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Via E-mail

James Herink
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State Water Resources Control Board
1001 "I" Street
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Re: California Sportfishing Protection Alliance and California Water Impact Network
Response to Coalitions' Petition for Review – SWRCB/OCC FILES A-2173(a) and A-2173(b)

Dear Mr. Herink,

California Sportfishing Protection Alliance and California Water Impact Network (collectively “CSPA”) submit this response to the petition for review filed by various irrigated lands coalitions and identified by the State Board as SWRCB/OCC file A-2173(b). CSPA generally concurs with several of the Coalitions’ objections to the Central Valley Regional Board’s Final Program Environmental Impact Report For The Long-Term Irrigated Lands Regulatory Program (“PEIR”).¹ However, because the renewal of the Irrigated Lands Waiver is based on that faulty PEIR, the State Board must vacate the renewal. And, for all of the reasons discussed in CSPA’s related petition (SWRCB/OCC file A-2173(a)), the State Board should order the Regional Board to adopt an irrigated lands program that does not rely upon coalition groups, assures meaningful and reasonable controls on actual irrigated lands discharges and implements monitoring that tracks not only trends in regional water quality but allows for meaningful enforcement of the Boards’ discharge requirements.

The overall message that CSPA takes from the Coalitions’ petition is that the use of the Coalitions as regulatory intermediaries or unofficial Regional Board deputies makes for an overly-complicated and opaque regulatory scheme. Lumping all dischargers together in Coalitions fails to address the site specific differences on each farm. The only way to take those site specific differences into account is through farm specific management plans and farm

¹ To the extent CSPA, in this response, does not address every factual, legal or policy contention raised by the Coalitions in their petition, CSPA does not concede or waive any disputes or objections to those points and expressly reserves its right to comment on any issues not addressed in this response.

specific best management practice and water quality monitoring. In the meantime, the Boards will be constantly fighting an uphill battle to respond to objections from the Coalitions that the Boards do not have sufficient evidence to take meaningful steps, even while the Coalitions are the main obstacle to the Boards' gathering first hand information from the dischargers themselves.

CSPA generally agrees that the long-term regulatory program and staff's recommended program have never been reviewed by an EIR and that the PEIR fails to include a proposed project. Coalition's Petition, pp. 20-29. *See* CSPA Petition, pp. 24-25. Although CSPA disagrees with many of the factual assertions underlying the Coalition's legal arguments, the Coalition's legal point is correct that the PEIR fails to include a proposed project.

CSPA agrees with the Coalitions that the PEIR's no project alternative is incorrect as a matter of law. Coalition Petition, pp. 31-32; CSPA Petition, pp. 47-51.

CSPA disagrees with the Coalitions' argument that the baseline employed for the PEIR is incorrect. Coalition Petition, pp. 32-33. CSPA does not believe the alternatives discussed in the PEIR will have any significant adverse impact on water supply. If anything, to the extent an alternative were developed and selected that included meaningful incentives for irrigated farms to significantly reduce their water consumption, such an alternative should result in increases in base flows for natural watercourses in the Valley. In any event, the Coalitions' baseline argument amounts to mere speculation about the impacts of pollution controls for irrigated lands on water supply.

Similarly, the Coalitions do not cite to any evidence in speculating that meaningful pollution controls for irrigated lands would have any significant effect on groundwater recharge. Coalition Petition, pp. 32-33. And given the programmatic nature of the PEIR, and the lack of specificity about farm-specific pollution controls contemplated even by the most aggressive Alternative 5 (which CSPA believes is too aggressive especially as regards the drilling of groundwater wells and the degree of monitoring required), it is only speculation that any significant changes to irrigation practices would occur that would affect groundwater recharge or the volume of return flows to local channels.

CSPA does believe that the PEIR fails to address cumulative impacts plainly relevant to the irrigated lands program, for example, cumulative impacts to fish from pollution discharges, the massive federal and state water project pumps and other well-documented impacts. CSPA Petition, pp. 67-71. CSPA agrees that the Regional Board had to evaluate the impacts of numerous existing discharges in the Central Valley – many of which contribute to existing impairments – in order to conduct a proper cumulative impacts analysis in the PEIR as well as to properly apply the state and federal antidegradation policies to their renewal of the irrigated lands program. Coalition Petition, pp. 29-31. CSPA does not believe that either EPA's pesticide controls or the Groundwater Protection Strategy have any conceivable cumulative impacts to an effective irrigated lands discharge program.

The Coalitions' claim that an effective pollution control program for irrigated lands would create inconsistencies with general plans or habitat conservation plans is entirely speculative. Coalition Petition, p. 36. Nothing in the range of alternatives under consideration would be inconsistent with the terms of any general plan or HCP. Obviously, any measures a specific farm may choose to install would have to be consistent with other applicable laws. CSPA cannot conceive of how reasonable pollution control measures would ever amount to violations of a general plan or, by necessity, be inconsistent with an HCP. The Coalitions offer no evidence in support of their contention.

As for the Coalitions' concerns with mitigation measures for sensitive biological resources, CSPA does not have any objection to the Regional Board clarifying that any farm-specific CEQA review would, of course, be subject to the prerequisite that a discretionary action be involved. Coalition Petition, pp. 38-39. As for the Coalitions' attempt to limit the Regional Board's wetlands jurisdiction to the Corp's federal jurisdiction simply ignores the Regional Board's broad authority over pollution discharges to any water as well as to land that threatens to reach surface or groundwater. None of the federal authorities cited by the Coalitions has any application to the Regional Board's implementation of Porter-Cologne. *Id.*, pp. 39-40.

CSPA agrees that the PEIR does not identify a preferred alternative. Coalition Petition, p. 40.

CSPA notes the irony of the Coalitions complaining about the Regional Board treating all irrigated lands as dischargers of waste to groundwater. Coalition Petition, p. 43. For almost a decade now, the presence of the Coalitions has prevented or inhibited the Regional Board's effort to collect information about specific farms, beginning with the Coalitions' long effort to avoid even identifying their members. The Regional Board has ample authority to require dischargers to land to provide information about potential pollution threats to groundwater showing that such discharges do not threaten groundwater.

Despite the numerous flaws in the PEIR pointed out by the Coalitions, they attempt to finesse their requested remedy by only asking the State Board to vacate the additional monitoring requirements added to the renewed waiver. Coalition Petition, p. 11. Unless the State Board wants to proceed to cure the PEIR's defects and issue irrigated lands order(s) on its own motion, any remand to the Regional Board is bound by the remedies provided in CEQA. Thus, because the Regional Board's renewal of the waiver relied upon an unlawful PEIR, the waiver renewal must be vacated. "Under Public Resources Code section 21168.9, upon a finding of the agency's noncompliance with CEQA, the court must enter an order mandating that the agency set aside its decision and take any necessary action to achieve compliance." *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 414-415. See also Pub. Res. Code § 21168.9(a)(1). The exception to that remedy is where some portions of the project are linked to the CEQA flaws and severable from the rest of the project, that portion of the project could be vacated and the remainder left intact. Pub. Res. Code § 21168.9(b) ("the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this

division"). The Coalitions turn that rule on its head, seeking to vacate the monitoring additions which have nothing to do with the PEIR's flaws and which are severable from the overall renewal, while asking the State Board to maintain the waiver renewal despite the PEIR's flaws and no conceivable way to sever the waiver renewal from the noncomplying PEIR. Indeed, where, as here, the flaws in the EIR are so extensive, courts have refused to allow portions of a project to proceed. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 742 n. 13 ("mass of flaws" and "the vast array of inadequacies in the FEIR precludes severance"); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221 ("No discrete or severable aspects of the projects are unaffected by the omitted analyses"). The State Board's remedial options are similarly limited. Because the PEIR is legally inadequate and the Regional Board's renewal cannot be severed from the PEIR's mass of flaws, the State Board must vacate the Regional Board's renewal of the irrigated lands waiver. However, the need for additional monitoring is severable from the renewal and is unrelated to the PEIR's flaws. Accordingly, the State Board should maintain all existing monitoring requirements, using an appropriate order, and, indeed, expand those requirements to begin to fill in the glaring information gap regarding the current pollution controls, if any, in place on Central Valley farms and the absence of any monitoring of best practicable treatment controls ("BPTC") or edge of field of monitoring.

Thank you for this opportunity to respond to the Coalitions' Petition. CSPA reserves the right to supplement its comments once it has been provided a copy of the administrative record and in response to any draft or proposed decision by the State Board.

Sincerely,



Michael Lozeau



Bill Jennings 4/4/12

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