

Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Frank Temmerman, Clerk

Hearing Held: Friday, March 29, 2013, 10:00 a.m.

SAN JOAQUIN COUNTY RESOURCE CONSERVATION DISTRICT, et al.	Case Number: 34-2012-80001186 (Consolidated Case Number: RG12632180)
v.	
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION, et al.	
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CALIFORNIA RICE COMMISSION	
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CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, et al.	
v.	
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION, et al.	
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CALIFORNIA RICE COMMISSION	

**Proceedings: Petition for Writ of Mandate and Complaint for Declaratory
and Injunctive Relief**

On March 28, 2013, the court issued a tentative ruling in the above-entitled proceeding. On March 29 2013, at 10:00 a.m., the matter came on for hearing with counsel present as indicated on the record. After the hearing, the Court requested supplemental briefing. Upon receipt of the supplemental briefing, the matter was taken under submission.

Having reviewed the administrative record and considered the oral and written arguments of the parties, the Court hereby rules as follows:

RULING UNDER SUBMISSION

I. Introduction

At issue in this case is the Central Valley Regional Water Quality Control Board's certification of a "Final Program Environmental Impact Report for the Long-Term Irrigated Lands Regulatory Program" (Resolution No. R5-2011-0017) and adoption of the "Short-Term Renewal of the Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands" (Resolution No. R5-2011-0032).

Petitioner San Joaquin County Resource Conservation District, on behalf of the San Joaquin County and Delta Water Quality Coalition (the "Ag Coalition"), challenges the certification of the Final Program EIR. Petitioners California Sportfishing Protection Alliance and California Water Impact Network (collectively, "CSPA"), separately challenge both the certification of the Final Program EIR and the renewal of the waiver. The Court shall grant the CSPA petition in part, but deny the Ag Coalition's petition in its entirety.

II. Background Facts and Procedure

The Central Valley is home to some of the world's most productive and economically-viable agriculture industry. As a result, agriculture has become a dominant land use activity in the Central Valley and a significant and important part of the California economy. California's Central Valley includes over seven million acres of irrigated farm land, and approximately 35,000 individual farms.

Irrigated farm lands can convey an array of pollutants to surface and ground waters that potentially could impact water quality. Unlike industrial wastewater discharges, which generally contain low volumes of concentrated pollutants emanating from a discrete discharge point, agricultural discharges are characterized by large volumes of water containing relatively low levels of pollutants. In addition, whereas industrial discharges are usually "point source" discharges emanating from a discrete discharge point, agricultural discharges usually are "nonpoint source" discharges.

Discharges from agricultural lands include irrigation return flow, flows from tile drains, storm water runoff, drift from sprayed materials, and spills and leaks. These discharges can affect water quality by transporting pollutants, including pesticides, sediment, nutrients, salts, pathogens, and heavy metals into surface and ground waters. The amount and type of effects on water quality vary from location to location, depending on the irrigation method, geography, rainfall,

crops grown, soil types, pesticides and fertilizers used, management practices, and other factors.

As "nonpoint source" discharges, discharges from agricultural lands historically have not been subject to the same type of regulation as other discharges of waste. For example, agricultural discharges are exempt from regulation under the federal Clean Water Act and, until relatively recently, were virtually unregulated under California law as well. However, California has regulated agricultural discharges since 1982 under the Porter-Cologne Water Quality Control Act (Porter-Cologne).

California's Porter-Cologne Act has the explicit goal to protect all California waters for use and enjoyment by people of the State. Porter-Cologne maintains that all activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable. (Cal. Water Code § 13000.) Pursuant to Porter-Cologne, the regional water quality control boards must develop basin plans to ensure the reasonable protection of beneficial uses of waters and set forth the water quality conditions that could reasonably be achieved. (Cal. Water Code §§ 13240, 13241.)

Regional boards implement their basin plans primarily through the issuance of National Pollutant Discharge Elimination System (NPDES) permits (for point source and storm water discharges) and Waste Discharge Requirements (WDRs) (for nonpoint source discharges). Under Porter-Cologne, anyone discharging or proposing to discharge waste that could affect water quality must file a Report of Waste Discharge (RWD) with the regional board. (Cal. Water Code § 13260.) After receipt of an RWD, the regional board may issue a WDR for discharge to the state's waters. (Cal. Water Code § 13263.)

Water Code section 13263 sets forth the requirements of WDRs. WDRs must implement any relevant water quality control plans that have been adopted, take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the factors that are required to be considered by Water Code section 13241 in establishing water quality objectives.

In addition to authorizing regional boards to issue WDRs, Porter-Cologne authorizes regional boards to waive the filing of RWDs and the issuance of WDRs if the regional board determines, after a hearing, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest. (Cal. Water Code § 13269.) Waivers shall be conditional and persons subject to the waiver must comply with such conditions. (*ibid.*)

Since 1982, the Central Valley Regional Water Quality Control Board (the "Regional Board") has regulated nonpoint source discharges from agricultural lands through a waiver of WDRs. The 1982 waiver's only substantive

requirement was to require agricultural dischargers to minimize sediment to meet basin plan turbidity objectives and prevent concentrations of materials toxic to fish or wildlife.

Beginning in 2002-03, the Regional Board substantially increased regulation of agricultural discharges through a conditional waiver of WDRs for discharges from irrigated agricultural lands. The conditional waiver program has come to be known as the "Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands" and, alternatively, as the "irrigated lands regulatory program" (or "ILRP"). The conditional waiver program includes substantial monitoring requirements, watershed plans, and education and outreach components.

Between 2003 and 2005, Regional Board staff presented the Board with updates on the waiver, progress on the long-term EIR, and proposed revisions and extensions to the program. At the August 2005 meeting, the Regional Board adopted an updated monitoring program, and asked staff for a recommendation on how to incorporate groundwater protections into the waiver program. Staff prepared an informational report dated September 15, 2005, which outlined the progress of the program as well as options on bringing groundwater protection into the program. (AR 2294-97.)

The 2003 conditional waiver program was set to expire in 2006. In 2006, the Regional Board adopted a new conditional waiver for discharges from irrigated agricultural lands that continued the program until 2011. The extension was intended to serve as an interim program while a new, long-term ILRP was developed. (AR 22.) As part of the approval of the extension, the Board directed staff to begin developing the new long-term ILRP and to continue preparation of an EIR that would evaluate alternatives for the long-term program. (*Ibid.*)

The Board's 2006 renewal of the waiver program was challenged by the California Sportfishing Protection Alliance. As part of a stipulated judgment to settle the action, the Regional Board staff agreed to propose a program EIR ("PEIR") for Board certification by April 2011. (*Ibid.*)

In 2008, the Regional Board embarked on a two-year stakeholder process in an effort to outline the next steps for a new long-term ILRP.

In July of 2010, the Regional Board released the Draft PEIR for the long-term ILRP for public review and comment. The Draft PEIR analyzed five alternatives for the long-term ILRP program, but did not identify a "preferred" alternative. Instead, the Regional Board purported to analyze each of the five alternatives equally. (AR 1097, 1123-53.)

The five alternatives included in the Draft PEIR were the No Change Alternative [Alternative 1], the Third Party Lead Entity Alternative [Alternative 2], the

Individual Farm Water Quality Management Plan Alternative [Alternative 3], the Direct Oversight with Regional Monitoring Alternative [Alternative 4], and the Direct Oversight with Farm Monitoring Alternative [Alternative 5].

Under the No Change Alternative, the Board would renew the 2006 conditional waiver without change.

Under the Third Party Lead Entity Alternative, the Board would develop a single or series of regulatory mechanisms for discharges from irrigated lands to both surface and groundwater. Regulation of discharges to surface water would be similar to the approach of the 2006 conditional waiver, with third party groups functioning as the lead entities. Third party groups would also be required to monitor groundwater and develop groundwater management plans.

Under the Individual Farm Water Quality Management Plan Alternative, the Board would abandon the coalition approach, and require individual growers to individually apply for a conditional waiver directly from the Board. The Board would have to approve each individual farm water quality management plan.

Under the Direct Oversight with Regional Monitoring Alternative, individual growers would be required to obtain WDRs and develop individual farm water quality management plans. However, the alternative would include various tiers, which could trigger additional requirements.

Under the Direct Oversight with Farm Monitoring Alternative, individual growers would be required to obtain WDRs and develop farm water quality management plans. Individuals growers also would be required to monitor at the edge-of-field, track pesticide and fertilizer use, and develop a farm nitrate balance as part of a nutrient management plan. Growers also would be required to install groundwater monitoring wells.

In addition to the alternatives analyzed in the Draft PEIR, Regional Board staff added a "Recommended Project Alternative" as an appendix to the Draft PEIR. (AR 1461-1708.) The staff report indicates that the Recommended Project Alternative is essentially a conglomerate of different elements of the five alternatives analyzed in the Draft PEIR. (AR 1604-10.)

The Recommended Project Alternative was not analyzed in the four corners of the Draft PEIR. The environmental analysis of the Recommended Program Alternative relies on the environmental review of the five alternatives in the PEIR, and the discussion in the staff report attached as an appendix. (AR 1123.)

In March of 2011, the Regional Board issued a Notice of Availability for the Final PEIR. The Regional Board also released a staff report for an April hearing to certify the PEIR. The staff report contained a Recommended Irrigated Lands Regulatory Framework Program (the "Framework"), which was purportedly

intended to implement the Recommended Program Alternative. (AR 103774-103810.) Under the Framework, the new, long-term ILRP will replace the 2006 conditional waiver with new WDRs that expand the current regulatory requirements for discharges to surface waters and impose new requirements to protect groundwater.

At the April 2011 hearing, the Regional Board adopted Resolution No. R5-2011-0017, certifying the Final PEIR. (AR 22-23.) However, the Regional Board did not approve a new, long-term ILRP program, concluding that adoption of a new ILRP program at that time would have been premature.

On June 9, 2011, to bridge the gap between expiration of the existing conditional waiver program and the adoption of a new ILRP program, the Regional Board adopted Resolution R5-2011-032 (the "Renewed Waiver"). Resolution R5-2011-032 renews and extends for two years, until June 30, 2013, the existing 2006 conditional waiver program.

The Regional Board made express findings that due to resource constraints it could not implement a new program and develop new WDRs at the same time. Because staff indicated that completing the new ILRP project would take up to two years, the Board found that a short-term renewal was the only way to ensure a viable regulatory program would be in place pending the ILRP. (AR 24-26.) The Board relied on the certified Final PEIR in approving the Renewed Waiver.

On June 15, 2011, the Board filed a notice of determination for the Renewed Waiver.

Under the Renewed Waiver, dischargers can either choose to be subject to a waiver and comply with its conditions, or submit a RWD and seek an individual WDR. The Waiver allows groups of farmers to create groups of dischargers and other interested entities, dubbed "coalition groups," to implement the conditions of the waiver.

In general, coalition groups are required to (1) maintain a list of participants, including parcel information; (2) prepare and implement a monitoring and reporting program that meets the requirements of the Coalition Group Monitoring and Reporting Program (Order No. R5-2008-0005); (3) report exceedances of water quality standards to the Board; and (4) develop, submit, and implement management plans where there are exceedances of water quality standards.

The Coalition Group Monitoring and Reporting Program requires a monitoring plan that describes the conditions of the waters that receive discharges from irrigated lands within the coalition group boundaries; the magnitude and extent of water quality problems in those waters; the contributing sources from irrigated agriculture to the water quality problems; the management practices that are being implemented to reduce the impacts of irrigated agriculture on the waters;

and a statement whether the water quality problems are getting better or worse. (AR 32935 *et seq.*) In addition to addressing these five issues, the monitoring plans need to include twenty-one different components, including a discussion of specific management practices in use and available programs to reduce or eliminate water quality impacts from irrigated agricultural discharges and locations where these occur.

The Coalition Group Monitoring and Reporting Program requires three different types of monitoring. The monitoring sites must represent the various water body types that directly or indirectly receive agricultural drainage. Monitoring cannot be limited to larger volume bodies that would dilute contaminants. (AR 32940.) The location of monitoring sites must fairly represent agricultural drainage and discharges from irrigated agriculture in the coalition group boundary area.

Based on the monitoring data, the coalition groups are required to report to the Board if monitoring results indicate exceedances of water quality standards. The report must include follow-up analysis or other actions the coalition group intends to take to address the exceedance. If the exceedance involves a pesticide or toxicity, the follow-up actions must include investigation of pesticide use within the watershed area associated with the exceedance. If there is more than one exceedance of the same parameter at the same location within a three-year period, the coalition group must develop and implement a management plan.

Management plans are required to identify management practices to address exceedances, provide for a schedule of implementation, contain performance goals, include additional monitoring for constituents of concern, evaluate the effectiveness of management practices being encouraged, identify participants that are subject to the specific management plan in question, and provide routine reporting to the Board. (AR 32958.)

The Renewed Waiver generally requires that dischargers participating in a coalition group implement management practices as necessary to achieve best practicable treatment or control to reduce discharges to the extent feasible and achieve compliance with applicable water quality standards, protect the beneficial uses of the waters of the state, and prevent nuisance.

The Renewed Waiver prohibits dischargers who are participating in a coalition group from discharging any waste not specifically regulated by the waiver, causing any new discharges of waste from irrigated lands that impair surface water quality, or increasing discharges of waste or adding new wastes that impair surface water quality not previously discharged. The Waiver also prohibits discharges that cause or contribute to an exceedance of any applicable water quality standard.

However, the Waiver does not require individual dischargers to sample, monitor, or report the pollutants that they have discharged or will discharge. Nor does the

Waiver require monitoring of receiving waters at or near the locations of individual farm discharges. Further, individual dischargers are not required to report management practices to their coalition group, and individual dischargers do not have to allow coalition group representatives access to the discharger's property. A coalition group cannot mandate that an individual discharger implement or install any specific management practice; the group can only recommend management practices. (AR 1477.)

Following certification of the PEIR and approval of the Renewed Waiver, petitioner San Joaquin County Resource Conservation District, on behalf of the San Joaquin County and Delta Water Quality Coalition (the "Ag Coalition"), filed a lawsuit in this Court challenging the certification of the Final PEIR.

Petitioners California Sportfishing Protection Alliance and California Water Impact Network (collectively, "CSPA"), filed a separate lawsuit in Alameda County Superior Court challenging the certification of the Final PEIR and the approval of the Renewed Waiver (Case No. RG12632180). The Alameda case subsequently was transferred to this Court and consolidated as Sacramento Superior Court Case No. 34-2012-80001186.

III.

Requests for Judicial Notice and Objections

The Board has filed a request for judicial notice of a September 14, 2011, response to petitions for review of actions taken by the Board. The Ag Coalition has filed a separate request for judicial notice of sixteen additional documents. Both CSPA and the Ag Coalition object to the Board's request for judicial notice. CSPA also objects to Exhibits 14 and 16 of the Ag Coalition's request for judicial notice, and to the Declaration of William Thomas.

The Court sustains the objection to the Board's request for judicial notice, to the objection to Exhibit 16 of the Ag Coalition's request, and to the Declaration of William Thomas. The Court overrules the objection to Exhibit 14, although the Court notes that Exhibit 14 is not part of the administrative record and shall not be considered when determining whether findings are supported by evidence in the record.

IV.

Standard of Review

The challenges to the Board's issuance of the Renewed Waiver are reviewed under Code of Civil Procedure section 1094.5. (Water Code § 13330(e).) The inquiry under section 1094.5 is whether the agency has (1) proceeded without, or in excess of, jurisdiction; (2) whether there was a fair trial; and (3) whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is

not supported by the findings, or the findings are not supported by the evidence. (Civ. Proc. Code § 1094.5(b).)

Under Water Code section 13330(e), the Court is authorized to exercise its independent judgment on the evidence. In applying the independent judgment test, the trial court reweighs the evidence from the hearing and makes its own determination as to whether the administrative findings are supported by the weight (i.e., preponderance) of the evidence. (*Vaill v. Edmonds* (1991) 4 Cal.App.4th 247, 257.)

Even where the independent judgment test applies, the findings of the agency come before the court with a strong presumption as to their correctness. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811-12, 817.) It is presumed that the agency regularly performed its official duty. (*Id.*; *Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 354.) The burden falls on the petitioner attacking the administrative decision to convince the court that the administrative proceedings were unfair, were in excess of jurisdiction, or that the agency's findings are contrary to the weight of the evidence. (*Fukuda, supra*, at pp. 811-12.)

The Court reviews the Regional Board's compliance with CEQA by evaluating whether there was a prejudicial abuse of discretion. (Pub. Res. Code § 21168.5.)

In a mandate proceeding to review an agency's decision for compliance with CEQA, the court reviews the administrative record to determine whether the agency abused its discretion. Abuse of discretion is shown if the agency has not proceeded in the manner required by law, or the determination is not supported by substantial evidence. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106.) Judicial review differs significantly depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Prot.* (2008) 43 Cal.4th 936, 945.)

Where the alleged defect is that the agency has failed to proceed in the manner required by law, the court's review is de novo. (*Id.*) Although CEQA does not mandate technical perfection, CEQA's information disclosure provisions are scrupulously enforced. (*Id.*) A failure to comply with the requirements of CEQA which results in an omission of information necessary to informed decision-making and informed public participation constitutes a prejudicial abuse of discretion, regardless whether a different outcome would have resulted if the agency had complied with the disclosure requirements. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198; *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.)

Where the alleged defect is that the agency's factual conclusions are not supported by substantial evidence, the reviewing court must accord deference to the agency's factual conclusions. The reviewing court may not weigh conflicting evidence to determine who has the better argument and must resolve all reasonable doubts in favor of the administrative decision. The court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. (*Ebbetts Pass, supra*, at p.945; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.)

Regardless of what is alleged, an EIR approved by a governmental agency is presumed legally adequate, and the party challenging the EIR has the burden of showing otherwise. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158; *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919.)

V. Discussion

A. The Ag Coalition Petition

The Ag Coalition challenges the Board's certification of the PEIR for the long-term ILRP. The Ag Coalition contends that the PEIR suffers from the following fundamental flaws and must be set aside: (1) the Regional Board failed to identify and describe the "proposed" project, distorting the impacts and alternatives analysis; (2) the PEIR contains an inadequate environmental baseline; (3) the PEIR contains an inadequate identification and analysis of alternatives; (4) the Board failed to recirculate the PEIR after significant new information was added in the form of the Recommended Program Alternative and the Framework; (5) the PEIR contains an inadequate evaluation of individual and cumulative environmental impacts for the alternatives included; and (6) the mitigation measures in the PEIR are unlawful and in excess of the Board's jurisdiction.¹ The Ag Coalition seeks an order commanding the Regional Board to set aside the certification of the PEIR and prepare and certify a legally adequate PEIR for the long-term ILRP before the Board takes any action to implement the long-term ILRP.

1. The PEIR's project description is adequate.

The Ag Coalition contends that the Board's PEIR violates CEQA because it contains a defective description of the project. According to the Ag Coalition, CEQA requires the lead agency to identify a "proposed" project and to consider a reasonable range of alternatives to that project. Here, the Ag Coalition contends,

¹ The petition also challenged the Board's long-term ILRP as violating Porter-Cologne and the Due Process Clause. However, since the Board did not approve a long-term ILRP, these challenges are not ripe and, therefore, the Court shall not consider them.

the PEIR does not identify any proposed project. Rather, the PEIR identifies five alternatives and analyzes all five alternatives to an equal level of detail. The PEIR indicates that the Board intends to use the PEIR in selecting a "preferred" alternative.

The Board does not agree that the PEIR fails to identify the "proposed" project. According to the Board, the proposed project is the development and implementation of an ILRP. The Board admits that the PEIR does not identify a "preferred" alternative. Rather than using the typical EIR approach of starting with a preferred project and then looking at alternatives to that project, the Draft PEIR was intended to be used as a tool to assist decisionmakers in selecting a project.

The Board argues that nothing in CEQA requires a lead agency to identify a "preferred" alternative. The Board argues that its approach, while not typical, resulted in *more* detailed analysis of project alternatives than would have occurred if the Board had taken a more traditional approach. The Board argues it should not be penalized for providing more detailed analysis and for using the CEQA process to inform its selection. In any event, the Board contends, based on the results of the Draft PEIR, Board staff selected and described a "Recommended Program Alternative" in an appendix to the Draft EIR, which was released and circulated for public comment in that form.

The Court finds the PEIR's description of the project to be adequate. While the Board's approach is not typical, it is consistent with the purposes of CEQA. The purpose of an EIR is to provide public agencies and the public with detailed information about the significant effects a project is likely to have on the environment, to list ways those effects might be minimized or avoided, and to identify alternatives to the project. (Pub. Resources Code §§ 21061, 21100.) It follows that an accurate description of the "project" is necessary to decide what kind of EIR is required. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192.) Only through an accurate view of the project may official decisionmakers and the public balance the project's benefit against its environmental cost, consider mitigation measures, and weigh other alternatives. (*Id.* at p.193.)

By refusing to select a "preferred" alternative, and analyzing all of the alternatives with an equal level of detail, the Board promoted, rather than impaired, CEQA's role in the decisionmaking process. In essence, the Board applied CEQA in its purest form: as an informational tool to help the agency select a preferred project alternative.

The Court fails to see what CEQA purpose would be served by requiring the Board to artificially select one alternative as the "preferred" alternative and then perform the exact same analysis (or a less detailed analysis). To construe

CEQA in this manner would grossly elevate form over substance, which this Court will not do.

Moreover, even if a "preferred" project alternative was required, the Board included one in the appendix to its Draft PEIR: the so-called "Recommended Project Alternative." The Recommended Program Alternative was attached to and circulated with the Draft PEIR and analyzed as an additional alternative to the five alternatives discussed in the body of the Draft EIR. (AR 1604-41.) The Court fails to see what difference it makes that the analysis was contained in an appendix to the Draft PEIR rather than in the body of the Draft PEIR itself. Even if this was error, it certainly was not prejudicial; it did not deprive the public or the Board of information necessary to informed decision-making and informed public participation.

The PEIR's project description satisfies CEQA requirements for a program-level EIR.

2. The PEIR's environmental baseline is adequate.

The Ag Coalition next argues that the PEIR's description of the environmental baseline is inadequate because it does not describe in detail how much water is currently diverted and returned to streams, and because it improperly relies on the "no project" alternative to represent existing baseline conditions.

These claims are rejected. The PEIR did not improperly rely on the "no project" alternative to represent the existing baseline conditions, and the additional information that petitioners seek to have included in the PEIR – while desirable – is simply not reasonably available to the Board or necessary to perform a program-level analysis of the hydrologic effects of the ILRP.

3. The PEIR's alternatives analysis is adequate.

The Ag Coalition contends that the PEIR's alternatives analysis is inadequate because it contains a flawed "no project" alternative, failed to analyze the Recommended Program Alternative and the Framework, and failed to identify a preferred or environmentally-superior alternative.

In its tentative ruling, the Court agreed that the PEIR was flawed because it did not contain a true "no project" alternative discussing the existing conditions, as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved. However, at the hearing, the Board persuasively argued that, under the unique circumstances of this case, the Board properly treated the continuation of the existing regulatory plan, policy, or ongoing operation as the "no project" alternative. As explained in the PEIR, if the existing program were not extended and were allowed to expire, regulation of irrigated agriculture would not cease. Rather, agricultural dischargers would be required

by Water Code section 13260 to file a Report of Waste Discharge and the Board would be required to issue individual or general WDRs to regulate the discharges or to adopt a new waiver. An environmental analysis of the impacts of issuing WDRs to each of tens of thousands of individual dischargers would not be feasible. (See AR 121-122, 1153.) The most that the Board reasonably could be expected to do is to estimate the impacts of issuing general WDRs or a new waiver. This is precisely what was done. Accordingly, the Court finds no violation of CEQA.

The Court likewise rejects the contention that the PEIR's alternatives analysis is inadequate because it failed to analyze the Recommended Program Alternative or the Framework.

As described above, the Draft PEIR included the Recommended Program Alternative as an alternative (albeit in an appendix), and the alternative was circulated along with the other five alternatives. (See AR 118, 123-124, 1459-1740.) In addition, the text of the Draft EIR referred to the appendix that contained the discussion of the Recommended Program Alternative. (See AR 1123.) While the use of an appendix to present information is not favored, the Court is persuaded that it may satisfy CEQA where, as here, the appendix is referenced in the text of the EIR and the discussion in the appendix is adequate. (See *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239.)

Moreover, the Recommended Program Alternative was derived from the elements of the other five alternatives and there is no material difference between the elements of the Recommended Program Alternative and the elements of the other five alternatives described in the Draft PEIR. Thus, to the extent the PEIR was required to analyze the Recommended Program Alternative, the Court finds that it does so.

Moreover, the Ag Coalition has failed to explain why the range of alternatives described in the PEIR is unreasonable in the absence of the Recommended Program Alternative and the Framework. Accordingly, the Court rejects the contention that the alternatives analysis is inadequate because it fails to consider the Recommended Program Alternative and the Framework. (The Ag Coalition's alternative contention that the Board abused its discretion by failing to recirculate the PEIR to discuss the Recommended Program Alternative and the Framework is discussed below.)

For the reasons described above, the Court also rejects the contention that the PEIR is inadequate because the Draft PEIR initially failed to identify a "preferred" project alternative.

The Court agrees with the Ag Coalition, however, that the PEIR should have identified an environmentally-superior alternative. Even if this requirement is not

explicitly stated in CEQA, it is implied by the Guidelines and the structure of CEQA, which requires a lead agency to consider environmentally superior alternatives. (See 14 C.C.R. § 15126.6(e)(2); see also *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1007; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1353.)

4. The Board was not required to recirculate the PEIR.

The Ag Coalition argues that due to the inclusion of the Recommended Program Alternative and the Framework, the Board should have recirculated the Draft PEIR for public comment. The Court does not agree.

An EIR to which significant new information is added after the initial publication and review of the Draft EIR, but prior to the agency's consideration or approval of the project, must be recirculated for an additional round of review and comment by the public and interested agencies. (Cal. Pub. Res. Code § 21092.1; 14 C.C.R. § 15088.5.) In *Laurel Heights Improvement Association v. Regents*, the California Supreme Court clarified that recirculation is required in four different circumstances: (1) when new information discloses a new, substantial environmental impact of a project; (2) when new information shows a substantial increase in the severity of an environmental impact (unless mitigation measures reduce that impact to insignificance); (3) when new information discloses a feasible alternative or mitigation measure that has not been adopted and that clearly would lessen environmental impacts; and (4) when the draft EIR was so fundamentally flawed that public comment on the draft was effectively meaningless. (*Laurel Heights Improvement Association v. Regents (Laurel Heights II)*) (1993) 6 Cal.4th 1112, 1130.)

CEQA does not require a lead agency to add significant new information to an EIR before determining whether the information is significant enough to require recirculation. (*Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 903.) Here, by certifying the EIR, the Board necessarily concluded that the new information was not significant, and therefore did not require recirculation and additional public comment. The question is whether the Board's determination is supported by substantial evidence.

The Court concludes that it is. The evidence in the record supports a finding that the Recommended Program Alternative was not "new" information since it was appended to and circulated with the Draft PEIR. Moreover, even if the Recommended Program Alternative was new information, substantial evidence supports a finding that the changes proposed by the Recommended Program Alternative were not "significant" for purposes of CEQA.

A similar analysis applies to the Framework. While the Framework was new information, it does not appear to make any "significant" changes to the

Recommended Program Alternative that may cause new or more severe environmental impacts – at least at a programmatic level.

5. The PEIR contains an adequate evaluation of the project's individual and cumulative environmental impacts.

The Ag Coalition contends the PEIR is inadequate because it contains an inadequate evaluation of the project's individual and cumulative environmental impacts. The Court finds the PEIR's discussion of the project's individual and cumulative impacts to be adequate for a programmatic EIR.

In its tentative ruling, the Court took issue with the PEIR's cumulative impacts analysis. However, at the hearing, the Court was persuaded by the Board that it made a good faith effort at full disclosure and that, due to the sheer size and scope of the project, further analysis of the project's cumulative impacts was not reasonably feasible.

6. The PEIR's mitigation measures are lawful.

The Ag Coalition also challenges the PEIR's implicit finding that the mitigation measures are feasible. The Ag Coalition contends that several of the mitigation measures, namely CUL-MM-1, BIO-MM-1, BIO-MM-2, and FISH-MM-1, are not feasible because they impose requirements on dischargers that the Board does not have the power to impose, and because they impose excessive costs.

The Court rejects this claim. The Ag Coalition has failed to persuade the Court that substantial evidence does not support finding the mitigation measures are feasible and that the Board has the power to impose them.

In its request for supplemental briefing, the Court questioned whether the Board has the power to require as part of its mitigation measures that agricultural operations undertake "additional CEQA review" if such review would not otherwise be required under CEQA. The Board responded that it does not believe it has that authority, but that it did not believe it had imposed any such requirement on agricultural operations.

In essence, where the mitigation measures refer to "additional CEQA review," the Board clarified that the language was simply intended to mean that if a future discretionary approval by the Board would require additional CEQA review, such review will be undertaken. With this stipulation, the Court is persuaded that the PEIR's mitigation measures are lawful.

B. The CSPA Petition

Like the Ag Coalition, CSPA challenges the Board's certification of the Final PEIR. CSPA alleges that the Board's certification of the Final PEIR violated

CEQA because the PEIR was not based on a proposed project, and because the Board approved the Renewed Waiver even though it conflicts with applicable laws and regulations.

CSPA also challenges the Regional Board's approval of the Renewed Waiver. CSPA contends that the Regional Board abused its discretion in approving the Renewed Waiver because the Renewed Waiver is not consistent with the State's Antidegradation Policy (Resolution No. 68-16) or the State's "Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (aka, the "Nonpoint Source Policy") and, therefore, the Board could not make the findings required by Water Code § 13269 to issue the Renewed Waiver.

CSPA seeks an order commanding the Regional Board to set aside the certification of the PEIR and the approval of the Renewed Waiver, and to suspend all activity under the ILRP that could result in any change or alteration to the environment until the Board has taken actions necessary to bring the certification and project approval into compliance with CEQA and Porter-Cologne.

1. CSPA's CEQA arguments lack merit.

Like the Ag Coalition, CSPA claims that the Board's certification of the PEIR violated CEQA because the PEIR did not include an adequate project description. For the reasons described above, the Court rejects this claim.

CSPA also contends that the Board's certification violates section 21002.1 of CEQA because the project that was approved – the Renewed Waiver – is inconsistent with "applicable laws and regulations." This claim, too, is rejected.

CSPA has taken the cited language out of context. Section 21002.1 provides, in relevant part:

In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reports prepared pursuant to this division:

(a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.

(b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

(c) If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.

In context, it is clear that the reference to "applicable laws and regulations" was not intended to give rise to an independent cause of action under CEQA. The intent of the language is simply to make clear that compliance with CEQA does not exempt projects from compliance with otherwise applicable laws and regulations. An agency may abuse its discretion by approving a project that does not comply with applicable laws and regulations, but CEQA does not create a separate cause of action for violations of otherwise applicable laws and regulations.²

2. The Board abused its discretion in approving the Renewed Waiver without complying with the State's Antidegradation Policy.

CSPA contends that the Regional Board abused its discretion in adopting the Renewed Waiver because the Renewed Waiver fails to comply with the State's Antidegradation Policy (Resolution No. 68-16). CSPA contends that the Board violated the Antidegradation Policy in at least four ways: (1) by finding that the Antidegradation Policy does not apply to already degraded (impaired) waters; (2) by relying upon watershed-scale monitoring, which petitioners contend is not adequate to detect and prevent further degradation; (3) by failing to implement Best Practicable Treatment or Control (BPTC); and (4) by ignoring the adverse effects of the Waiver on discharges to groundwater.

The Board responds that because the Renewed Waiver is simply an interim step in the phased implementation of the long-term ILRP, the appropriate time to question compliance with the Antidegradation Policy is when the final order establishing the program is issued. To consider application of the Antidegradation Policy at this time, argues the Board, would be premature.

Further, since the Board considered the Antidegradation Policy when it issued the 2006 waiver, and the Renewed Waiver simply extends the 2006 waiver, the Board argues that the petitioners' claims are time barred and that no useful purpose would be served by requiring a new antidegradation analysis at this time.

Finally, even if the petitioners' challenges are ripe, the Board contends the Court should find the Renewed Waiver is consistent with the Antidegradation Policy

² The fact that a project violates otherwise applicable laws and regulations may, however, give rise to a potentially significant impact under CEQA.

because it prohibits discharges that will lower water quality, requires dischargers to meet water quality objectives, and implements best management practices.

As an initial matter, the Court rejects the Board's claim that the Antidegradation Policy should not be applied to the Renewed Waiver because the Waiver is only an "interim" program. There is no evidence of any exemption from the Antidegradation Policy for "interim" programs, or that the Board has interpreted interim programs to be exempt from the Antidegradation Policy's requirements.

For similar reasons, the Court rejects the Board's argument that the petitioners' claims are barred by the doctrine of *res judicata*. The petitioners here are challenging the 2011 Renewed Waiver, not the 2006 conditional waiver.

Before renewing the 2011 Waiver, the Board was statutorily required to determine that the Waiver is consistent with any applicable basin plan and is in the public interest. Since the Antidegradation Policy is state policy and has been incorporated into the Regional Board's basin plan, the Board was required to consider whether the Waiver was consistent with the Antidegradation Policy.

Moreover, even if *res judicata* otherwise would apply, it would not apply here because there are changed circumstances and new facts which did not exist at the time of the prior judgment, including, among other things, the decision in *Asociacion De Gente Unida Por El Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255.

The Court finds some merit in the Board's argument that a new antidegradation analysis should not be required because the Board considered the Antidegradation Policy when it issued the 2006 waiver, and the Renewed Waiver simply extends the 2006 waiver. It would make little sense to require the Board to perform a new antidegradation analysis to support a very brief (e.g., one or two month) extension of an existing program for which an antidegradation analysis already had been performed. But the Court is not persuaded that this reasoning can be applied to a situation such as this, where the Board granted an additional two-year extension.

Therefore, the Court proceeds to consider whether the Renewed Waiver is consistent with the Antidegradation Policy.

The Antidegradation Policy provides that where a regional board is permitting an activity that may produce waste that will discharge into existing high quality waters, it may permit such activity only if it makes certain findings. Specifically, the board must find that the activity (1) is consistent with the maximum benefit to the people of the state, (2) will not unreasonably affect beneficial uses, and (3) will not violate water quality standards. It also must find that any discharge to high quality water will be required to undergo best practicable treatment or control of the discharge necessary to assure that no pollution or nuisance will

occur, and the highest water quality consistent with the maximum benefit to the people of the state will be maintained. (*Asociacion De Gente Unida Por El Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1260.)

In this case, the Regional Board has failed to make any of these findings for the 2011 Renewed Waiver. Instead, the Board appears to rely on the findings it made for the 2006 waiver. (AR 35; see also AR 96-97.) But even if the findings for the 2006 waiver are carried forward to the 2011 Renewed Waiver, the finding that the Waiver is consistent with the Antidegradation Policy is not supported by substantial evidence.

The Board admits that an ILRP that fails to regulate and monitor groundwater quality will not be consistent with the Antidegradation Policy. There is no dispute that the Renewed Waiver does not regulate or monitor groundwater quality. Thus, for this reason alone, the Renewed Waiver is not consistent with the Antidegradation Policy.

At the hearing, the Board argued that potential degradation to groundwater should not be considered because discharges to groundwater are not "covered" by the Waiver. However, if the authorized discharges to surface water under the Waiver may produce waste that will discharge into existing high quality groundwater, the Antidegradation Policy applies. Indeed, the Board's Final PEIR concedes that the Renewed Waiver is not consistent with its Antidegradation Policy. (See, e.g., AR 1160 [discussing the "No Change" alternative].)

Further, in regard to surface water, Board staff admitted in the July 2010 staff report that the Renewed Waiver would only partially implement the iterative BPTC process for addressing degradation to surface waters because the program is geared toward identifying exceedances, rather than degradation. (AR 1583.) This also renders the Renewed Waiver inconsistent with the Antidegradation Policy. (Cf. AR 1536 [describing the proposed iterative BPTC process for the long-term ILRP].)

It also is questionable whether the Renewed Waiver is sufficient to comply with the Antidegradation Policy since it is not clear that the Board has an adequate means of identifying and taking actions against dischargers who are violating water quality objectives when water quality objectives are being exceeded, or of ensuring that BPTC is being implemented when high quality water is being degraded.³

The Court does not agree with petitioners that edge-of-field monitoring is necessarily required to correlate management practices with resulting water quality and achieve BPTC. (See Cal. Water Code § 13269.) Even if individual edge-of-field monitoring might provide additional useful information, the evidence

³ The Court recognizes that this issue exists, but does not decide the issue in this ruling.

in the record supports the Board's argument that it likely is not cost-effective or reasonable for the Board to put a "cop on every corner." However, if the Board is going to rely on watershed-scale monitoring to ensure agricultural dischargers are implementing BPTC, the Board still must ensure that any activity that will result in a discharge of waste to high quality waters will comply with water quality standards and meet BPTC.

The Court recognizes that the Renewed Waiver is intended to be an interim step toward implementation of a new, long-term ILRP which, the Board contends, will fully comply with the Antidegradation Policy. This well may be true, but the Court nevertheless must decide whether the Renewed Waiver itself complies with the Antidegradation Policy. For the reasons described above, the Court is persuaded it does not.

The Board may only waive WDRs if the Board determines that the waiver is consistent with any applicable basin plan and is in the public interest. (Cal. Water Code § 13269.) As demonstrated above, the Renewed Waiver is inconsistent with the Antidegradation Policy, a key component of the Basin Plan. Accordingly, the Renewed Waiver is not consistent with the Basin Plan and the Board could not make the findings required by Water Code § 13269 to issue the Renewed Waiver. Accordingly, the Court shall issue a writ of mandate compelling the Board to comply with the Policy.

3. The Board abused its discretion in approving the Renewed Waiver because the Renewed Waiver does not comply with the State's Nonpoint Source Policy.

CSPA also contends that the Renewed Waiver is inconsistent with California's "Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (aka, the "Nonpoint Source Policy"). (AR 16025-44.) The Nonpoint Source Policy includes five key elements with which any nonpoint source program must abide.⁴ (AR 16037.) CSPA contends the Renewed Waiver is inconsistent with at least three of those elements: Key Elements 1, 2, and 4.

Key Element 1 states that a nonpoint source control implementation program must, at a minimum, address nonpoint source pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements. (AR 1110, 1576, 16037.) For the reasons described above, the Court finds that the Renewed Waiver is inconsistent with applicable antidegradation requirements. Accordingly, the Renewed Waiver is inconsistent with Key Element 1 of the Nonpoint Source Policy.

⁴ The Court rejects the Board's claim that the Renewed Waiver is not a "nonpoint source control implementation program."

Key Element 2 of the Nonpoint Source Policy provides that a nonpoint source control implementation program must include a description of the management practices and other program elements that are expected to be implemented to ensure attainment of the program's stated purpose, the process to be used to select or develop management practices, and the process to be used to ensure and verify proper management practice implementation. (AR 1576, 16038.)

CSPA contends that the Renewed Waiver fails to comply with Key Element 2 because the Board does not know what management practices are being implemented by individual dischargers and because the Waiver's monitoring requirements are insufficient to detect violations of water quality standards. However, the Court is not persuaded that the Renewed Waiver fails to comply with the requirements of Key Element 2. The alleged flaws identified by petitioners do not appear to be requirements of this element.

It is true that Key Element 2 requires the Board to be able to determine there is a high likelihood that the management practices authorized by the program will attain water quality requirements. This involves consideration of the management practices to be used, the effectiveness of the management practices to be used, and the process for ensuring their proper implementation. However, CSPA has failed to show that this Element requires the Board to collect and analyze information about the particular management practices being implemented on each individual farm.

Key Element 4 of the Nonpoint Source Policy requires every nonpoint source pollution control program to include "sufficient feedback mechanisms" to determine whether the program is achieving its stated purpose, or whether additional or different management practices or other actions are required. (AR 1579, 16039.) The program must describe the measures, protocols, and associated frequencies that will be used to verify the degree to which management practices are being implemented and achieving the program's objectives, and/or provide feedback for use in adaptive management.

The Renewed Waiver is inconsistent with Key Element 4 because it does not include feedback mechanisms for waste discharges to high quality groundwater. In addition, since the feedback mechanism for discharges to surface water do not apply unless there is an exceedance, the feedback mechanism also appears to be insufficient in regard to potential degradation of high quality surface water. Accordingly, the Court finds the Renewed Waiver is inconsistent with Key Element 4 of the Nonpoint Source Policy.

VI. Disposition

The Ag Coalition's petition is denied.

CSPA's petition is granted in respect to its claims that the Board abused its discretion in approving the Renewed Waiver because the Waiver does not comply with the State's Antidegradation Policy or Nonpoint Source Policy. In all other respects, CSPA's petition is denied.

The Court denies the requests for declaratory and injunctive relief, as unnecessary.

A writ of mandate shall issue commanding the Board to bring its long-term ILRP into compliance with the State's Antidegradation Policy and Nonpoint Source Policy. The writ shall further command the Board to file a return specifying what it has done to comply.

The parties are directed to meet and confer regarding what is a reasonable amount of time for the Board to comply with the writ and file a return. If the parties cannot reach an agreement, the Court will entertain additional argument from the parties in the form of short letter briefs (not to exceed 2 pages in length), and decide the issue.

Counsel for CSPA is directed to prepare a formal judgment and writ, consistent with this ruling; submit them to opposing counsel for approval as to form; and thereafter submit them to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

In recognition of the environmental harm that could occur if the Renewed Waiver were to be invalidated immediately without a replacement ILRP, the Court's writ shall not compel the Board to set aside its approval of the Renewed Waiver pending compliance with the writ. The Renewed Waiver shall remain in place until the Board has complied with the writ and/or the Waiver is replaced by a new, long-term ILRP.

Dated: May 21, 2013

Signed:



Hon. Timothy M. Frawley
California Superior Court Judge
County of Sacramento

Case Number: 31-2012-80001186/RG12632180

Department: 29

Case Titles: San Joaquin RCD v. Cal Regional WQCB/CA Rice Commission.

CalSPA v. Cal Regional WQCB/CA Rice Commission

CERTIFICATE OF SERVICE BY MAILING

(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing RULING by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed to:

Michael Lozeau
Douglas Chermak
Lozeau Drury LLP
410 12th St., Ste. 250
Oakland, CA 94607

Theresa Dunham
Somach Simmons and Dunn
500 Capitol Mall, Ste. 1000
Sacramento, CA 95814

Anita Ruud
Office of the Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004

Alex P. Mayer
State Water Resources Control Board
1001 I St., 22nd Floor
Sacramento, CA 95814

William Thomas, Jr.
Best Best and Krieger, LLP
500 Capitol Mall, Ste. 1700
Sacramento, CA 95814

Steven Torigiani
Young Wooldridge, LLP
1800 30th St., 4th Floor
Bakersfield, CA 93301-5298

Kari Fisher
California Farm Bureau Federation
2300 River Plaza Dr.
Sacramento, CA 95833

Jennifer Spaletta
Spaletta Law PC
P.O. Box 2660
Lodi, CA 95241

Andrea Matarazzo
Pioneer Law Group., LLC
431 I St. Ste. 201
Sacramento, CA 95814

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: May 21, 2013

Superior Court of California, County of
Sacramento

By: F. Temmerman,
Deputy Clerk