality standards.” AR 1871. Of course, laudable goals
19 and intentions do not suffice by themselves as sufficient factual bases for a conclusory finding of
20 no impact. Indeed, on its face, the Board’s discussion of its no impact finding for hydrology and
21 water quality essentially admits that the Board failed to gather in any evidence upon which it
22 could base that finding: “Existing information on these discharges is limited.” *Id.* It also admits
23 that its no impact finding is based on future evaluations and plans – not evidence cited in the
24 Initial Study: “The extent and sources of discharges of waste from irrigated lands will be
25 delineated in the monitoring component of the Waiver. Plans will be developed to identify and
26 correct any problems.” *Id.* (emphasis added).

26 ¹⁴ None of the exhibits attached to the Initial Study in July 2003 documenting previous adverse
27 impacts to water quality caused by pre-Waiver discharges of agricultural wastes support the
28 Regional Board’s analysis that the Waiver’s conditions will preclude any possible impact to
water quality or hydrology. *See* AR 15928-29. Each of the exhibits actually underscores the
certainty that future discharges authorized by the Waiver will have adverse impacts to water
quality.

1 In sum, the Board’s cavalier findings of no impacts for key issues in its Initial Study are
2 not based on any data or evidence and should be rejected.

3 **4. Second Cause Of Action, ¶ 72(d) - The uncontradicted opinions of**
4 **qualified experts that the project may lead to increased loadings of**
5 **pollutants is substantial evidence of a fair argument that the project**
6 **may have a significant environmental effect.**

7 Because a number of credible experts reviewed the Waiver and concluded, based on their
8 evaluation of actual facts, that the Waiver could result in adverse environmental effects, the
9 Regional Board abused its discretion by concluding that there is no fair argument that the Waiver
10 would have a significant effect on the environment. Credible expert testimony that a project may
11 have a significant impact, even if rebutted, is generally dispositive that an EIR must be prepared.
12 *See City of Livermore v. Local Agency Formation Comm’n* (1986) 184 Cal.App.3d 531, 541-42;
13 *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 247-49.

14 Drs. Susan Kegley, Ph.D., G. Fred Lee, Ph.D., and Charles Benbrook, Ph.D., provided
15 consistent expert opinions that the project may not or would not reduce the levels of pollutants
16 currently being discharged by agricultural operations in the Central Valley and that, in some
17 watersheds, the project likely could lead to increases in pollutant loadings and more severe water
18 quality impacts. Thus, Dr. G. Fred Lee of U.C. Davis submitted expert comments noting that
19 any monitoring program that was less comprehensive than the minimum monitoring program
20 proposed by staff in April 2003 would not work: “A less comprehensive program will not
21 satisfy the requirements of receiving a waiver of WDRs, since it will not provide the information
22 that is needed to ultimately determine the water quality problems caused by agricultural
23 discharges/runoff and assess the potential for control through management practices.” AR
24 13483.^{15, 16} Dr. Charles Benbrook provided a lengthy detailed analysis of the proposed Waivers

25 ¹⁵ A subsequent comment by Dr. Lee confirmed that the monitoring program adopted by the
26 Regional Board would not prove successful in evaluating management practices or determining
27 impacts:

28 Upon review of the CVRWQCB final Agricultural Waiver water quality
29 monitoring program, I found that the CVRWQCB did not correct many of the
30 significant deficiencies in the water quality monitoring program that I had
31 discussed in my comments on the draft Agricultural Waiver water quality
32 monitoring program. As a result, the currently adopted Agricultural Waiver water
33 quality monitoring program will result in developing substantial water quality
34 data that cannot be used to reliably evaluate the water quality characteristics and

1 and concluded that “agricultural discharges under the proposed waiver may actually *increase*,
2 rather than decrease or be maintained.” AR 13727. Further comments by these and other
3 experts reiterate the likelihood that the Waivers will not improve environmental protection. *See*
4 AR 14605 (Dr. Kegley) (“Implementation of a waiver without an enforceable mandate of
5 pollution reduction is equally likely to result in *greater* pollution from agricultural sources . . .
6 Given the lack of data proposed to be collected, it is likely that increased degradation to Central
7 Valley waters could occur and would go undetected.”);¹⁷ AR 13720 (Dr. Benbrook) (“[b]ased on
8 my experience looking at other efforts around the nation to change on-farm practices to meet
9 concrete environmental goals, I can attest that this approach [Coalition Groups] will result in
10 distraction and delay, and likely wholesale failure to reduce on-going discharges of agricultural
11 pollutants”); AR 13720-21 (Dr. Benbrook) (describing need to focus on individual farms and
12 Coalition Group Waiver’s failure to do so); AR 13724 (Dr. Benbrook) (“the proposed waiver
13 and watershed approach is likely in most parts of the state to eventually lead to documented
14 ‘failure.’”); AR 15351 (Steven Bond) (“Consequently under this Waiver pesticides and toxic
15 metals may be released, not monitored and the impacts not identified. . .”);¹⁸ AR 15351
16 (complete version, Ex. A, Dec’l of Michael R. Lozeau [“Lozeau Dec.”]) (“As a result the
17 effectiveness of management practices can not be evaluated. Further, continued worsening of
18 water quality conditions is likely, and would not be detected under the proposed Waiver”).
19 Because this uncontroverted expert testimony makes clear that a fair argument exists that the
20 Waiver may have a significant environmental effect, Respondents must prepare an EIR.

21 **5. Second Cause Of Action, ¶ 72(e) - Other responsible and trustee
22 agencies besides the Regional Board provided substantial evidence of
23 a fair argument that the project may have a significant environmental
24 effect.**

25 In addition to the expert testimony described above, the Regional Board’s finding of no
26 impact also directly conflicts with the expert opinion of the California Department of Fish &
27 Game, California’s “Trustee Agency” for fish and wildlife resources. PRC § 15386. Under

28 impacts of the irrigated agriculture stormwater runoff and tailwater/subsurface
29 drain water discharges.

30 AR 18697.

31 ¹⁶ Dr. Lee’s expert experience is summarized at AR 14549-50.

32 ¹⁷ The copy Dr. Kegley’s resume submitted to the record is attached at Lozeau Dec., Ex. C.
33 ¹⁸ Mr. Bond’s resume is found at AR 14623-26.

1 CEQA, a lead agency is required to consult with trustee agencies in evaluating the potential
2 effects of a project. CEQA Guidelines, § 15063(g).

3 Commenting on the negative declaration and the initial study, the Chief of the California
4 Department of Fish and Game’s Scientific Branch explained that:

5 Discharged water from irrigated lands often carries pesticides, either in solution or
6 adsorbed to suspended solids, from the field into associated receiving waters.
7 Runoff can also carry dissolved salts and trace metals. These compounds and
8 salts have been shown to have the potential for serious deleterious effects on fish
9 and wildlife. The draft Initial Study and Negative Declaration fails to mention or
address these potential impacts in any type of analysis. The Proposed Conditional
Waiver also fails to specify how the required management plans are to address
this issue.

10 Memorandum from Ken Mayer, Chief, Scientific Branch, Dept. of Fish & Game, to Rudy
11 Schnagel, Regional Board (Nov. 18, 2002) (Lozeau Dec., Ex. B). Fish & Game also criticizes
12 the Initial Study’s and Conditional Waiver’s failure to mitigate impacts that are reasonably
13 expected to occur: “Discharged waters from irrigated lands often carry pesticides, fertilizers and
14 other suspended solids that have the potential to impact beneficial uses, particularly those
15 associated with fish and wildlife resources. . . . The document fails to provide any information
16 on how these potential impacts will be mitigated.” *Id.* Fish & Game also focuses its comments
17 on the project’s threat to endangered and threatened fish species: “The potential impacts that
18 changes in discharges to the Central Valley’s rivers could have on state and federally listed
19 anadromous fish species as well as other wildlife species should warrant close involvement by
20 DFG.”¹⁹ Fish & Games’ analysis demonstrates the inadequacy of the Initial Study and Negative
21 Declaration and the likelihood that unwritten management plans would successfully prevent the
22 likely impacts of authorizing waste discharges from farms throughout the Central Valley.
23 Accordingly, a fair argument exists that the project may have a significant environmental effect.

24
25 ¹⁹ See also AR 15281 (California Department of Food and Agriculture) (“there is a
26 significant lack of quantitative information on the effectiveness of management measures to
27 control deterioration of water quality in receiving waters. This applies to both nutrients and
28 pesticides. . . . Thus, agricultural producers are faced with implementing management measures
with no guarantee that they will produce the desired results”); AR 15282 (“Further, the science,
engineering, and economics of potential management measures has not been adequately
developed to give confidence that implementation of any one or combination of measures will
remedy the water quality deficiency”).

1 **6. Second Cause Of Action, ¶ 72(f) and 72(m) - The Regional Board’s**
2 **finding that the project could not have a significant effect on the**
3 **environment, in particular water quality, assumes that the project’s**
4 **vague conditions are sufficient and will prove effective.**

5 As is evident from various discussions above, when issuing its Waivers, the Regional
6 Board had no idea what, if any, management practices would prove effective at protecting water
7 quality from discharges of toxic pesticides, nutrients and other harmful pollutants from
8 thousands of farms. *See supra*, pp. 18, 27-30. The Regional Board’s Waiver and its
9 accompanying Negative Declaration are structured on an internal contradiction – the Board
10 emphasizes its lack of even the most basic information regarding existing and future
11 management practices but then assumes with absolute certainty the ability of those unknown
12 practices to fully protect beneficial uses and water quality. *Compare* AR 1871, 1856 and 15935.
13 When issuing a negative declaration, the agency cannot presume the success of mitigation
14 measures that have not been developed or formulated at the time of project approval. *Sundstrom*,
15 *supra*, 202 Cal.App.3d at 306-07. Nor can an agency rely on after-the-fact approvals of
16 mitigations that were not prepared at the time of the original project approval. *Oro Fino Gold*
17 *Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 884-85.

18 The Regional Board’s deferral of mitigation into the indefinite future is directly contrary
19 to the ruling in *Sundstrom*. In *Sundstrom*, the Court of Appeal rejected a county’s negative
20 declaration because the county relied on other agencies to formulate mitigation measures to
21 avoid potential significant impacts. 202 Cal.App.3d at 306-07. Because the county had no way
22 to determine whether such future measures would prove successful, the Court held that the
23 county had no basis for finding that the project’s impacts would be insignificant. *Id.* The same
24 is true here. Like the county in *Sundstrom*, the Regional Board relies on mitigation to be
25 developed by other entities, in this case coalitions of the dischargers themselves. Like the county
26 in *Sundstrom*, because the Regional Board is unaware of what those future mitigations may be, it
27 has no basis for a finding of no significant impact.

28 To the extent the Waiver contemplates post-approvals by either the Regional Board or its
29 staff, such post-hoc review of mitigations relied on for a CEQA finding have been rejected by
30 the courts. *See Oro Fino Gold Mining, supra*, 225 Cal.App.3d at 884. In *Oro Fino Gold*
31 *Mining*, the Court invalidated a mitigated negative declaration that relied on conditions requiring
32 the establishment of various plans, including an erosion plan, a reclamation plan and several

1 other plans. “There cannot be meaningful scrutiny of a mitigated negative declaration when the
2 mitigation measures are not set forth at the time of project approval.” *Id.* The Regional Board’s
3 adoption of the negative declaration relies on far more extensive future planning than was
4 rejected by the Court of Appeal. The Regional Board has deferred almost every aspect of its
5 CEQA analysis to future actions by the dischargers or their representatives, including
6 information about current discharges and management practices, the structure and geographic
7 extent of “coalition groups,” all monitoring plans, and all management plans. This wholesale
8 deferral of serious analysis and mitigation measure development is inconsistent with the dictates
9 of CEQA: “the CEQA process demands that mitigation measures timely be set forth, that
10 environmental information be complete and relevant, and that environmental decisions be made
11 in an accountable arena.” *Id.* at 885 (citing *Sundstrom, supra*, 202 Cal.App.3d at 306-09).

12 As the Regional Board staff explained early in the proceeding, “[t]he extensive use of
13 water for irrigation in the Central Valley demonstrates that return flows have a significant
14 potential to adversely impact water quality if pollutants are not managed at the farm level.” AR
15 378 (emphasis added). Similarly, Board staff emphasized the importance of controlling pollution
16 at the individual farm level: “Discharges from an individual field have the potential to contain
17 high enough levels of a pollutant to cause violations of water quality objectives in smaller water
18 bodies. Cumulative impacts from numerous such discharges can adversely impact larger water
19 bodies, such as the Sacramento-San Joaquin Delta or its tributary rivers. . . .” AR 313.
20 Nevertheless, the Regional Board failed to analyze farm-specific measures that would reduce or
21 prevent such pollution and put its faith in future undefined efforts by the dischargers.
22 Accordingly, the Regional Board’s finding of no significant impact is an abuse of discretion
23 because there is no factual information in the record regarding the effectiveness of existing or
24 future management practices throughout the project area.

25 **7. Second Cause Of Action, ¶ 72(g) - The project may result in increased
26 agricultural pollution discharges to Central Valley ground water.**

27 Although the record includes substantial evidence of agricultural discharges adverse
28 impacts on groundwater resources in the Central Valley, the Regional Board’s initial study
makes no mention about possible impacts from current or future management practices nor does
the Waiver include any conditions regarding groundwater pollution whatsoever. *See* AR 1871.

Of particular note is a study conducted by the United States Geological Survey
documenting extensive contamination of groundwater by pesticides applied to rice fields. *See*

1 AR 2048 (Dawson, B., USGS, “Shallow Ground-Water Quality Beneath Rice Areas in the
2 Sacramento Valley, California 1997” (2001)). Pursuant to an existing Basin Plan prohibition,
3 rice growers are required to hold their irrigation waters for up to 30 days in order to facilitate the
4 breakdown of toxic pesticides. *See* AR 2060; Basin Plan, p. IV-25.00 (RJN, Ex. A).²⁰ Rice
5 fields are typically flooded from April to September with some significant portion also flooded
6 during winter months to help break down leftover straw. AR 2060. Detections of pesticides and
7 nitrites in groundwater beneath rice fields were attributed to pesticide and fertilizer applications
8 to the fields. AR 2076. The study describes the possible effects to ground water of holding
9 irrigation waters on the fields in order to protect surface water:

10 an additional factor in the frequency of detection of pesticides in this study may
11 be the changes in rice-field irrigation water management begun in the 1983 to
12 protect surface water quality. The holding of rice-field irrigation water after
13 applications of molinate and thiobencarb may be allowing more recharge
14 containing pesticides to reach shallow groundwater.

15 AR 2080. *See id.* at 2085.

16 Another study provided to the Regional Board documents routing of pesticide-
17 contaminated surface runoff from orchards into drainage wells that drain the contaminated runoff
18 into groundwater. AR 11076 (Troiano, J, et al., Cal. Dept. of Pesticide Regulation, “Movement
19 of Simazine in Runoff water from Citrus Orchard Row Middles as Affected by mechanical
20 Incorporation” (1998) (“evidence linked contamination [of groundwater] to movement of
21 [pesticide] residues in orchard runoff water that was directed into drainage wells”). *See also* AR
22 11323 (Ingalls, Charles A., U.C. Davis, pp. 5-10, “Movement of Chemicals to Groundwater,” of
23 “Protecting Groundwater Quality in Citrus Production” (1994)).

24 These studies show that one potential negative environmental impact of storing polluted
25 water as a means of protecting surface water quality is an acceleration of the pollutants
26 discharged into groundwater through recharge or existing pathways such as wells. Nevertheless,
27 the Initial Study makes no effort to evaluate potential impacts to groundwater from practices
28 focused on protecting surface water quality. For this reason, a fair argument exists that the

26 ²⁰ Although the rice program has reduced the total loadings of molinate and other rice-
27 production related pesticides to the waters of the Sacramento River, those discharges still
28 frequently exceed applicable criteria for protecting beneficial uses. *See* AR 22224-31; AR
22235; AR 33-0690.

1 Waiver may have an adverse impact on groundwater quality. *See also* AR 11673 (Dr.
2 Benbrook) (“The Department of Water Resources has stated that three-fourths of the impaired
3 groundwater in California was contaminated by salts, pesticides, and nitrates, primarily from
4 agricultural practices”); AR 13763-68.

5 **8. Second Cause Of Action, ¶ 72(h) - Agricultural discharges claim that**
6 **the project’s watershed approach as adopted is not feasible.**

7 A fair argument exists that the project may have a significant environmental effect
8 because even the representatives for the Coalition Groups have testified that provisions included
9 in the final Waiver doom the Coalition Groups to fail. For example, the Waiver requires
10 members of Coalition Groups to knowingly elect to join a group to become a member. AR
11 15978 (¶ B.1.c). *See also* AR 21658 (“At a minimum, the Coalition Groups must maintain a list
12 of all farmers who have knowingly elected to join the group, contact information, and
13 information that the Regional Board needs to determine the location of each participant”). A
14 number of prominent spokespersons for the Coalition Groups unequivocally stated that the
15 “knowingly elect” provision would result in the failure of the program. *See* AR 18327
16 (“[Affirmative sign-up] requirement will likely guarantee the failure of the watershed coalitions,
17 and hence the waiver program”); AR 21582 (knowingly elect “will frustrate water quality
18 improvement efforts of the SWRCB and RWQCB”).²¹ Similar predictions were made based on
19 the Waiver’s property access provision. *See* AR 15289 (the Property Access Provision “is a
20 political bombshell likely to destroy the watershed process”); AR 21614 (“we feel that the
21 affirmative action of ‘knowingly election’ dooms to failure the Waiver program. . .”). These
22 provisions remain in the Waiver. Hence, the agricultural community has provided a fair
23 argument that the Waiver program may not succeed and, hence, may result in further water
24 quality degradation.

25
26 ²¹ *See also* AR 21587 (“The revised draft [State Board] order incorporates the devastating
27 requirement of extending waiver coverage only for dischargers who make an affirmative election
28 and sign-up with the watershed and Regional Board as a participating member of a watershed
group. . . .”); AR 21591 (“The imposition of an affirmative sign-up will undermine the effective
implementation of the conditional waiver”).

1 **9. Second Cause Of Action, ¶¶ 72(i)-(j), (n) - The Regional Board was**
2 **mandated to find the Waiver may have a significant effect because of**
3 **the project’s potential to substantially degrade the quality of the**
4 **environment, substantially reduce the habitat of a fish or wildlife**
5 **species or reduce the number or restrict the range of an endangered,**
6 **rare or threatened species plant.**

7 A finding of significant impact is mandatory where “the project has the potential to
8 substantially degrade the quality of the environment; substantially reduce the habitat of a fish or
9 wildlife species; . . . [or] reduce the number or restrict the range of an endangered, rare or
10 threatened species plant. . . .” 14 CAC § 15065(a)(1). Given the sensitivity to pesticides and
11 other agriculture-related pollutants of various endangered species and key prey species within the
12 Central Valley, any decision approving their discharge has the potential to impact those species.
13 *See supra*, p. 6. *See also* AR 33-0745 (discussing potential impacts of farm discharges to listed
14 salmon and trout); AR 17431 (“chronic exposure [of threatened delta smelt] to individual and
15 multiple pesticides may hinder growth rate, reproduction, and swimming performance. Indirect
16 effects of pesticide exposure, such as alteration of delta smelt diet, also are possible.”); AR
17 13727 (pesticide impacts on frogs); AR 33-0675; AR 33-0679; AR 16246 (toxicity to algae
18 and potential impacts to amphibians); AR 10325 (“Movement of organophosphate pesticides
19 (OP) into surface waters from any source presents an ecological risk, and if water quality
20 standards are exceeded is also illegal”); AR 2545; AR 2556 (CUWA report) (“Toxicity testing
21 has provided evidence that pesticides are killing and/or impairing growth and reproduction in
22 fish, zooplankton, and algae – all levels of the aquatic foodchain”); AR 2097. Given the scale of
23 pollution discharges authorized by the Waiver coupled with the fact that the Regional Board has
24 authorized such discharges 1) without requiring any on-farm pollution control efforts for many
25 years, 2) without evidence of management practices that will control such discharges, and 3)
26 relying on experimental discharger coalitions, the potential to degrade the environment,
27 including habitat for listed species, is practically guaranteed. *See supra*. *See also* AR 385.

28 **10. Second Cause Of Action, ¶ 72(k) – The Regional Board’s finding that**
29 **the project would not have cumulative impacts is not supported by**
30 **substantial evidence in the record of a fair argument that the project**
31 **may result in such cumulative impacts.**

32 A lead agency must make a mandatory finding of significance for “environmental effects
33 which are individually limited but cumulatively considerable.” 14 CAC § 15065(a)(3). *See also*
34 *Id.*, § 15064(i). Such cumulative impacts must be considered in light of the backdrop of

1 cumulative conditions. Thus, where applicable standards already are being impaired, the
2 threshold for finding impacts to be cumulatively significant will usually be lower than in
3 unimpaired areas. *See Kings County Farm Bureau v. City of Hannaford* (1990) 221 Cal.App.3d
4 692, 718-21. In the case of the Waiver, cumulative surface and ground water quality impacts
5 from farm discharges are rampant throughout the Central Valley. *See supra.*, p. 6. Any
6 additional discharges of pollutants that already are impairing water quality are, by definition,
7 cumulatively considerable. *See* AR 8101 (Regional Board staff) (“But the concern is that if you
8 have a water body that is exceeding the water quality objective already, any discharge that
9 exceeds the water quality objective is going to be contributing to the exceedance. . .”). Given the
10 potential violations that a single farm’s discharges may cause, a project that approves every
11 Central Valley farmers’ waste discharges with practically non-existent pollution control
12 requirements is a recipe for cumulative impacts at numerous locations in the region. *See* AR 313
13 (Regional Board staff report) (“Discharges from an individual field have the potential to contain
14 high enough levels of a pollutant to cause violations of water quality objectives in smaller water
15 bodies. Cumulative impacts from numerous such discharges can adversely impact larger water
16 bodies, such as the Sacramento-San Joaquin Delta or its tributary rivers. . .”). The potential for
17 cumulative impacts to already polluted groundwater from any future changes to management
18 practices that may result from the Waiver also is obvious. Lastly, the Regional Board has
19 previously noted the potential cumulative impacts from agricultural and other discharges as well
20 as water diversions and habitat destruction. *See* AR 33-2120. The Regional Board’s failure to
21 include any serious analysis of these and other potential cumulative impacts is an abuse of
22 discretion.

21 **11. Second Cause Of Action, ¶ 72(p) – The Initial Study and Negative**
22 **Declaration fail to set forth an adequate description of the project.**

23 The Regional Board’s initial study fails to include an adequate description of the project
24 being reviewed. 14 CAC § 15063(d). The Regional Board’s project description downplays that
25 the Waiver project authorizes pollution discharges from 7 million acres of irrigate lands. AR
26 1853. The entire description of the waste discharges being approved states:

27 The Regional Board proposes to adopt a conditional waiver of WDRs for
28 discharges from irrigated lands, which includes tailwater, operational spills,
subsurface drainage, and stormwater runoff, and to waive the requirement to
submit reports of waste discharge. Irrigated lands include nurseries and managed
wetlands as well as over seven million acres in production agriculture.

1 *Id.*²² Although approving thousands of waste discharges, the project description provides the
2 reader no information about the discharges. The Initial Study does not describe the specific or
3 even general locations of waste discharges authorized by the Waiver. The Initial Study does not
4 describe the number of discharges being approved or their magnitude. The Initial Study does not
5 describe the pollutants authorized to be discharged by the project. The Initial Study does not
6 describe the nature of any pollution control measures that may already be in place or their
7 effectiveness, only talking vaguely about development of future plans by future undefined
8 watershed groups. AR 1854. The Initial Study does not describe future pollution control
9 measures that would be applied or their effectiveness. Lastly, the Initial Study incorporates by
10 reference the December 2002 waiver that ultimately was vacated by the Board and bears little
11 resemblance to the Waiver ultimately adopted in July 2003. In short, the Regional Board’s
12 project description is so vague, misleading and confusing as to render it useless to the general
13 reader and at odds with the goals and requirements of CEQA.

13 **12. Second Cause Of Action, ¶ 72(q) – The Initial Study and Negative**
14 **Declaration fail to adequately describe the environmental setting of**
15 **the project.**

15 An initial study must include “[a]n identification of the environmental setting.” 14 CAC
16 § 15063(d)(2). The environmental setting of a project is intertwined with the determination of
17 significant effects – “[a]n ironclad definition of significant effects is not always possible because
18 the significance of an activity may vary with the setting.” § 15064(b). The “environmental
19 setting” is defined as “the physical environmental conditions in the vicinity of the project, as they
20 exist at the time . . . environmental analysis is commenced, from a local and regional
21 perspective.” § 15125(a); *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277. The
22 Regional Board’s entire description of the project’s environmental setting states: “The project
23 encompasses more than 7 million acres of irrigated land[,] commercial nurseries and managed
24 wetlands in the Central Valley Region encompassing the Sacramento River, San Joaquin River
25 and Tulare Lake Basins.” AR 1854. No “physical environmental conditions” are described.
26 For example, the Initial Study and Negative Declaration do not describe the condition of surface
27 waters into which discharges governed by the project occur. The Study fails to mention the

28 ²² The remainder of the project description is devoted to a general and misleading
description of the Waiver conditions. AR 1854.

1 numerous endangered and threatened fish, amphibian and reptile species with habitat in the
2 Region. The Initial Study does not describe the condition of groundwater, which may be
3 affected by implementation of the project. The Initial Study does not describe the proximity of
4 operations governed by the project to sensitive recreation areas, including popular swimming and
5 fishing areas. For these and other shortcomings, the environmental setting description is
6 inadequate.

7 **V. CONCLUSION**

8 Because Respondents abused their discretion under Porter-Cologne and CEQA by
9 establishing the Waiver and accompanying negative declaration, Petitioners respectfully request
10 that the Court 1) vacate and set aside Resolution No. R5-2003-0103 adopting the Initial Study
11 and Negative Declaration; 2) vacate and set aside Resolution No. R5-2003-0105, Order No. R5-
12 2003-0826 and Order No. R5-2003-0827 adopting the conditional waiver for agricultural
13 discharges and the accompanying monitoring requirements; 3) vacate and set aside WQO 2004-
14 0003 upholding Respondent Regional Board's actions, and; 4) order Respondents to prepare,
15 circulate, and consider a legally adequate EIR and otherwise to comply with CEQA in any
16 subsequent action to approve the project.

17 Dated: October 21, 2004

18 Respectfully Submitted,

19 EARTHJUSTICE

20 By: _____

21 Michael R. Lozeau
22 Attorney for Petitioners