APPENDIX B. Response to Comments for Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program Response to Comments -

Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program (Version Date: December 18, 2003) (NPS Implementation Policy)

Written comments were received from the following parties (listed in order of receipt):

Date Received: January 29, 2004

Commenter: G. Fred Lee, PhD, DEE G. Fred Lee and Associates 27298 East El Macero Drive El Macero, CA 95618-1005

Date Received: January 30, 2004

<u>Commenter:</u> Anthony L. Francois, Esq. Director, Water Resources California Farm Bureau Federation Governmental Affairs Division 1127 – 11th Street, Suite 626 Sacramento, CA 95814

Commenter:Mark Gold, D. EnvExecutive Director and
Shelley Luce, D. Env.
Issues Director
Heal the Bay
3220 Nebraska Avenue
Santa Monica, CA 90404

Commenter:Patrick PorgansPatrick Porgans and Associates, Inc.P. O. Box 1713West Sacramento, CA 95691

Commenter: Davis S. Beckman, Senior Attorney Natural Resources Defense Council 1314 Second Street Santa Monica, CA 90401 Commenter: Linda Sheehan Director, Pacific Regional Office The Ocean Conservancy 116 New Montgomery Street San Francisco, CA 94105

Date Received: February 3, 2004

- Commenter: David J. Guy Executive Director Northern California Water Association
- Commenter: Mark E. Biddlecomb Director of Conservation Programs Ducks Unlimited

Date Received: February 10, 2004

Commenter: Senator Dede Alpert, Chair (Senator Alpert) California State Senate, Committee on Appropriations State Capitol, Room 2206 Sacramento, CA 95814

The following parties provided oral comments (OC) at the SWRCB workshop, on February 4, 2004:

- 1. Anthony L. Francois, Esq. representing the California Farm Bureau Federation
- 2. Aaron Ferguson representing the Northern California Water Association
- 3. Linda Sheehan representing the Ocean Conservancy.

Responses to the comments are provided below in order of the respective section to which they relate in the NPS Implementation Policy (Version Date: December 18, 2003). Where appropriate the location by page number in the subsequent version of the NPS Implementation Policy (Version Date: April 16, 2004) and the Functional Equivalent Document (Version Date: April 16, 2004) is provided at the end of the comment response.

Section II B - Water Quality Planning

Commenter: California Farm Bureau Federation

Comment: The commenter recommended that California Water Code (CWC) section 13241 factors be recognized in Section IIB of the NPS Implementation Policy where Porter-Cologne Water Quality Control Act (Porter-Cologne Act) planning requirements are discussed.

Response: This comment is accepted. The State Water Resources Control Board (SWRCB) and Regional Water Quality Control Boards (RWQCBs) must consider CWC section 13241 factors when they adopt water quality objectives. We will add a sentence to footnote 11 that explains that these factors must be considered when the SWRCB and RWQCBs adopt or revise water quality objectives. (See NPS Implementation Policy [Version Date: April 16, 2004] at pages 3 and 22 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at pages A-3 and A-22.)

Section II C - Waste Discharge Regulation Section

Commenter: Heal the Bay

Comment: The commenter concluded that "...the State has never produced a policy to ensure compliance with NPS programs." The commenter further states "...that California's Porter Cologne Act makes all discharges, except those covered by specific waivers, subject to waste discharge requirements...[and] any nonpoint source of pollution that causes or contributes to a water quality violation could be subject to enforcement action by the SWRCB if the problem is not rectified." The commenter concludes that "... this should be the cornerstone of nonpoint source compliance assurance policy, yet it is not even a part of this DRAFT NPS Policy....The Policy implies that voluntary third-party programs constitute the State's major NPS implementation program."

Response: This comment is rejected. Section IIC of the NPS Implementation Policy states "...all dischargers are subject to regulation under the Porter-Cologne Act including...NPS dischargers". This section then describes the administrative tools available to the SWRCB and RWQCBs to regulate discharges. They are, as Heal-the Bay has noted, WDRs and waivers of WDRs. An additional administrative tool, not mentioned by the commenter, is that of basin plan prohibitions. To further emphasize this point, Section IIC has been revised to reiterate that all NPS discharges must be regulated under one or more of these administrative tools. (See NPS Implementation Policy [Version Date: April 16, 2004] at page 3 and FED Appendix A [Version Date: April 16, 2004] at page A-3.)

Section IIC additionally states that "any person discharging or proposing to discharge waste that could affect water quality must file a report of waste discharge (RoWD)". Following the RoWD "The RWQCB must then determine the appropriate action to take, either issuing WDRs to the discharger or conditionally waiving the requirements." Section IID further states, "Just as the

RWQCBs are obligated to address all NPS discharges of waste through one or more of the available administrative tools, they also are obligated to take steps to ensure that their NPS pollution control requirements are met. The NPS Implementation Policy incorporates by reference the SWRCB Enforcement Policy, which clearly defines the options available to a RWQCB.

The NPS Implementation Policy language cited makes explicitly clear that: (1) all NPS discharges that could affect the quality of the waters of the State are subject to regulation; (2) the administrative tools available to the RWQCBs to regulate these discharges are WDRs, waivers of WDRs and basin plan prohibitions; and (3) through enforcement actions, the RWQCBs are obligated to take steps to ensure that their NPS pollution control requirements are met. Enforcement actions are based upon discharger failure to meet the requirements of the administrative tool applicable to their discharge.

Having established the regulatory requirements for control of nonpoint sources of pollution, the NPS Implementation Policy then proceeds, in Section III, to describe potential discharger actions to meet the requirements governing their particular discharge. The policy states "the most successful control of nonpoint sources is achieved by prevention or by minimizing the generation of NPS discharges" and "most NPS management programs depend, as least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution." The policy subsequently, in Section IV, discusses various organizational approaches to achieving statewide implementation of appropriate MPs. Section IV states that "...Implementation programs for NPS pollution control may be developed by the SWRCB, the RWQCBs, a discharger or by a coalition of dischargers operating in cooperation with a thirdparty representative, organization or government agency." The foregoing in no way implies, as the commenter states, "that voluntary third-party programs constitute the State's major NPS implementation program. Third-party programs are but one approach—one alternative—to developing implementation programs to prevent and control NPS pollution sources. (See also the response to Natural Resources Defense Council regarding the organizational and outreach advantages of third-party programs (Section IV – Structuring NPS Implementation Programs).

Commenter: California Farm Bureau Federation

Comment: The commenter recommended that the language referencing the RWQCB's new authority to collect annual administrative fees to establish and implement waivers of waste discharge requirements (WDRs) be modified to reflect the legal requirement that the SWRCB adopt a fee schedule before a RWQCB may charge a fee.

Response: This comment is accepted. The referenced language has been rewritten to state "As of January 1, 2004, and following SWRCB adoption of a fee schedule, RWQCBs are authorized to collect annual administrative fees to establish and implement waivers of WDRs." (See NPS Implementation Policy [Version Date: April 16, 2004] at page 5 and FED Appendix A [Version Date: April 16, 2004] at page A-5.)

Commenter: California Farm Bureau Federation

Comment: The commenter stated that it would be appropriate to include language that indicates that the traditional methods for calculating fees may not be equitable in developing fees for nonpoint sources operating under waiver programs.

Response: This comment is rejected. Issues related to fee calculation are separate from those related to the NPS Implementation Policy and would be inappropriate to discuss in this document.

Commenter: The Ocean Conservancy

Comment: The commenter recommends that the NPS Implementation Policy should state clearly that the RWQCBs <u>must</u> adopt waste discharge requirements when required to do so by law (e.g., when a waiver is not in the public interest).

Response: This comment is rejected. The NPS Implementation Policy already states that NPS discharges must be regulated under one or more of the administrative tools, and clearly identifies these tools as WDRs, waivers of WDRs, or a basin plan prohibition. The draft Policy also states the conditions under which a waiver may be legally issued (e.g., it must be consistent with the applicable water quality control plan and must be in the public interest). If the RWQCB determines that it cannot legally waive regulation of a NPS discharge, then it has the discretion to regulate the discharge under either a WDR or a prohibition. To further emphasize the point of the RWQCBs being required to use one or more of the administrative tools, we will add a sentence to the first full paragraph under subheading C that states "Hence, all current and proposed NPS discharges must be regulated under WDRs, waivers of WDRS, or a basin plan prohibition, or some combination of these administrative tools". (See NPS Implementation Policy [Version Date: April 16, 2004] at page 3 and FED Appendix A [Version Date: April 16, 2004] at page A-3.)

Section III – Developing the State's NPS Pollution Control Program

Commenter: The Ocean Conservancy

Comment: The commenter indicated that the NPS Implementation Policy misstates the Porter-Cologne Act mandate in Section 3, page A-10, by stating that the '[r]egulation of nonpoint sources of pollution is much less prescriptive than point sources.' To be consistent and avoid confusion, we ask that this be corrected to read that regulation 'has been to date less prescriptive than for point sources."

Response: This comment is accepted. To prevent further confusion, this statement has been removed. (See NPS Implementation Policy [Version Date: April 16, 2004] at page 7 and FED Appendix A [Version Date: April 16, 2004] at page A-7.)

Commenter: California Farm Bureau Federation

Comment: The commenter recommended that the NPS Implementation Policy direct RWQCBs to take care that their requirements are not inconsistent with eligibility or participation in assistance programs.

Response: This comment is rejected. Under the Porter-Cologne Act, the RWQCBs' primary mandate is to protect the quality of the waters of the state. It would be inappropriate for the RWQCBs to subjugate their water quality protection responsibilities to the requirements of another agency's technical and/or financial assistance programs.

Section IV – Structuring NPS Implementation Programs

Commenter: Natural Resources Defense Council

Comment: The commenter states that the use of implementation programs developed through an organizational approach that uses third-parties is creating a new bureaucratic interface between the SWRCB and the RWQCBs, on one hand, and dischargers, on the other. Furthermore the commenter considers that it is not at all clear that efficiency and pollution reduction will be the result of third-party programs. The commenter considers the use of third-party programs by the SWRCB and RWQCB as contracting away their pollution reduction responsibility and may not lead to better practices in the field. In fact it may tend to distance the discharger from the specific practices necessary to reduce NPS pollution.

Response: This comment is rejected. We disagree that the use of third-party organizational structures creates a bureaucratic interface between the SWRCB and the RWQCBs and the dischargers. Dischargers themselves form the core of third-party organizations. Third-party organizational arrangements provide an efficient mechanism for dischargers with common NPS pollution generating activities or situations to assemble in an organizational structure that facilitates sharing of pollution control information and expertise and collaborative involvement in solving NPS pollution prevention and control problems. Such organizations may, in some cases, provide a peer pressure environment that also facilitates earlier NPS prevention and control than would otherwise occur. As the NPS Implementation Policy states, "A primary advantage...of third-party programs is their ability to reach multiple numbers of dischargers who individually may be unknown to the RWQCBs."

Nor do we agree that the pollution reduction responsibility of the RWQCBs is contracted away. The NPS Implementation Policy clearly states that "The RWQCBs have the primary responsibility for ensuring that appropriate NPS control implementation programs are in place throughout the state". It also makes explicitly clear that even though an individual discharger may participate in a third-party organization, the responsibility for the implementation of actions to prevent and control nonpoint sources of pollution lies with individual dischargers. The policy further declares that if an enforcement action needs to be taken, it will be against individual discharger(s), not the third-party.

Commenter: Natural Resources Defense Council

Comment: The commenter states that while the draft policy focuses on third-party agreements, it could and should focus on making the State's approach to reducing nonport source pollution consistent with the Porter-Cologne Act as well as the Clean Water Act.

Response: This comment is rejected. We disagree with the judgement that the NPS Implementation Policy is not consistent with the Porter-Cologne Act. The stated purpose of the policy is to provide policy guidance for the implementation and enforcement of the *Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan). While the NPS Program Plan itself was developed in response to the federal CWA section 319 and CZARA requirements, it only received federal approval as a consequence of the fact that the Porter-Cologne Act provided back-up authorities to implement and enforce the NPS Program Plan. The NPS Implementation Policy focuses on the various Porter-Cologne Act authorities available to the SWRCB and RWQCBs to implement and enforce the NPS Program Plan. Among Porter-Cologne Act authorities delegated to the boards are the identification of beneficial uses, establishment of water quality objectives to protect those uses, regulatory permitting authority (through the use of WDRs, waivers of WDRs, basin plan prohibitions), and enforcement authority to ensure that dischargers comply with permitting requirements.

The above requirements are articulated in Section I- Introduction, Section II – Statutory and Regulatory Background and Section III – The State's NPS Pollution Control Program – History and Background of the NPS Implementation Policy.

Commenter: Heal the Bay

Comment: The commenter stated that when the SWRCB and RWQCB rely on other parties to implement key regulatory responsibilities through third-party programs, there is the chance that procedures and standards will not be applied uniformly to all programs.

Response: This comment is rejected. Third parties do not have regulatory responsibility. Regulatory responsibility lies with the SWRCB and RWQCBs. Third parties provide organizational advantages that facilitate RWQCB regulation of large numbers of dischargers.

Commenter: The Ocean Conservancy

Comment: The commenter expressed concerns about the NPS Implementation Policy's heavy reliance on third-party programs to do the 'legwork' of implementation and enforcement.

Response: This comment is rejected. With the 1999 SWRCB adoption of *The Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan) the State has committed to implement 6l management measures by 2013 to prevent and control NPS pollution in California. Throughout the state, there are, at a minimum, tens of thousands of NPS dischargers whose individual identity is unknown to the RWQCBs or the SWRCB.

Development and recognition of third-party NPS control implementation programs that meet RWQCB performance criteria, as outlined in the first four of the key elements, provide the most efficient and effective mechanism to reach and involve large numbers of dischargers and hold all discharger implementation programs to the same performance levels. This approach also facilitates efforts to track the implementation of specific management practices (MPs) and the water quality results thereof.

The "legwork" of enforcement is the sole responsibility of the RWQCBs. In the introduction to Section IV-D of the NPS Implementation Policy, the first paragraph on page A-15 clearly states that the RWQCBs are responsible for developing Key Element No. 5, dealing with potential enforcement actions.

Commenter: The Ocean Conservancy

Comment: The commenter indicated that all third-party programs should demonstrate a high, not "reasonable" likelihood of success and should contain the five key elements.

Response: This comment is accepted. We agree with the commenter that the success or failure of third-party programs will either further or inhibit the RWQCB's ability to expeditiously protect water quality from nonpoint sources of pollution, and that success or failure of these programs could either conserve or squander RWQCB resources. Consequently, the NPS Implementation Policy language has been changed so that... "Before approving or endorsing a specific Third-Party Program, the RWQCB must determine there is a high likelihood that the Third-Party Program will attain the RWQCB's stated water quality objectives." (See NPS Implementation Policy [Version Date: April 16, 2004] at page 12 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at page A-12).

Commenter: Patrick Porgans and Associates

Comment: The commenter indicated that it was not possible to discern where the proposed NPS Implementation Policy breaks any new ground.

Response: This comment is rejected. The authorities granted the SWRCB and the RWQCBS by the Porter-Cologne Water Act, provide the SWRCB and RWQCBs with the authority necessary to prevent and control NPS sources of pollution. Heretofore, there has been no SWRCB policy direction for the implementation and enforcement of NPS pollution control programs using these authorities. The NPS Implementation Policy provides a systematic approach for NPS control implementation. This direction, applicable to all NPS implementation programs, is found in the five key elements mandated by the policy (Section IV D). The five key elements establish program implementation program's ultimate purpose, relating water quality requirements to the implementation actions projected to be taken; (2) identification of management practices, including assurance of proper implementation and provision for adaptive management adjustments, or the implementation of additional management practices where indicated; (3) a

time schedule for NPS control program implementation with quantifiable milestones; (4) a verification or monitoring program to track implementation program progress toward achieving water quality requirements; and (5) identification of RWQCB enforcement action(s), should verification/feedback mechanisms indicate or demonstrate a particular program is failing to achieve its stated objectives. These mandatory minimum requirements are applicable to all NPS control implementation programs statewide, regardless of who develops them, and breaks significant new ground in NPS control implementation program requirements.

Commenters: Northern California Water Association (NCWA) and Ducks Unlimited

Comment: In the commenters' joint letter they detail the Coalition Regional Plan developed under their leadership to prevent and control nonpoint sources of pollution, and how they perceive the Coalition's Plan reflects the five key elements of the NPS Implementation Policy.

Response: This comment is acknowledged. We commend NCWA and Ducks Unlimited for their foresight and proactive efforts. It would be inappropriate, however, for the SWRCB to comment on the adequacy of a specific plan. That determination must be made by the appropriate RWQCB, as they are the agency most knowledgeable about the factors involved. Consequently, our commendation for your foresight and efforts should not be construed as approving or endorsing your program, a RWQCB responsibility, but for the proactive efforts you are making and the example you are setting for others.

<u>IV- 4C Third-Party Programs Administered by State Agencies Other Than the SWRCB or</u> <u>RWQCBs</u>

Commenter: The Ocean Conservancy

Comment: The commenter states that the NPS Implementation Policy does not specify a course of action for RWQCBs and the SWRCB to take when a third-party program administered by another agency fails to meet its objectives. The Policy states that "[w]hile RWQCBs cannot directly enforce another agency's requirements against a discharger who is out of compliance, the RWQCB can ask the agency to enforce its own requirements."¹ Implicit in this provision is that the agency administering the program is not enforcing its requirements in the first place, and may not be inclined to comply when enforcement is requested by a RWQCB. According to the commenter, this is not just a hypothetical problem – significant water quality problems have arisen as a result of delegated agencies' failures to properly administer their programs.² The NPS Implementation Policy should deal explicitly with this issue, and provide that when agencies are failing to properly administer their water quality obligations under a Management Agency Agreement (MAA), Memorandum of Understanding (MOU), or informal agreement, then the MAA, MOU, or informal agreement will be terminated.

¹ NPS Implementation Policy at Page A-13 (Version Date: December 18, 2003).

² See, e.g. California Senate Office of Research, Timber Harvesting and Water Quality: Forest Practice Rules Fail to Adequately Address Water Quality and Endangered Species (December 2002) at 10.

Response: This comment is rejected. As explained in the NPS Implementation Policy, there are many staff and resource advantages to designating another agency with regulatory authority as a management agency to take the lead in implementing NPS pollution control. In negotiating these agreements, the SWRCB/RWQCBs at no time relinquish their water quality protection responsibilities or authorities. Water Code section 13269 was amended in 1999 to provide that waivers of waste discharge requirements in effect on January 1, 2000, expired on January 1, 2003, and new Porter-Cologne Act waiver legislation also requires more stringent controls over NPS discharges, including those referenced by the commenter. These increased controls are anticipated to result in increased compliance with basin plan water quality requirements. In addition, the MAAs and MOUs and the newly adopted waivers delineate actions, and the legal authority for actions, that may be taken to increase water quality protection.

Comments Related to Key Element 1:

Commenter: The Ocean Conservancy

Comment: The commenter requested the the NPS Implementation Policy explicitly require that the Clean Water Act section 319 goal of a NPS management program to control pollution added from nonpoint sources to the navigable waters of the state and to provide for utilization of best management practices at the earliest possible date be included. The commenter also recommended inclusion of language contained in the Coastal Zone Act Reauthorization Amendments of 1990 that requires such a program be designed to "achieve and maintain applicable water quality standards under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313) and protect designated uses". In addition the commenter requested that language from the U.S. Environmental Protection Agency "Nine Key Elements of an Effective State NPS Program" be incorporated that requires that a NPS control program be designed to achieve and maintain beneficial uses of water" be included among goals identified by "third parties" in Key Element 1.

Response: This comment is rejected. The language and requirements cited are explicitly covered in the language of Key Element 1 which states "Third-party programs must, at a minimum, address NPS pollution programs in a manner that achieves and maintains water quality objectives and beneficial uses, including applicable antidegradation requirements." The explanatory language for Key Element 1 further refines the requirements as they apply to a specific discharger or group of dischargers and a specific NPS pollutant discharge situation. This includes beneficial uses to be protected, water quality objectives and the selection, design, implementation and maintenance of management practices to prevent or control the NPS discharge(s) in accordance with site-specific considerations.

Commenter: The Ocean Conservancy

Comment: The commenter supports the recommendation in the NPS Implementation Policy that third-party programs "should identify their participants", but urged the SWRCB to modify this

recommendation into a requirement. It considers this information to be essential if the RWQCBs are to "ensure that all of the significant sources of the NPS discharges of concern are addressed."

Response: This comment is rejected. We believe that the RWQCBs should have the discretion to decide under the facts specific to each case whether or not to require the Third-Party program to identify their participants.

Commenter: Heal the Bay

Comment: The commenter feels that "a timeline requirement should be added to Key Element 1 to ensure that third-party pprograms are carried out, and water quality objectives and beneficial uses are achieved, within an acceptable time frame."

Response: This comment is rejected. The five key key elements act as a mutually reinforcing package. The issue of timelines (compliance schedules) is addressed in Key Element 3.

Comments Related to Key Element 2:

Commenter: The Ocean Conservancy

Comment: The commenter states that the NPS Implementation Policy requires that third-party programs demonstrate 'a reasonable likelihood that the program will attain water quality requirements' and it is unclear what is meant by 'a reasonable likelihood.' The commenter states that to comply with Porter-Cologne Act requirements, the Draft NPS Implementation Policy must create a more specific – and higher – standard for identifying when the selected MPs will be considered adequate to meet water quality requirements. The commenter recommends that when proposing to use a particular management practices (MP), dischargers should be required to document that a particular MP has been previously used successfully. If an MP has never been used previously, the discharger should document and substantiate, at a minimum, the reasons they believe the MP would be adequate for this purpose ...[and] contain more specific standards for assessing whether implementation of MPs is proceeding properly."

Response: This comment is accepted. The explanatory language for Key Element 2 has been expanded to cover these points. The term "reasonable likelihood" has been replaced by the expression "the RWQCB must determine there is a high likelihood the program will attain water quality requirements". Other language changes state that although MPs must be site-specifically tailored, justification for the use of a particular category or type of MP must show that the MP has been successfully used in comparable circumstances. If an MP has not previously been used, documentation to substantiate its efficacy must be provided by the discharger. A RWQCB must be convinced there is a high likelihood the MP will be successful. Adaptive management provisions and/or provision for use of other MPs also must be provided. In addition, language has been added requiring a schedule for MP implementation and feedback measures to ensure proper implementation. We recognize that in the earlier stages of some pollution control programs, water quality changes may not be immediately apparent, even with the

implementation of pollution control actions. Although MP implementation never can be a substitute for meeting water quality requirements, MP implementation assessment may, in some cases, be used to measure NPS source control implementation progress. (See NPS Implementation Policy [Version Date: April 16, 2004] at page 14 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at page A-14.)

Comments Related to Key Element 3

Commenter: The Ocean Conservancy

Comment: The commenter is concerned about the requirement that an implementation program's schedule to achieve water quality requirements not be longer than is "reasonably necessary". They recommend that the NPS Implementation Policy should, instead, require that NPS implementation programs be designed to meet their objectives by some expeditious date specified by the SWRCB, and there should be a process to ensure the deadline is met.

Response: This comment is rejected. Taking into consideration the severity, extent, variety and circumstances of individual NPS control problems throughout the state, it would be inappropriate for the SWRCB to arbitrarily set such a date, as requested.

Commenter: Heal the Bay

Comment: The commenter states that the NPS Implementation Policy should require that thirdparty programs to include a date by which they expect to achieve the objective(s), and a process to ensure the deadline is met, including enforcement actions that can be taken by the RWQCB.

Response: This comment is rejected. Key Element 3 already requires a "specific time schedule and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements." Time schedules automatically include dates. The enforcement issue is covered by Key Element 5.

Comments Related to Key Element 4

Commenter: California Farm Bureau Federation

Comment: The commenter recommended that a statement be included that MPs, whose effectiveness is well documented by research and experience, not require monitoring at a level as intensive as may be appropriate for more experimental MPs.

Response: This comment is rejected. The NPS Implementation Policy takes this into consideration with the statement: "Depending on the water quality problem, the cause, the beneficial uses at risk, and the purpose for which the monitoring will be used...the appropriate

types of monitoring should be used". Equally important is the factor that although there is available general information regarding the effectiveness of many known MPs, for a specific practice to be effective under specific discharge conditions, they must be adapted to meet the circumstances of those conditions. These conditions include, but are not limited to site and climatic conditions and proper implementation.

Commenter: California Farm Bureau Federation

Comment: The commenter recommended that the RWQCBs should give attention to the potential need for development of watershed scale monitoring programs where more intensive monitoring is economically impossible (i.e. farm level water quality monitoring).

Response: This comment is rejected. The NPS Implementation Policy neither requires nor forecloses monitoring on a watershed scale. This is a determination that must be made by the appropriate RWQCB and is dependent upon specific individual circumstances.

Commenter: G. Fred Lee (PhD, DEE) for G. Fred Lee and Associates

Comment: The commenter expressed support for the concept that before approving or endorsing a specific Third-Party Program, the RWQCB must determine there is a high likelihood that the program will attain the RWQCB's stated objectives. However, citing the agricultural waiver monitoring program, the commenter is concerned this may not be properly carried out at the RWQCB level and cites his comments to the Central Valley RWQCB and SWRCB on the agricultural waiver monitoring program.

Response: This comment is acknowledged. We appreciate the commenter's approval of the NPS Implementation Policy's monitoring requirements. Nevertheless, it would be inappropriate to comment on his statements referencing past action's taken by the RWQCB and SWRCB regarding the effectiveness of the agricultural waiver monitoring requirements and decision to take a phased approach to achieve its goals. That is not the purpose of the NPS Implementation Policy.

Commenter: G. Fred Lee (PhD, DEE) for G. Fred Lee and Associates

Comment: Based on his experience, the commenter stated that often RWQCB staff do not have the technical background, time, and resources to carry out the key element requirements in the timeframe allowed. The commenter felt that if the NPS water pollution control program is to be a valid program, there will need to be a drastic increase in the level of support for the RWQCBs with respect to increased staff and expertise, increased funding for special studies, and for hiring consultants who can work with the staff to assist them in review of issues.

Response: This comment is acknowledged. We agree that the availability of staff, resources, and time are key factors in the ability of the RWQCBs to prevent and control nonpoint sources of

pollution. The NPS Implementation Policy acknowledges this in Section VI-Implementation Success and Future Considerations. On the issue related to staff "technical background" we believe that technical staff are well trained and talented. Through mechanisms such as advisory committees and "blue ribbon" committees, staff has a history of involving other scientists and knowledgeable parties in their deliberations. The RWQCBs are very sensitive to staff resource and time issues and, when appropriate, leverage resources to provide funding for special studies and for hiring "expert" consultants to help broaden the breadth and depth of staff knowledge and expertise. In addition, the regional boards are partnering with the state board's State Water Assessment and Monitoring Program (SWAMP) and will benefit from the \$5 million in funding being made available to this program.

Commenter: The Ocean Conservancy

Comment: The commenter states that it is axiomatic that the degree of success or failure of a NPS implementation plan is unknowable in the absence of adequate monitoring. The monitoring and other provisions of Key Element 4 should be specific enough to ensure that third-party programs be reviewable on an ongoing basis. To ensure the public's review is adequate, the commenter agrees with the NPS Implementation Policy that all monitoring programs should provide a permanent, documented record that is available to the public.

Response: This comment is acknowledged.

Comments Related to Key Element 5

Commenter: The Ocean Conservancy

Comment: The commenter stated that although we appreciate the intent of this provision, we believe it should be more specific. For example, if monitoring shows that the program is failing to meet its objectives, the NPS Implementation Policy should provide for the resumption of primary authority to implement the NPS Program by the RWQCB, as appropriate. In addition, the commenter disagreed with the provision of the NPS Implementation Policy that states that this element is not binding on the RWQCB.

Response: This comment is rejected. A RWQCB must have enforcement flexibility and discretion to make decisions based on the record before it, and to be able to take into consideration extenuating and remediable circumstances. Enforcement actions, consistent with the SWRCB Enforcement Policy, are always an option.

IV - Integrating CWC §13369 Management Options Into NPS Pollution Control

Commenter: Senator Dede Alpert

Comment: The commenter is the author of Senate Bill (SB) 227, which directed the SWRCB to develop the NPS Implementation Policy consistent with existing NPS pollution programs. According to the commenter, the legislative requirement to develop the NPS Implementation Policy arose from the lack of clearly articulated, enforceable mechanisms for controlling nonpoint pollution, which were required under the CWA section 319 and CZARA in order to obtain federal funds. Federal programs at the time were the only source of funding for polluted runoff controls generally, and in controlling polluted runoff. As such, the language in CWC 13369(a)(2)(A) must be read in the context of its source; that is, it arose from the federal nonpoint programs under Section 319 and CZARA. The commenter also authored SB390, which sunset as of January 1, 2003, all existing waivers of waste discharge requirements issued under the Porter-Cologne Act and which mandated five-year reviews of any new waivers.

The commenter emphasized that there should be no confusion that the Porter Cologne Act as articulated in the NPS Implementation Policy, is <u>the</u> process for regulating polluted runoff in California. As such, the major changes in the SWRCB's and RWQCBs' implementation of the Porter-Cologne Act since the passage of SB 227 make it critical that the boards consistently recognize the supremacy of Porter-Cologne's Act WDR and waiver of WDRs requirements as the only regulatory process for the RWQCBs to follow.

Response: This comment is accepted. We agree that the Porter-Cologne Act establishes the only legally permissible methods for regulating NPS waste discharges. The NPS Implementation Policy discussed CWC section 13369's management options in an attempt to explain their role in the overall NPS management program. The discussion, however, generated much confusion. Based upon the author's explanation of the rationale underlying CWC 13369(a)(2)(A), we have decided that it is unnecessary to retain Section IV-E ("Integrating CWC §13369 Management Options Into NPS Pollution Control") in the NPS Implementation Policy. Removal of this section will prevent future confusion regarding SWRCB/RWQCB implementation and enforcement of NPS pollution prevention and control under the Porter-Cologne Act. (See NPS Implementation Policy [Version Date: April 16, 2004] at page 16 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at page A-16.)

Commenter: Natural Resources Defense Council and Heal the Bay

Comment: The commenters are concerned that the NPS Implementation Policy reifies a flawed -- and illegal -- "tiered system" that emphasizes a "voluntary approach" to control NPS pollution problems.

Response: This comment is accepted. As discussed in the previous response to Senator Alpert's comment, these comments are a result of the confusion generated by Section IV-E ("Integrating CWC §13369 Management Options Into NPS Pollution Control") in the NPS Implementation Policy. We have removed Section IV-E ("Integrating CWC §13369 Management Options Into NPS Pollution Control") in the NPS Implementation Policy. Removal of this section will prevent future confusion regarding SWRCB/RWQCB implementation and enforcement of NPS pollution prevention and control under the Porter-Cologne Act. (See NPS Implementation Policy

[Version Date: April 16, 2004] at page 16 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at page A-16.)

Commenter: The Ocean Conservancy

Comment: The commenter urged the SWRCB to add a statement minimizing the use of management options 1 and 2 (Section IV.E) discharges. According to the commenter the harm documented to occur from most polluted runoff discharges does not support the use of anything less than management option 3 in most cases. In addition, the commenter had significant concerns about the effectiveness of the "non-regulatory management option" and the "regulatory-based incentives management option.

Response: This comment is accepted. As discussed in the previous response to Senator Alpert's comment, these comments are a result of the confusion generated by Section IV-E ("Integrating CWC §13369 Management Options Into NPS Pollution Control") in the NPS Implementation Policy. We have removed Section IV-E ("Integrating CWC §13369 Management Options Into NPS Pollution Control") in the NPS Implementation Policy. Removal of this section will prevent future confusion regarding SWRCB/RWQCB implementation and enforcement of NPS pollution prevention and control under the Porter-Cologne Act. (See NPS Implementation Policy [Version Date: April 16, 2004] at page 16 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at page A-16.)

Commenter: Northern California Water Association and Ducks Unlimited

Comment: The SWRCB should recognize the difference between point source and NPS pollution and assure that the regulatory framework reflects these differences.

Response: This comment is rejected. The NPS Policy not only recognizes the difference but emphasizes it. This emphasis is seen not only in the policy title (Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program), but in references throughout the document to the State's NPS pollution control program and the Plan for California's Nonpoint Source Pollution Control Program (NPS Program Plan);

V - RWQCB COMPLIANCE ASSURANCE

Commenter: California Farm Bureau

Comment: The commenter asked for clarity on the issue of compliance assurance regarding the independent responsibilities of the RWQCBs, individual dischargers and third-parties.

Response: This comment is rejected. This section of the NPS Implementation Policy (Section V – RWQCB Compliance Assurance) is clear on the responsibilities of the RWQCBs and the

individual dischargers. The RWQCBs can legally regulate only waste dischargers, either individually or as groups under general WDRs or waivers. Waste dischargers include both landowners and operators. Even though a non-discharger Third-Party develops an approved NPS Implementation Program, the actual individual dischargers, and not the Third-Party, are ultimately responsible for complying with a RWQCB's water quality requirements and orders. Likewise, the RWQCB can take enforcement action only against waste dischargers. As part of the fifth element described above, the RWQCBs will need to explain the potential consequences of a significant failure by a non-discharger Third-Party to achieve the program's stated purposes. This explanation should include information as to the criteria for measuring program success, what constitutes failure, and the actions that may be taken in response to failure. This explanation is necessary so that participating dischargers understand the ramifications of a Third-Party's failure to achieve program objectives.

Section VI - Implementation Success and Future Considerations

Commenter: California Farm Bureau Federation

Comment: The commenter objects to the language expressing a need to examine "old habits and cultural barriers" in the State's efforts to forge a new history of pollution control, as inappropriate.

Response: This comment is accepted. We have changed the words "old habits" to "the use of practices that have resulted in current NPS pollution discharges" and "cultural barriers" to "the barriers to change". This sentence now reads: "In addition to the need for resources, forging a new history of pollution control will take time and commitment, as well as a willingness to examine the use of practices that have resulted in current NPS pollution discharges and the barriers to change." (See NPS Implementation Policy [Version Date: April 16, 2004] at page 19 and Functional Equivalent Document [FED] Appendix A [Version Date: April 16, 2004] at page A-19.)

Commenter: The Ocean Conservancy

Comment: The commenter stated that lack of resources has, of late, become the justification-ofchoice for any decision on the part of the SWRCB and RWQCBs to delay or forgo action. With respect to processes that the SWRCB and RWQCBs could apply to solve this problem, the commenter recommended seeking to add or reassign staff to the NPS implementation program, a program that is mandated under existing law and is required to meet an immediate and urgent threat to public health and safety. The commenter also cited the use of Executive Order S-3-03, DF-160 applications to the Department of Finance pursuant to Budget Letter 03-42 as a possible solution. Finally, the commenter recommended working with the Legislature to ensure that the SWRCB and RWQCB budgets contain a reasonable number of needed staff, funded by fees, and coordinating with the Administration to ensure its approval.

Response: This comment is acknowledged.

Commenter: Heal the Bay

Comment: The commenter suggested that another way to control NPS pollution is through new regulations that target specific nonpoint sources. The Assembly Bill 885 Program (AB 885 Program) was cited as an example that attempted to do this for onsite sewage treatment systems. The commenter also pointed out that the regulatory compliance deadline for AB 885 Program has already passed, without any regulations in place.

Response: This comment is acknowledged.

Comments on the SWRCB Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program Dated December 8, 2003

Submitted by G. Fred Lee, PhD, DEE G. Fred Lee & Associates, El Macero, CA gfredlee@aol.com, www.gfredlee.com

January 29, 2004

On December 8, 2003, the State Water Resources Control Board (SWRCB) released for public comment a draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program. A public hearing on this draft policy is scheduled for February 3, 2004. Presented below are comments on this draft Policy.

The issue of properly regulating nonpoint-source-derived pollutants is a topic that I have worked on for about 43 years. In support of the Central Valley Regional Water Quality Control Board (CVRWQCB), Dr. Anne Jones-Lee and I developed reports pursuant to a contract through the California Water Institute at CSU Fresno that provided information on NPS pollution water quality monitoring program development (Lee and Jones-Lee, 2002a) and on the existing information on management practices (MPs) for irrigated agriculture stormwater runoff and tailwater/subsurface drain water discharges (Lee and Jones-Lee, 2002b).

We also developed reports on the occurrence of excessive bioaccumulation of organochlorine legacy pesticides (DDT, dieldrin, chlordane, toxaphene) and PCBs in edible fish in Central Valley waterbodies, as well as a recommended approach for controlling the excessive bioaccumulation problem in Central Valley fish (Lee and Jones-Lee, 2002c).

On behalf of the DeltaKeeper and the CVRWQCB, Dr. Jones-Lee and I, with the assistance of Dr. Scott Ogle of Pacific EcoRisk, conducted a study on the bioavailability of PCBs in city of Stockton Smith Canal sediments as a potential source of PCBs that had been found in Smith Canal fish (Lee, et al., 2002). This study represented the first application in California of the US EPA sediment bioavailability methodology using benthic organism biouptake of sediment-bound organochlorine hazardous chemicals. This methodology will need to be used to evaluate the bioavailability of organochlorine legacy pesticides and PCBs in Central Valley waterbody sediments, which will be an important part of a technically valid NPS program to control excessive bioaccumulation.

We developed a report (Lee and Jones-Lee, 2002d) for the CVRWQCB covering the approach that is needed to manage the aquatic life toxicity in city of Stockton stormwater runoff that is due to the organophosphorus pesticides (diazinon and chlorpyrifos) as part of implementing a TMDL to control the stormwater runoff toxicity. This report was based on another report (Lee and Jones-Lee, 2001), in which we assisted the CVRWQCB

and the DeltaKeeper in writing up a comprehensive report covering the city of Stockton stormwater runoff aquatic life toxicity monitoring data that the CVRWQCB and the DeltaKeeper had developed over the period 1994-2000. While urban stormwater runoff is regulated, for administrative purposes, as a point source discharge, from a management perspective, it needs to be addressed as an NPS problem.

In addition, we conducted about \$500,000 of studies over a five-year period on behalf of the Santa Ana Regional Water Quality Control Board and the Orange County, California, Public Facilities and Resources Department on the occurrence, magnitude, sources and water quality significance of aquatic life toxicity in the Upper Newport Bay watershed and the Bay. These studies were supported by US EPA 205(j) and 319(h) funds. Two major reports were developed (Lee, et al., 2001a,b). The studies included monitoring aquatic life toxicity, pesticides and heavy metals in stormwater runoff from 10 different watersheds that had land use ranging from 100% agricultural to 100% urban.

During the past year I have been active in reviewing the CVRWQCB agricultural waiver monitoring program. I have provided detailed comments on the deficiencies in the CVRWQCB water quality monitoring guidance. Comments on this issue have been submitted to the CVRWQCB (Lee, 2003a) and the SWRCB (2003b).

The work on the projects that led to the various reports mentioned above has provided me the opportunity to become familiar with NPS pollution control program implementation. It is with this recent background which is directly pertinent to NPS pollution control that I wish to make the following comments on the draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program.

Specific Comments

Page A-14 of the draft, section D. The Key Elements of an NPS Pollution Control Implementation Program, states in the first paragraph,

"Before approving or endorsing a specific Third-Party Program, the RWQCB must determine that there is a reasonable likelihood that the Third-Party Program will attain the RWQCB's stated objectives."

This is an appropriate requirement, but it has been my experience, in connection with the CVRWQCB agricultural waiver monitoring program, that this may not be properly carried out at the Regional Board level. With respect to the agricultural waiver monitoring requirements, the CVRWQCB specified certain minimum monitoring requirements; however, as I pointed out to the Board staff and to the Board (Lee, 2003a), the minimum monitoring requirements set forth cannot satisfy the objectives of the proposed agricultural waiver management program.

The Regional Board chose to ignore the obvious significant technical deficiencies in the required monitoring program in producing the data that would be useful in achieving the desired objectives of developing a database that could be used to determine the potential water quality impacts and water quality objective violations of irrigated agriculture

stormwater runoff and tailwater and subsurface drain water discharges. When several groups filed petitions to the State Board on the Regional Board's agricultural waiver program, I provided a detailed set of comments to the State Board (Lee, 2003b), pointing out the inadequacies of the proposed agricultural waiver water quality monitoring program. The State Board attorneys concluded that there were no problems with this program and that it was appropriate. This was obviously a political decision that had nothing to do with science or a scientific review.

Attached to these comments are the comments that I recently submitted to State Board Chairman Baggett (Lee, 2004) on the unreliability of the State Board attorneys/staff's review of this matter. As pointed out, it is blatantly obvious that the CVRWQCB agricultural waiver monitoring program specified in Order No. R5-2003-0826 cannot achieve the RWQCB's stated objectives for a number of the key parameters. The reasons for this are discussed in the attachment. The State Board members all chose to ignore my technical comments on these deficiencies and supported the Regional Board. This is an example of the inability of both the Regional and State Boards to use elementary technical information in adopting a nonpoint source management program. It is obvious that politics – not science or engineering – plays a dominant role in the NPS program. Further, it is clear by this example which occurred in the past month that neither the Regional Board nor the State Board can fulfill the requirement of determining that there is "reasonable likelihood that a Third-Party Program will attain the RWQCB's stated objectives."

While there are many who understand the deficiencies in the monitoring program, there are members of the agricultural community who will likely follow the Regional Board's inadequate minimum monitoring requirements, knowing that they will not generate the data that the Regional Board can use in a meaningful way to discern violations of water quality objectives for key constituents in stormwater runoff and tailwater discharges. This will lead to significant delays in achieving the objectives within the timeframe adopted by the Regional Board, since the first step in implementing the NPS policy under the agricultural waiver approach is a credible monitoring program that reliably defines the water quality objective violations, which in turn triggers the implementation of management practices to control the violations.

In the draft NPS pollution control Policy, there are a series of Key Elements delineated beginning on page A-15. Several of these require that the Regional Board carry out certain activities. It has been my experience in working closely with Regional Board staff for over 10 years with both the Central Valley and Santa Ana Regional Boards, that often the staff do not have the technical background, time and resources to carry out the Key Element requirements in the timeframe allowed. This situation will become extremely significant in preventing the NPS water pollution control program from achieving its objectives. If this NPS water pollution control program is to be a valid program, there will need to be a drastic increase in the level of support for the Regional Boards with regard to increased staff and expertise, increased funding for special studies and for hiring consultants who can work with the staff to assist them in review of issues,

and to find a way to isolate the staff and the Boards from the political pressures that often dominate water pollution control efforts in the state.

References

Lee, G. F., "Need for Comprehensive Monitoring to Justify Issuance of a Waiver of WDRs for Irrigated Agriculture and Managed Wetlands in the Central Valley of California," Submitted to Tom Pinkos, Executive Officer, Central Valley Regional Water Quality Control Board, by G. Fred Lee & Associates, El Macero, CA, May 20 (2003a).

Lee, G. F., "Comments on the Monitoring and Reporting Program for CVRWQCB Order No. R5-2003-0826 Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, Dated July 11, 2003," Submitted to State Water Resources Control Board, Sacramento, CA, by G. Fred Lee & Associates, El Macero, CA, September 11 (2003b).

Lee, G. F., "Comments on SWRCB January 9, 2004 Review of Irrigated Agriculture Waiver Water Quality Monitoring Requirements," Submitted to the California State Water Resources Control Board by G. Fred Lee & Associates, El Macero, CA, January (2004).

Lee, G. F. and Jones-Lee, A., "Review of the City of Stockton Urban Stormwater Runoff Aquatic Life Toxicity Studies Conducted by the CVRWQCB, DeltaKeeper and the University of California, Davis, Aquatic Toxicology Laboratory between 1994 and 2000," Report to the Central Valley Regional Water Quality Control Board, G. Fred Lee & Associates, El Macero, CA, October (2001).

Lee, G. F. and Jones-Lee, A., "Issues in Developing a Water Quality Monitoring Program for Evaluation of the Water Quality - Beneficial Use Impacts of Stormwater Runoff and Irrigation Water Discharges from Irrigated Agriculture in the Central Valley, CA," California Water Institute Report TP 02-07 to the California Water Resources Control Board/ Central Valley Regional Water Quality Control Board, 157 pp, California State University Fresno, Fresno, CA, December (2002a).

http://www.gfredlee.com/Agwaivermonitoring-dec.pdf

Lee, G. F. and Jones-Lee, A., "Review of Management Practices for Controlling the Water Quality Impacts of Potential Pollutants in Irrigated Agriculture Stormwater Runoff and Tailwater Discharges," California Water Institute Report TP 02-05 to California Water Resources Control Board/Central Valley Regional Water Quality Control Board, 128 pp, California State University Fresno, Fresno, CA, December (2002b). http://www.gfredlee.com/BMP_Rpt.pdf

Lee, G. F. and Jones-Lee, A., "Organochlorine Pesticide, PCB and Dioxin/Furan Excessive Bioaccumulation Management Guidance," California Water Institute Report TP 02-06 to the California Water Resources Control Board/Central Valley Regional Water Quality Control Board, 170 pp, California State University Fresno, Fresno, CA, December (2002c). http://www.gfredlee.com/OCITMDLRpt12-11-02.pdf

Lee, G. F. and Jones-Lee, A., "City of Stockton Mosher Slough and Five Mile Slough Diazinon and Chlorpyrifos Aquatic Life Toxicity Management Report," California Water Institute Report TP 02-08 to the California State Water Resources Control Board/Central Valley Regional Water Quality Control Board, 44 pp, California State University Fresno, Fresno, CA, December (2002d). http://www.gfredlee.com/StockDiaTMDL12-14-02.pdf

Lee, G. F., Taylor, S., and County of Orange Public Facilities and Resources Department, "Upper Newport Bay/San Diego Creek Watershed 205(j) Water Quality Planning Grant, Final Report," Agreement No. 7-037-250-0, US EPA 205(j) Project, May (2001a).

Lee, G. F., Taylor, S., and County of Orange Public Facilities and Resources Department, "Upper Newport Bay Water Quality Enhancement Project, Final Report," Agreement Nos. 8-023-258-0 and 8-174-250-0, submitted to State Water Resources Control Board, Santa Ana Regional Water Quality Control Board and Orange County Public Facilities and Resources Department to meet the requirements of the US EPA 319(h) Project, G. Fred Lee & Associates, El Macero, CA and RBF Consulting, Irvine, CA, May (2001b).

Lee, G. F., Jones-Lee, A., and Ogle, R. S., "Preliminary Assessment of the Bioaccumulation of PCBs and Organochlorine Pesticides in *Lumbriculus variegatus* from City of Stockton Smith Canal Sediments, and Toxicity of City of Stockton Smith Canal Sediments to *Hyalella azteca*," Report to the DeltaKeeper and the Central Valley Regional Water Quality Control Board, G. Fred Lee & Associates, El Macero, CA, July (2002). http://www.gfredlee.com/SmithCanalReport.pdf

Comments on SWRCB January 9, 2004 Review of Irrigated Agriculture Waiver Water Quality Monitoring Requirements Submitted by G. Fred Lee, PhD, DEE G. Fred Lee & Associates El Macero, CA <u>gfredlee@aol.com</u>, <u>www.gfredlee.com</u> January 19, 2004

As a followup to the State Water Resources Control Board (SWRCB) workshop devoted to review of the petitions that were filed on the CVRWQCB Monitoring and Reporting Program Order No. R5-2003-0826 for the agricultural water quality (WQ) waiver, Craig M. Wilson, Chief Counsel of the SWRCB stated on page 11 of the January 9, 2004, draft,

"We have reviewed the monitoring requirements for Coalition Groups and have determined that they reflect a comprehensive and reasonable approach for a watershedbased monitoring program."

In connection with the request for comments on the SWRCB December 5, 2003, draft of the State Board's initial findings on the irrigated agriculture waiver (ag waiver) petitions, I provided detailed comments to the State Board on the significant technical problems with the Central Valley Regional Water Quality Control Board's (CVRWQCB's) ag waiver water quality monitoring program. I discussed that many of the monitoring parameters and the analytical methods used for them will not develop data that can be used in a regulatory program to determine if discharges/runoff from irrigated agricultural lands are causing violations of water quality objectives (WQO) in the receiving waters for this runoff/discharge.

Importance of Developing Reliable Water Quality Monitoring Guidance

My previous comments, as well as these comments are unsponsored. They are made as part of my career-long effort to improve the quality of science and engineering used in water quality investigation and management. Throughout my career I have repeatedly found that regulatory agencies and their administrative boards do not necessarily use the currently available science and engineering in developing management programs. This leads to ineffective or unreliable programs. This is what will occur with the ag waiver monitoring/management program if the current deficiencies in providing adequate guidance on the ag waiver WQ monitoring are not properly addressed. This will lead to delays in implementing the ag waiver management program such as developing management practices to control WQO violations since there will not be defined violations of a Basin Plan WQO that need to be controlled even though the water quality – beneficial uses are adversely impacted by the constituents of concern.

In the comments to the Central Valley Regional Board, as well as the State Board, I pointed out that if this issue is not adequately addressed, large amounts of funds will be spent by agricultural interests and the public in agriculture waiver water quality monitoring that would generate inadequate, unreliable and significantly deficient data on the characteristics of the runoff and its impact on the beneficial uses of the monitored and receiving waters for agricultural discharge/runoff. My comments were based on my over 43 years of work on water quality monitoring program development, development of water quality analytical methods, and using

water quality data in water pollution control programs, and 38 years of work on water quality criteria/standards development and their implementation.

Background to Ag Waiver Comments

Several years ago Dr. Val Connor then of the Central Valley Regional Water Quality Control Board asked if I would be of assistance to the CVRWQCB in developing guidance on nonpoint source water quality monitoring for the Central Valley. The focus of this effort was to be on determining the potential water quality-beneficial use impacts of Central Valley irrigated agricultural runoff/discharges. Eventually, a contract was issued to the California Water Institute at CSU Fresno to support Dr. Jones-Lee and me in this effort. This resulted in a comprehensive report,

Lee, G. F. and Jones-Lee, A., "Issues in Developing a Water Quality Monitoring Program for Evaluation of the Water Quality - Beneficial Use Impacts of Stormwater Runoff and Irrigation Water Discharges from Irrigated Agriculture in the Central Valley, CA," California Water Institute Report TP 02-07 to the California Water Resources Control Board/Central Valley Regional Water Quality Control Board, 157 pp, California State University Fresno, Fresno, CA, December (2002). http://www.gfredlee.com/Agwaivermonitoring-dec.pdf

on the issues that need to be considered in developing a credible water quality monitoring program for irrigated agricultural runoff/discharges that could be used in a CVRWQCB water quality management program. In that report, Dr. Jones-Lee and I reviewed the guidance that had been provided by others, with particular reference to the publication by the National Research Council entitled, "Managing Troubled Waters." I also provided references to the earlier work that Dr. Jones-Lee and I had done for the US EPA on developing credible water quality monitoring programs for hazardous chemicals in the US-Canadian Great Lakes. This guidance has been updated and expanded as,

Lee, G. F. and Jones-Lee, A., "Guidance for Conducting Water Quality Studies for Developing Control Programs for Toxic Contaminants in Wastewaters and Stormwater Runoff," Report of G. Fred Lee & Associates, El Macero, CA, 30pp, July (1992). www.gfredlee.com/pwwqual2.htm

The NRC and our guidance both stressed the importance of adequate definition of the objectives of a water quality monitoring program.

Objectives of the Ag Waiver Water Quality Monitoring

Those familiar with water quality monitoring program development know that the first step in developing a credible program is a clear statement of the objectives of the monitoring program. Most water quality monitoring programs do not develop credible objectives, with the result that the money spent in water quality monitoring can largely wasted. In Dr. Jones-Lee and my report to the Central Valley Regional Water Quality Control Board, we provided detailed guidance on the kinds of information that is needed to achieve meaningful water quality monitoring. In reviewing the CVRWQCB agriculture waiver water quality monitoring program, I found, as I discussed in my comments on it, that this program will be significantly deficient in developing the information needed to use the monitoring results in the ag waiver water quality management

program. One of the fundamental tenets of a credible water quality monitoring program is that it is specifically designed to achieve the objectives of the management program.

The CVRWQCB ag waiver monitoring program "minimum requirements" set forth in Table 1, in the CVRWQCB, in its Monitoring and Reporting Program Order No. R5-2003-0826 for Coalition Groups under Resolution No. R5-2003-0105, states on page 2,

"The Coalition Group shall submit to the Regional Board a detailed MRP [Monitoring and Reporting Program] Plan that supports the development and implementation and demonstrates the effectiveness of the Watershed program to comply with conditions of the Waiver.

The MRP Plan shall be designed to achieve the following objectives as a condition of the Waiver:

- a. Assess the impacts of waste discharges from irrigated lands to surface water;
- b. Determine the degree of implementation of management practices to reduce discharge of specific wastes that impact water quality;
- c. Determine the effectiveness of management practices and strategies to reduce discharges of wastes that impact water quality;
- d. Determine concentration and load of waste in these discharges to surface waters; and
- e. Evaluate compliance with existing narrative and numeric water quality objectives to determine if additional implementation of management practices are necessary to improve and/or protect water quality."

This statement delineates the objectives of the water quality monitoring program that is to be conducted as part of the ag waiver water quality management program. It is these objectives that become the basis for the development of the ag waiver monitoring program that the Coalition Groups are to propose to the Regional Water Quality Control Board by April 1, 2004. However, as discussed in my comments to the Regional Board and State Board, the guidance provided in R5-2003-0826 for developing the monitoring and reporting program will not generate the data needed to accomplish the objectives set forth by the Regional Board for this program.

Someone who is not familiar with the CVRWQCB Basin Plan characteristics with respect to listing specific concentrations that would represent a violation of the Basin Plan objectives might assume that measuring the suite of parameters such as in Table 1 in the CVRWQCB Monitoring and Reporting Plan and comparing those measured values to the WQO listed in the Basin Plan would reveal potential situations where the measured parameters could be in violation of the critical concentrations listed in the Basin Plan. However, many of the potentially most important parameters in agricultural stormwater runoff, tailwater, and subsurface drain water discharges do not have specific numeric objectives against which the monitoring data can be compared. This will lead to an inability to use the data generated in the ag waiver WQ monitoring program to determine whether irrigated agricultural runoff/discharges are potentially causing water quality objective violations.

Table 1 Constituents to be Monitored1Quantitation LimitReporting Unit

Constituents

General Parameters		
Flow	N/A	cfs (ft ³ /sec)
pH	N/A	pH units
Electrical Conductivity	N/A	µmhos/cm
Dissolved Oxygen	N/A	mg O2/L
Temperature	N/A	Degrees Celsius
Color	N/A	ADMI
Turbidity	N/A	NTUs
Total Dissolved Solids	N/A	mg/L
Total Organic Carbon	N/A	mg/L
Drinking Water		
E. coli	(b)	MPN
Total Organic Carbon	(b)	mg/L
Chloroform	(b)	μg/L
Bromoform*	(b)	μg/L
Dibromochloromethane*	(b)	μg/L
Bromodichlormethane*	(b)	μg/L
Toxicity Tests		
Water Column Toxicity	_	-
Sediment Toxicity	-	-
Pesticides (a)		
Carbamates	(b)	μg/L
Organochlorines	(b)	μg/L
Organophosphorus	(b)	μg/L
Pyrethroids	(b)	μg/L
Herbicides	(b)	μg/L
Metals (a)		
Cadmium	(b)	μg/L
Copper	(b)	μg/L
Lead	(b)	μg/L
Nickel	(b)	μg/L
Zinc	(b)	μg/L
Selenium	(b)	μg/L
Arsenic	(b)	μg/L
Boron	(b)	μg/L
Nutrients (a)		
Total Kieldahl Nitrogen	(b)	mg/L
Phosphorus	(b)	ug/L
Potassium	(b)	μg/L
	· /	. 0

a. In addition to Toxicity Investigation Evaluations (TIEs), sites identified as toxic in the initial screen shall be resampled to estimate the duration of the toxicant in the waterbody. Additional samples upstream of the original site should also be collected to determine the potential source(s) of the toxicant in the watershed.

b. Quantitation limits must be lower than LC50 or other applicable federal or state toxic or risk limits.

* deleted by the State Water Resources Control Board

¹ Adapted from CVRWQCB (2003)

The deficiencies in the ag waiver WQ monitoring program discussed in my previous comments, as well as in these comments, are typical of deficiencies that occur in many water quality monitoring programs, since those who develop the water quality monitoring programs are not the individuals who will have to use the data in a management program. The approach that should be followed is not to separate the development of the monitoring program from the use of the data, but to closely integrate the two. In this way, the data generated from such programs can be used. Otherwise, substantial funds will be spent in monitoring that will be of little or no value in management.

Experience with Using CVRWQCB Basin Plan WQ Objective in Evaluating Water Quality

I can speak from experience on the deficiencies in conventional water quality monitoring programs of the type adopted by the CVRWQCB last July for ag waiver water quality monitoring, as a result of my work on behalf of the Yolo County Department of Public Works. I was a subcontractor on a Supplemental EIR for Cache Creek bank stabilization and sandbar and vegetation removal projects. As part of this effort, Dr. Jones-Lee and I conducted a critical review of the water quality monitoring data that Yolo County Department of Public Works had been collecting on Cache Creek over a period of several years. The County conducted a "conventional" water quality monitoring program, in which a wide variety of parameters were monitored periodically at several locations on Cache Creek. Our report,

Lee, G. F., "Water Quality," Chapter 4.6 of Yolo County's Supplemental Environmental Impact Report for the Cache Creek Resources Management Plan and Cache Creek Improvement Program County of Yolo Planning and Public Works Department, Woodland, CA (2002).

was a chapter in the SEIR, which was peer reviewed by a UCD faculty member and a senior member of the Central Valley Regional Water Quality Control Board staff who both understand water quality issues and appropriate monitoring.

A key aspect of conducting the Yolo County Cache Creek projects is the 401 Certification of these projects by the CVRWQCB. This Certification requires that the project not cause violations of the CVRWQCB Basin Plan objectives. As a result of this requirement, Dr. Jones-Lee and my review of the Yolo County Department of Public Works monitoring data, which in many respects will be similar to the data generated in the ag waiver monitoring program, involved comparing the results of the monitoring to the requirements set forth in the CVRWQCB Basin Plan. It was through this effort that we discovered that it is difficult to judge violations of several Basin Plan water quality objectives based on conventional WQ monitoring program data. A detailed discussion of these issues is presented in our Yolo County report. A copy of our report is available from our website at www.gfredlee.com.

As part of developing the nonpoint source monitoring program guidance for the CVRWQCB, we incorporated our experience from trying to interpret conventional water quality monitoring data obtained in our review of the Cache Creek data into this report, indicating that there is need to address the issues that we have raised, such as being certain that the monitoring that is done provides data that can be used to implement the narrative water quality objectives set forth in the CVRWQCB Basin Plan, as well as the other objectives which set forth an approach that does not

involve a single specific numeric value or concentration in a water sample to evaluate water quality objective violations.

I have recommended in my comments to the CVRWQCB on the draft ag waiver monitoring guidance that the staff develop a set of data from the existing ag drain database then conduct a review of the use of this data to evaluate the water quality objective violations based on the CVRWQCB Basin Plan. Adopting this approach will demonstrate the problems that I have been discussing in my comments.

For example, there is not a single numeric water quality objective for turbidity, but an objective that is based on the magnitude of increase over background. Unless the monitoring program incorporates a collection of data to establish pre-rainfall runoff background turbidity, the monitoring data on turbidity collected on a particular day at a particular sampling station cannot be interpreted in terms of a WQO violation. It is, therefore, of no value in judging whether excessive suspended solids (which lead to turbidity) are being discharged from an agricultural or other source. As discussed in our reports on Cache Creek and nonpoint source monitoring guidance, there is need for a considerably different monitoring program than that set forth in the CVRWQCB ag waiver water quality Monitoring and Reporting Plan. It should not be assumed that the agricultural dischargers and their consultants will have the expertise and motivation to conduct the monitoring/evaluation programs needed to properly evaluate whether a measured concentration in an ag discharge/drain is a violation of a narrative water quality objective.

As I discussed in my comments on this proposed monitoring program, an appreciable amount of work needs to be done by the CVRWQCB to provide specific guidance on how to determine, for a variety of parameters of concern in agricultural runoff/discharges, what constitutes an impairment of the beneficial use of the receiving waters for these discharges. Since amendment of the CVRWQCB Basin Plan often requires a number of years, it could readily be that the tenyear timetable that the Central Valley Board has established for achieving the water quality objectives in the runoff/discharges from agricultural areas will not be met, since the violations of the water quality objectives for runoff/discharges from irrigated agriculture are not adequately defined. Since violations are the key to information needed by agricultural interests to implement management practice evaluation, the ag waiver WQ management program may falter on the lack of appropriate monitoring and evaluation information. Without the violations of water quality objectives being well-defined, the dischargers will not proceed to implement the management practices needed to control violations of the Basin Plan objectives.

A critical review of the requirements/guidance provided by CVRWQCB ag waiver WQ monitoring requirements shows that for some areas of water quality concern expressed in the Order, additional parameters beyond those listed in Table 1 will have to be monitored to properly assess WQO violations. Also the conventional monitoring program of periodically collecting a grab sample at a particular location will not provide the information needed to determine if a violation of a narrative WQO has occurred. A significantly expanded monitoring/evaluation program will need to be implemented to determine if a water quality objective violation has occurred for several of the Table 1 minimum required parameters. For other required monitoring parameters, the CVRWQCB will need to develop a WQO in order to determine if agricultural discharges/runoff are causing an impairment of the state's waters that requires implementation of

management practices to control particular constituents in the discharge/runoff. Examples of these types of problems are presented below.

Upstream Water Quality Problems Will Be Detected at Downstream Monitoring Stations

Repeatedly at the Central Valley Board meetings and at the State Board workshop mention was made that violations of water quality objectives at the mouth or downstream of an ag drain can lead to the need to go upstream in the ag drain to define the sources of the constituents that are causing the measured downstream WQO violations. As I have discussed in each set of comments, the approach of monitoring at the drain discharge is not necessarily protective of the State's waters, since there can readily be upstream releases from agricultural sources which lead to an impairment of the beneficial uses of the waterbody, such as for fish reproduction, but are not translated to violations at the mouth of the ag drain or in the receiving waters for an ag drain discharge.

Ammonia

The CVRWQCB does not propose to require monitoring for ammonia, even though ammonia can be present in significant concentrations in ag drains as a result of its use as a fertilizer on agricultural fields. Also, it is a constituent that is present in some wastewater discharges and runoff, such as from dairies and areas where manure is present or has been applied. I have pointed out in each of my comments that not measuring ammonia as a distinct chemical species is a significant deficiency in the Regional Board's ag waiver monitoring program. The Regional Board staff and the Board, and now the State Board staff, have not addressed this highly significant deficiency in the minimum required WQ monitoring program. Ammonia is an important WQ parameter because of its potential to cause aquatic life toxicity and to serve as a nutrient (biostimulatory substance) for causing excessive growths of aquatic plants. Ammonia is also an important constituent in causing sediment toxicity. It is one of the most important quality evaluations.

While the CVRWQCB has not adopted a WQO for ammonia, the US EPA has established an updated water quality criterion for ammonia as set forth in the November 2000 *Federal Register* that can be used to judge excessive concentrations of ammonia. It is possible that ag drains can contain sufficient ammonia to be toxic to aquatic life, violating the water quality criteria that can serve as the basis for a water quality objective. However, since the CVRWQCB does not require that ammonia be monitored as a distinct chemical species, it will not be possible to evaluate whether the objective is violated for aquatic life toxicity.

While the Regional Board's required ag waiver WQ monitoring program includes Kjeldahl nitrogen, there are no critical concentrations (WQOs) for Kjeldahl nitrogen. Kjeldahl nitrogen is the sum of the organic nitrogen and ammonia concentrations. The organic nitrogen part of it can be the dominant species of nitrogen in a Kjeldahl N measurement. There is no reliable way to interpret Kjeldahl N measurements with respect to aquatic life toxicity. While organic nitrogen can be part of the nitrogen that stimulates excessive growths of aquatic plants, parts of the organic nitrogen are refractory and do not mineralize to ammonia, which is the nutrient of concern. The ammonia can be converted to nitrate, through nitrification reactions. Both

ammonia and nitrate are of concern as aquatic plant nutrients (biostimulatory substances). A discussion of biostimulatory substances is presented in a subsequent section.

Nitrate

Another significant problem in measuring nitrogen compounds with the current ag waiver WQ monitoring program is the failure to require measurements of nitrate. Nitrate is of concern because of its potential to be adverse to drinking water quality and as a biostimulatory substance. Nitrate concentrations above about 10 mg/L N in drinking water can be toxic to young children. Concentrations of nitrate above the nitrate drinking water MCL have been found in discharges from irrigated agriculture subsurface drains in the San Joaquin River watershed. It is a WQ parameter that should be measured, since the waters in which these concentrations have Domestic Water Supply as a beneficial use listing.

Another aspect of the significant deficiency of not requiring that nitrate be monitored is that normally nitrate is the most important nitrogen biostimulatory substance leading to excessive growth of algae and water weeds. While the CVRWQCB only included Kjeldahl nitrogen as a form of nitrogen that can be a "nutrient," of greater importance as a source of nitrogen that is a biostimulatory substance is nitrate. It should be a required monitoring parameter because it is an algal/water weed nutrient and also because it occurs in concentrations above its drinking water MCL.

Nitrite is another nitrogen species that is a potential cause of aquatic life toxicity. It needs to be considered in any TIE conducted for determining the cause of aquatic life toxicity. Nitrite is also a constituent that can add to the aquatic plant nutrients (biostimulatory substances) that are of concern in ag drains and in waters receiving drainage from agricultural areas. Ag runoff/discharge waters can have excessive concentrations of nitrite. The typical analytical method for nitrate includes nitrite as a measured parameter. However without separate measurement of nitrite it is not possible to evaluate the adverse impacts of nitrite.

Phosphorus Compounds

The CVRWCB ag waiver WQ minimum monitoring requirements list the measurement of "phosphorus." I have commented in my previous comments that the minimum monitoring requirements should specify that total phosphorus, and soluble orthophosphate should be measured as part of the ag waiver WQ monitoring program. My graduate students and I (and, subsequently, several others) have shown that substantial parts of the phosphorus in agricultural and urban stormwater runoff are do not become available to support algal growth, i.e., are unavailable. Unless the current problems with the measurement of phosphorus in the ag waiver WQ monitoring are adequately addressed, the phosphorus data developed will be of little value in evaluating the potential water quality impacts of phosphorus in runoff/discharges from irrigated agriculture.

Potassium

The CVRWQCB staff and State Board staff have approved the listing of potassium as a parameter that must be measured in agricultural runoff/discharges, because it is a "nutrient." While potassium is a well known nutrient in terrestrial soil systems, it is not an element that is of concern in aquatic systems as a nutrient. As I have pointed out previously, all funds spent in

measuring potassium in ag runoff/discharges will be a waste of money. There is nothing that can be done with that data, except file it in a filing cabinet.

Biostimulatory Substances

According to the CVRWQCB Basin Plan,

"Biostimulatory Substances

Water shall not contain biostimulatory substances which promote aquatic growths in concentrations that cause nuisance or adversely affect beneficial uses."

As discussed by Lee and Jones-Lee in

Lee, G. F. and Jones-Lee, A., "Review of Management Practices for Controlling the Water Quality Impacts of Potential Pollutants in Irrigated Agriculture Stormwater Runoff and Tailwater Discharges," California Water Institute Report TP 02-05 to California Water Resources Control Board/Central Valley Regional Water Quality Control Board, 128 pp, California State University Fresno, Fresno, CA, December (2002). http://www.gfredlee.com/BMP_Rpt.pdf

in order to evaluate whether excessive biostimulatory substances occur in a water, it is necessary to conduct detailed monitoring/evaluation at the sampling site and downstream. There are no numeric WQOs for biostimulatory substances. The Basin Plan requires that whatever stimulates excessive growths of aquatic plants be controlled. This means that it is not possible to use the nutrient (nitrogen and phosphorus) data generated in the ag waiver WQ monitoring program to define what an excessive discharge of a biostimulatory substance is. As discussed in our nonpoint source monitoring report, as well as in the management practices report, cited above, the approach that must be used to properly interpret excessive nutrients (biostimulatory substances) involves a detailed investigation of the water quality use impairments associated with excessive growths of aquatic plants in the waterbody where the measurements are made, as well as downstream in all waterbodies that are potentially impacted by the discharge. As we have discussed this requires a substantially different monitoring program than that set forth in the guidance/requirements provided by the CVRWQCB and that has been approved by the SWRCB staff.

As discussed in my writings on nutrient criteria development, several years ago the US EPA initiated an effort to develop chemical specific numeric nutrient criteria. The original schedule was that by 2004 the state regulatory agencies, including the Regional Board, should have in place (or be well on their way to developing) numeric chemical-specific nutrient criteria. For political and other reasons, the US EPA has backed off on this effort, and while representatives of the Agency still state that nutrient criteria development will be required, progress toward developing criteria and deadlines to achieve these criteria is proceeding slowly and has been postponed for a considerable period of time, possibly forever.

The problem with the US EPA's approach for developing numeric nutrient criteria was that the Agency was trying to develop national default criteria, which would be used if the state regulatory agencies did not develop site-specific criteria. Because of the unreliability of the US EPA national default nutrient criteria, California Regional Boards have opted to develop site-specific nutrient criteria. However, the CVRWQCB has not had funds/staff to develop these

criteria. This leads to the situation that the nutrient data developed in the ag waiver monitoring will be of limited value in defining the excessive discharge of biostimulatory substances.

California, and especially the Central Valley is far behind the rest of the country and many parts of the world in addressing excessive fertilization water quality problems. This does not mean that there are not significant problems due to excessive fertilization; in fact, the Delta receives excessive nutrients from both the Sacramento and San Joaquin River watersheds, which stimulate the growth of algae and other aquatic plants that lead to severe DO depletion problems in the Deep Water Ship Channel near Stockton, excessive growths of water hyacinth and Egeria, and tastes and odors caused by algae in domestic water supply reservoirs, as well as at the Banks pumping station. All measurements of nutrients, as part of the ag waiver monitoring program, will be of no value in defining excessive discharge of nutrients from agricultural sources, without a comprehensive downstream monitoring and evaluation program. As I have discussed there is need to fund studies to define the allowed nutrient discharges from agricultural and other sources that will control to the extent needed the excessive fertilization of waterbodies receiving agriculturally derived nutrients. This is one of the most significant problems associated with ag runoff/discharges, yet the monitoring program developed by the CVRWQCB does not even begin to effectively address this issue in a meaningful manner.

Total Organic Carbon and Dissolved Organic Carbon

The CVRWQCB WQ monitoring program requires that total organic carbon (TOC) be monitored as a drinking water parameter. Data that have been available for some time have shown that there are elevated concentrations of total organic carbon and dissolved organic carbon (DOC) in agricultural drains, in tributaries to the Delta and in the Delta, compared to those that are known to cause excessive trihalomethane formation under conventional domestic water supply treatment involving chlorination that is used for disinfection. However the CVRWQCB does not have a Basin Plan objective for TOC. Further the US EPA does not have a fixed numeric value for what constitutes excessive TOC in a domestic water supply intake. This value depends on a variety of factors, including methods of treatment, etc. Without a Basin Plan objective for TOC or DOC, it is not possible to determine the critical concentrations of these constituents in ag runoff/discharges for regulatory purposes. The net result is that another of the key parameters of concern with respect to ag runoff/discharges, for which data will be generated by the ag waiver WQ monitoring, will be uninterpretable with respect to a WQO violation because of a lack of regulatory standards.

In addition to measuring TOC, DOC should be measured since this is the parameter of greatest concern with respect to water supply impacts that lead to excessive trihalomethane formation. Further, since in some cases (especially in some ag drains) an appreciable part of the TOC is in a labile form – i.e., will decompose by the time it reaches the water supply intake – there is need to measure BOD and planktonic algal chlorophyll associated with any TOC measurements. I have provided detailed discussions of these issues; however, the CVRWQCB and the SWRCB have failed to address this matter, with the result that the TOC measurements will not provide the kind of information that is needed to begin to properly regulate excessive TOC discharges, should a TOC Basin Plan objective be developed.

Organochlorine Pesticides, PCBs and Dioxins

One of the most significant problems associated with past and, likely to some extent, current irrigated agriculture in the Central Valley is the discharge of substances that lead to excessive bioaccumulation of the legacy organochlorine pesticides, such as DDT, chlordane, toxaphene and dieldrin, in edible fish tissue. Many of the major Central Valley waterbodies, including the Delta, Sacramento River, San Joaquin River and their tributaries, are listed as Clean Water Act 303(d) "impaired" because of excessive bioaccumulation of organochlorine pesticides and PCBs. One of the issues that the CVRWQCB and SWRCB staff did not address that was raised in my previous comments was the inability to monitor, using chemical methods as prescribed by the CVRWQCB staff in their Table 1 of required minimum monitoring parameters, the organochlorine pesticides and PCBs at critical levels - i.e., US EPA recommended Water Quality Criteria of December 2002 and CTR criteria. As I pointed out, concentrations of the organochlorine legacy pesticides in water can be "non-detect," yet bioaccumulate to excessive levels in fish tissue, causing the fish to be a hazard to those who use them as food. It is for this reason that I have been recommending, and now the US EPA is beginning to work toward regulating based on fish tissue concentrations, not water concentrations. Excessive bioaccumulation of the organochlorine pesticides and PCBs in a waterbody can reliably be evaluated based on exceedance of the OEHHA fish tissue guidelines. This approach is a direct measure of a real significant water quality/public health problem.

Another aspect of trying to use the water concentration approach as an indicator of excessive legacy pesticides and PCBs, which makes it unreliable, is that in many situations, most of the organochlorine pesticides and PCBs are associated with suspended solids, which renders them unavailable in the water column. Therefore, with respect to a water column concentration in excess of a US EPA criterion, there can be exceedances without adverse impacts. It is for this reason that measurement of tissue concentrations is the reliable approach for addressing one of the most important water quality problems in the Central Valley that is associated with past – and, likely, current – agricultural activities. Dr. Jones-Lee and I, in our excessive bioaccumulation report,

Lee, G. F. and Jones-Lee, A., "Organochlorine Pesticide, PCB and Dioxin/Furan Excessive Bioaccumulation Management Guidance," California Water Institute Report TP 02-06 to the California Water Resources Control Board/Central Valley Regional Water Quality Control Board, 170 pp, California State University Fresno, Fresno, CA, December (2002). http://www.gfredlee.com/OCITMDLRpt12-11-02.pdf

have discussed the approach that should be used to define the current sources of legacy pesticides and PCBs, with particular reference to distinguishing between current agricultural runoff from areas where these materials have been applied and residues that are derived from aquatic sediments. Since many ag drains and other waterbodies in the Central Valley have fish with excessive concentrations of the legacy pesticides, it will be necessary to follow an approach similar to that outlined in our report on how to address the excessive accumulation of these chemicals in edible fish tissue. Rather than trying to evaluate the discharge of the organochlorine legacy pesticides through measuring water column concentrations, the measurement of fish tissue residues is a much more reliable and direct approach of defining whether irrigated agriculture is a significant current source of these pesticides and PCBs.

Aquatic Life Toxicity

Considerable emphasis is given in the CVRWQCB ag waiver WQ monitoring program to detecting aquatic life toxicity in ag drains and waters receiving ag drain discharges. The finding of aquatic life toxicity in waterbodies with aquatic life propagation as a designated beneficial use is a violation of the Basin Plan objective that must be corrected. Over the past 15 years there has been considerable work done in the Central Valley by the CVRWQCB staff on determining the occurrence, causes and sources of aquatic life toxicity in the Sacramento and San Joaquin River watersheds and, to a lesser extent, in the Delta and some near-Delta tributaries. In addition to toxicity due to the organophosphorus pesticides diazinon and chlorpyrifos, there is also toxicity due to other pesticides. Toxicity has recently been found to be due to the pyrethroid-based pesticides.

While the CVRWQCB specifies making pyrethroid pesticide measurements, there are no analytical methods to measure the toxic/available forms of pyrethroid pesticides. Measurement of total pyrethroids, as it is now done, significantly overestimates the potential toxicity. This means that a measured concentration of a pyrethroid pesticide cannot be reliably translated into a toxic concentration. Further there are no water quality criteria/objectives for the pyrethroid pesticides. Until water quality criteria are available, the measured concentrations of pyrethroid pesticides will not produce meaningful/useful data that can be used to evaluate excessive discharges/runoff of these types of pesticides.

One of the situations that will be encountered in the ag waiver monitoring is that there will be toxicity measured during one sampling event that will not be measured at the next event. The Regional Board needs to decide how it is going to address this type of situation. It is important that the Regional Board not adopt State Board proposed 303(d) listing policy of establishing a frequency of allowed water quality objective violations to judge excessive aquatic life toxicity. This is not a valid approach for regulating water quality impacts of chemicals.

Another issue for which there is need for guidance is that there is aquatic life toxicity in the Central Valley water that is due to unknown causes. This is stimulating an effort by the CVRWQCB to gain funding from CALFED/CBDA to investigate the occurrence, cause and sources of unknown-caused toxicity. A group of individuals has been advising the CVRWQCB in developing an unknown-caused toxicity management strategy. This updated strategy, currently in draft form, is available from K. Larsen of the CVRWQCB.

As discussed in my previous comments, guidance needs to be provided on how the CVRWQCB will address sediment toxicity that is due to low DO, and hydrogen sulfide and ammonia that are not directly discharged by an identified source. These constituents are the most common causes of sediment toxicity. Will this toxicity be ignored as is typically done by regulatory agencies or will there be control of the nutrient discharges in the watershed that lead to algae and other aquatic plants that settle, die and become a source of the oxygen demand that leads to low DO and the development hydrogen sulfide and ammonia in the sediments?

Turbidity, Suspended Solids and Sediment

The discharge of sediment from irrigated agriculture causes significant adverse impacts on water quality and other beneficial uses of Central Valley waterbodies. The Regional Board requires
that turbidity be monitored as part of the ag waiver WQ monitoring program. While turbidity approximates suspended solids concentration, it is not a reliable approach for assessing the water quality impacts of suspended solids. The CVRWQCB Basin Plan lists as the WQO for turbidity,

"Turbidity

Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases in turbidity attributable to controllable water quality factors shall not exceed the following limits:

- Where natural turbidity is between 0 and 5 Nephelometric Turbidity Units (NTUs), increases shall not exceed 1 NTU.
- Where natural turbidity is between 5 and 50 NTUs, increases shall not exceed 20 percent.
- Where natural turbidity is between 50 and 100 NTUs, increases shall not exceed 10 NTUs.
- Where natural turbidity is greater than 100 NTUs, increases shall not exceed 10 percent.

In determining compliance with the above limits, appropriate averaging periods may be applied provided that beneficial uses will be fully protected."

Unless measurements are made before the discharge/runoff occurs to establish the background turbidity just before the runoff event, there is no way to implement the Basin Plan limits to judge a violation of the water quality objective.

While the CVRWQCB ag waiver required WQ monitoring program does not require monitoring for total sediment discharge from irrigated agriculture, it should be monitored since erosion from some of the irrigated agriculture lands especially on the west side of the San Joaquin River is the cause of significant problems in the Delta. The CVRWQCB Basin Plan defines the water quality objective for sediment as,

"Sediment

The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses."

Implementation of this approach requires a comprehensive monitoring/evaluation program at the sampling site and downstream to determine if a violation of the narrative "Sediment" WQO has occurred. Without this information the measurement of suspended sediment cannot be judged based on a numeric value, but requires a special-purpose study program at and downstream of the monitoring point.

pН

While the CVRWQCB requires that pH be measured, no guidance is provided as to the time of day and location in the water column that the measurements are to be made. As I discuss in my comments on this monitoring program, samples taken near the surface in the early morning hours may show no violations of the pH WQO, yet violations of the pH objective can occur in early

afternoon as a result of photosynthetic activity with the associated CO₂ removal and increases in pH.

Dissolved Oxygen

Dissolved oxygen (DO) measurements are required; however, as I discussed in my comments on the proposed, and now adopted, ag waiver WQ monitoring program, the time of day when measurements are to be made is not specified. Measurements made in late afternoon could show that there is no DO problem, yet in the early morning, there could be a severe DO problem, which could cause fish kills through overnight low DO.

Color

The CVRWQCB has specified that color should be measured. However, the CVRWQCB used inappropriate units for presenting color measurements, compared to the approach that is used to regulate color as it may impact drinking water beneficial uses. The units for color should be the chloroplatinate units set forth in Standard Methods for the Examination of Water and Waste Water (APHA, et al. latest edition.). Further, as I have discussed, there is need to specify whether the color measurements are for true (dissolved) or apparent (total) color. Without changing the color measurement approach and specifying the type of color measurements, the data generated from measuring color in the ag waiver WQ monitoring program can be largely unreliable and uninterpretable.

E. coli

The CVRWQCB has specified that *E. coli* be monitored as part of the ag waiver WQ monitoring. While the CVRWQCB adopted *E. coli* as a proposed water quality objective for contact recreation, the SWRCB has yet to support this approach. Therefore the *E. coli* data cannot be evaluated with respect to violations of the water quality objective until the State Board approves the *E. coli* objective, and it is approved by the Office of Administrative Law. Until this occurs, fecal coliform is the water quality objective applicable to REC-1 waters.

EC

The CVRWQCB lists electrical conductivity (EC) as a measured parameter for ag waiver WQ monitoring. Since EC has a high temperature coefficient it is necessary that the EC values be measured at or converted to 25 C in order to obtain comparable, and reliable data.

Heavy Metals -Hg

The CVRWQCB has specified a set of metals (see Table 1) for water quality monitoring. The measured concentrations of dissolved forms can be compared to CTR criteria. An important metal that is not listed is mercury. This is a significant omission since excessive bioaccumulation of mercury in edible fish is a common problem in Central Valley waterbodies. Since mercury is present in irrigation waters that are diverted from Valley rivers, total and methyl mercury should be monitored in discharges/runoff from irrigated agriculture. Also, fish taken from the waterbodies impacted by ag runoff should be analyzed for mercury in edible tissue.

Flow

The CVRWQCB ag waiver WQ monitoring guidance states that flow measurements should be made at the time of sampling. This approach could lead to unreliable estimates of loads of constituents if the data collected on concentrations are applied to an assumed flow, which is the average of the flows between samplings. As I discussed, it is well established that continuous flow measurements should be made if reliable load estimates are to be obtained. This is especially important for runoff samples where the flow can change rapidly during a runoff event.

Overall

It is clear that the monitoring program guidance provided by the CVRWQCB for the ag waiver monitoring violates one of the fundamental rules of water quality monitoring program development – namely, to specifically relate the monitoring approach to the objectives of the monitoring. This issue needs to be immediately corrected, or the various Coalition Groups and individual discharges will be generating substantial amounts of inadequate and unreliable data that cannot be used to implement the agricultural runoff/discharge management program. This situation can also lead to inappropriate assessment of the water quality significance of constituents in ag runoff/discharges for which large amount of money would have to be spent implementing management practices that are not appropriate or necessary for the situation.

If members of the State Board or Regional Board question the inadequacy of the current CVRWQCB minimum required monitoring guidance, they should have their staff try to use the existing representative data for ag drains to evaluate exceedances of CVRWQCB Basin Plan objectives for the parameters listed in Table 1. This effort will lead to the conclusions drawn in this discussion.

As part of my effort to improve the quality of science used in water quality management in CA, I will provide assistance to anyone interested in developing the guidance needed to properly evaluate and manage the significant water quality problems caused by runoff/discharges from irrigated agriculture.

References

CVRWQCB, "Monitoring and Reporting Program Order No. R5-2003-0826 for Coalition Groups Under Resolution No R5-2003-0105 Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands," California Central Valley Regional Water Quality Control Board Sacramento, CA (2003).

Lee, G. F., "Comments on the Monitoring and Reporting Program for CVRWQCB Order No. R5-2003-0826 Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, Dated July 11, 2003," Submitted to State Water Resources Control Board, Sacramento, CA, by G. Fred Lee & Associates, El Macero, CA, September 11 (2003).



CALIFORNIA FARM BUREAU FEDERATION

FACSIMILE TRANSMITTAL COVER SHEET



TOTAL NUMBER OF PAGES INCLUDING COVER SHEET: 4. IF YOU HAVE ANY PROBLEMS RECEIVING THIS TRANSMISSION, PLEASE CALL (916) 446-4647.

FAX - (916) 446-1391



CALIFORNIA FARM BUREAU FEDERATION

Governmental Affairs Division 1127-11th Street, Suite 626, Sacramento, CA 95814 + Phone (916) 446-4647

January 30, 2004

BY FACSIMILE ONLY (916) 341-5470

Steve Fagundes, Chief NPS Program Plan Implementation Unit Division of Water Quality State Water Resources Control Board P.O. Box 100 Sacramento CA 95812-0100

Re: Comments on Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program

Dear Mr. Fagundes:

On behalf of California Farm Bureau Federation, its 53 member county farm bureaus, and their over 90,000 members throughout the state, I would like to thank you and the Board for the opportunity to comment on the above referenced Draft Policy, and I am pleased to offer the following specific comments.

At Page A-6, the Draft Policy generally discusses basin planning under Porter-Cologne. It would be appropriate at this part of the document to insert a short explanation of the Water Code section 13241 factors that are to be used to develop water quality standards, and the basis for these factors. I would offer the following language as a model:

California's basic water quality law, the Porter-Cologne Act, requires that the beneficial uses of California's waters be protected by the development of standards that reflect values that are critical to all Californians: the use of water for numerous purposes (drinking, farming, industry, wildlife conservation, etc.); scientific reliability; economic and housing development; recycling and re-use.

At Page A-8 of the Draft Policy, it is stated that as of January 1, 2004, Regional Boards have the authority to charge a fee for participation in a conditional waiver program. This language should be modified to reflect the legal requirement that the State Board adopt a fee schedule before a Regional Board may charge any fee. It would also be appropriate to include language here or elsewhere in the document that indicates that the traditional methods of calculating fees (flow, etc) may not be equitable in developing fees for non point sources operating under waiver programs, and that alternative fee calculation methods may be necessary to consider. Steve Fagundes State Water Resources Control Board January 30, 2004 Page 2 of 3

Page A-17 of the Draft Policy discusses monitoring. It would be appropriate to include here a statement to the effect that those practices whose effectiveness is well documented by research and experience do not require monitoring at a level as intensive as may be appropriate for more experimental management practices. Also, it should be stated that Regional Boards should give attention to the potential need for development of watershed scale monitoring programs where more intensive monitoring is economically impossible (i.e. farm level water quality monitoring).

Page A-20 of the Draft Policy addresses the subject of Regional Board compliance assurance. It should be made clear in this context that the responsibility to individual dischargers to provide advice on initial Regional Board jurisdiction (i.e. am I a discharger under these specific facts), place them on legal notice of their responsibilities to the Board depending on the Third Party Program in which they are participating, collect notices of intent or other enrollment documents (in some cases), and making determinations as to whether an individual discharger is out of compliance with requirements, rests primarily and usually exclusively with the Board. Third Party Programs are not generally well served where the Third Party is expected to perform these regulatory functions if they are inconsistent with the essential role of the entities executing the Third Party Program.

Page A-21 of the Draft Policy encourages NPS dischargers to take advantage of the many technical and financial assistance programs available to assist with MP development and implementation. It is appropriate for the document to direct Regional Boards to take care that their requirements are not inconsistent with eligibility or participation in these assistance programs. Many technical and/or financial assistance programs have confidentiality requirements or features, and most render an applicant ineligible if the project is required to meet a permit obligation.

Page A-21 also contains a discussion of a purported need for re-examining 'old habits and cultural barriers' due to the 'long and complicated physical, economic and political history' of current land use management practices. On balance, I would suggest that this is an inappropriate comment for a document of this nature. It is not the function of the Porter-Cologne Act to dictate land use or redirect cultural prioritics, but rather to balance those land uses that are sanctioned by the State's land use laws with protection of the state's waters from undue impacts from those activities. This balance is expressed in the above comments relating to the Section 13241 factors that the Board is required to consider in setting standards.

Steve Fagundes State Water Resources Control Board January 30, 2004 Page 3 of 3

I look forward to discussing these issues with you, and to the further development of the Draft Policy.

Very Truly Yours,

2 Franço 3

Anthony L. François, Ésq. Director, Water Resources

cc: George Gomes, Administrator, California Farm Bureau Federation

info@healthebay.org www.healthebay.org

January 30, 2004

Steve Fagundes, Chief, NPS Program Plan Implementation Unit Division of Water Quality State Water Resources Control Board P. O. Box 100 Sacramento, CA 95812-0100

VIA EMAIL (fagus@dwq.swrcb.ca.gov)

RE: DRAFT POLICY FOR IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM

Dear Mr. Fagundes:

Thank you for the opportunity to comment on the Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (Draft NPS Policy). Heal the Bay has read and agrees with the comment letter from the Ocean Conservancy and we hereby incorporate their letter by reference.

Heal the Bay has read and commented on all the major plans and documents pertaining to California's nonpoint source pollution policies. We believe the State must develop and implement a comprehensive plan to control nonpoint source pollution that will result in the protection of existing beneficial uses and clean-up of the State's hundreds of impaired water bodies. Many water bodies are impaired because of the ongoing impacts of unregulated or poorly regulated non-point and stormwater sources, and Heal the Bay firmly believes that it is the State's legal responsibility to enforce nonpoint source pollution control to clean up those water bodies.

The Draft NPS Policy Does Not Provide Enforceable, Regulatory Programs to Address NPS Pollution

The Draft NPS Policy describes the SWRCB's and RWQCBs' requirements for implementing third-party programs for nonpoint source pollution reduction. We are aware that the State needed to issue requirements for third-party programs so they could determine their eligibility for federal funds and we feel that these guidelines are a good start (see comments below). However, this is not a comprehensive implementation and enforcement policy for nonpoint source pollution control, which we believe is desperately needed and long overdue. The State has never produced a policy to ensure compliance with NPS programs. California's Porter-Cologne Act makes all discharges, except those covered by specific waivers, subject to waste discharge requirements. Thus Porter-Cologne gives the SWRCB the authority to issue WDRs to all the currently unregulated nonpoint sources of pollution in California. Therefore any nonpoint source of pollution that causes or contributes to a water quality violation and is not explicitly exempted by a waiver could be subject to enforcement 3220 Nebraska Avenue Santa Monica CA 90404 ph 310 453 0395 fax 310 453 7927 info@healthebay.org www.healthebay.org

action by the SWRCB if the problem is not rectified. This should be the cornerstone of nonpoint source compliance assurance policy, yet it is not even a part of this Draft NPS Policy.

Another way to control NPS pollution is through new regulations that target specific nonpoint sources. The State has attempted to do this for onsite sewage treatment systems through the passage of AB 885. Unfortunately this remains a critical example of the State's failure on cleaning up NPS pollution – the regulatory compliance deadline for AB 885 has already passed, yet we still do not have a regulation in place. If the impaired beneficial uses of California water bodies are ever to be achieved, regulatory solutions to NPS pollution problems must be implemented and enforced.

The Draft NPS Policy does not ensure an enforceable, regulatory means of addressing NPS pollution. Instead, this Policy allows and even encourages non-regulatory approaches to NPS pollution control. This is in keeping with the State's historical approach which has failed for years to control NPS pollution. Virtually all NPS pollution issues are being dealt with through voluntary measures and, more recently, TMDLs. The Draft NPS Policy simply continues this reliance on voluntary measures, while laying out some guidelines on how to proceed with third-party programs. The Policy implies that voluntary third-party programs constitute the State's major NPS implementation program. Are TMDLs and third-party programs the entire plan for implementing and enforcing NPS pollution control in California?

Comments on Key Elements of Third Party NPS Implementation Programs

The Draft NPS Policy provides details of how the SWRCB and RWQCBs will proceed with Third Party Programs for implementing nonpoint source controls. When the SWRCB and RWQCBs rely on other parties to implement key regulatory responsibilities, there is the chance that procedures and standards will not be applied uniformly to all programs. Clear and explicit requirements are needed to avoid this, and therefore we are pleased that the State has proposed specific requirements for implementing third-party NPS programs. We agree that all third-party programs should comply with the same state-wide criteria, to ensure such plans achieve the goals of nonpoint source pollution control and attainment of beneficial uses. The five elements described in the NPS policy generally provide clear guidelines for implementing third-party programs, but there are a few items that we feel must be further clarified.

Key Element 1: This element is very clear and requires that third-party programs achieve and maintain water quality objectives and beneficial uses, and that the management practices (MP) used be directly correlated to the water quality objectives in question. However there is no requirement that the third-party plan include a timeline for implementing the MP or achieving the water quality objective or beneficial use. A timeline requirement should be added to Key Element 1 to ensure that third-party programs are carried out, and water quality objectives and beneficial uses are achieved, within an acceptable time frame. 3220 Nebraska Avenue Santa Monica CA 90404 ph 310 453 0395 fax 310 453 7927 info@healthebay.org www.healthebay.org

Key Element 2: It is unclear how the RWQCBs will determine whether there is a "reasonable likelihood" that the third-party plan will attain water quality requirements. Further, the RWQCBs should ensure that there is a *high* likelihood that the third-party plan will attain water quality requirements before it agrees to the plan.

Key Element 3: We agree that in some cases the RWQCB may need to allow time for water quality objectives to be met. Element 3 requires that the "schedule not be longer than that which is reasonably necessary" to achieve program objectives. The NPS Policy should instead require that third-party programs include a date by which they expect to achieve the objective(s), and a process to ensure the deadline is met, including the enforcement actions that can be taken by the RWQCB if the objective(s) is not achieved by the expected date.

Key Element 4: The monitoring requirements in this section allow for agency and public review of MP implementation and success. We support these monitoring requirements, which are absolutely necessary to ensure proper MP implementation and achievement of water quality objectives.

Key Element 5: This element requires that third-party programs include a "general description" of enforcement actions that may be taken if the program fails. We believe this should be stated more specifically, i.e. the course of action that will be taken by the RWQCB if a third-party plan should fail. For example, the plan could specify that primary responsibility for the program reverts back to the RWQCB. This element must also state clearly that in the event that a third-party plan fails to meet water quality objectives, the RWQCB is *required* to take action. The phrase "although not binding on the RWQCB" should therefore be removed from Key Element 5.

Conclusion

The draft NPS Policy provides a solid basis for implementing third-party NPS implementation programs. We believe that with some clarifications and more rigorous language, as suggested here and in the comment letter submitted by the Ocean Conservancy, this policy will contribute to the State's efforts to ameliorate NPS pollution and achieve water quality objectives and beneficial uses. However we continue to insist that much more than voluntary measures are necessary for reducing NPS pollution in California. Enforceable regulatory programs need to be implemented by the SWRCB and RWQCBs to address specific NPS pollution problems in California. Please call us if you have any questions or would like to discuss these issues further.

Sincerely,

Mark Gold, D.Env. Executive Director Shelley Luce, D.Env. Issues Director 01/30/04 15:40

FROM : FAX NO. : Jan. 30 2004 03:25PM P1 PATRICK PORGANS & ASSOCIATES, INC. February 3, 2004 Workshop Item 8 Comments GOVERNMENT/REGULAR

Tele: (916) 374-8197 Fax: 372--7679

P.O. Box 1713, W. Sacramento, CA 95691

FAX COVER LETTER

NUMBER OF PAGES 21 TOTAL PAGE COUNT INCLUDES COVER PAGE

1 /30/04

Sent to: Attn: Steve Fagundes, Chief, NPS Program Plan Implementation Unit	Affiliation: SWRCB
Fax No: (916) 341-5470 Tele.	No: (916) 341-5487
Sent by: Patrick Porgans Cont	irmation: Yes _√_ No

Re: Policy for Implemenation and Enforcement of the Nonpoint Source Pollution Control Program

Attn: Steve Fagundes, Chief, NPS Program Plan Implementation Unit

Please provide the members of the Board with copies of Porgans & Associates' comments and place a copy into the record. Thank you.

Respectfully,

Patrick Porgans PP:sp fnl: 1 S swrcbfailure toprotectwg/FAX2004

Attachments

FROM

FAX NO. :

OURCE CONVERGENCE

PATRICK PORGANS & ASSOCIATES, INC.

GOVERNMENT REGULATOR

Tele: (916) 374-8197 Fax: 372--7679

P.O. Box 1713, W. Sacramento, CA 95691

January 30, 2004

Art Baggett, Chairmen and Members of the Board State Water Resources Control Board 1001 I Street Sacramento, CA 95814

Re: Policy for Implemenation and Enforcement of the Nonpoint Source Pollution Control Program

Attn: Steve Fagundes, Chief, NPS Program Plan Implementation Unit Fax: (916) 341-5470

1 The following comments are in reference to the SWRCB's:

NOTICE IS HEREBY GIVEN that the State Water Resources Control Board (SWRCB) will hold a public
 hearing to seek comments on the proposed Policy for Implementation and Enforcement of the Nonpoint
 Source (NPS) Pollution Control Program (Policy). The Policy provides the SWRCB and the Regional Water
 Quality Control Boards (RWQCBs) with guidance for developing an integrated program for implementing
 and enforcing the "Plan for California's Nonpoint Source Pollution Control Program." The SWRCB is
 requesting comments on the draft Functional Equivalent Document (FED) and the draft Policy

7 requesting comments on the draft Functional Equivalent Document (FED) and the draft Policy.

8 P&A is perplexed by the SWRCB's "Policy for Implementation and Enforcement of the Nonpoint Sources Pollution 9 Control Program." It is with all due respects that P&A provides the following comments. To begin with, P&A cannot 10 discern where the proposed Policy breaks new ground. Unless, someone, can prove otherwise. this appears to be just 11 another diversionary program/policy that covers very-old ground, and continues to bury the compliance issue. By your 12 addmission, and I quote:

13 In 1988, the SWRCB adopted California's first NPS Management Plan (1988 Plan). NPS discharges 14 continue to be responsible for the major surface water quality problems facing California. Information 15 contained in the State's most recent Clean Water Act section 303(d) list indicated that 54 percent of 16 California's polluted waterways are contaminated by nonpoint sources only, and another 45 percent are 17 polluted by a combination of point and nonpoint sources. In December 1999, the SWRCB upgraded the 1988 18 Plan with adoption of the Plan for California's Nonpoint Source Pollution Control Program (NPS Program 19 Plan), jointly developed by the SWRCB and the California Coastal Commission. Adoption of the NPS 20 Program Plan brought the State into compliance with section 6217 of the Coastal Zone Act Reauthorization 21 Amendments of 1990 and upgraded the 1988 Plan to comply with U.S. Environmental; Protection Agency 22 requirements. The NPS Program Plan committed the State to implement 61 NPS control management 23 measures (Mms) by the year 2013, with the long-term goal of controlling NPS pollution and restoring the 24 quality of the State's waters.

The aforementioned statement is a testament to the collective failure of both the State and Regional Boards' to fulfill their respective public trust responsibilities. Your Boards' have had more than enough time to effective deal with the State's water pollution calamity. During the last 33 years, P&A has participated in a myriad of water quality and water rights issues within the jurisdiction of the respective Boards, and, with few exceptions, found that the primary cause of the deplorable condition of the State's waterways is the Boards' failure to fulfill their respective public trust mandates, policy and/or enforcement programs. Therefore, it is extremely difficult to provide meaningful comments on the so-called "new policy and enforcement program," in light of the Boards' past tract record. FROM :

FAX NO.

January 30, 2004

Art Baggett, Chairmen and Members of the Board, State Water Resources Control Board

Re: Policy for Implemenation and Enforcement of the Nonpoint Source Pollution Control Program Attn: Steve Fagundes, Chief, NPS Program Plan Implementation Unit

1 The crux of the issue is that, neither this or any prior policy provide assurance of "real" enforcement/compliance.¹ In 2 fact, the current policy/enforcement program further degrades and delays any remote possibility of near future 3 compliance (2050). Furthermore, as usual the policy does not provide a fail-safe mechaism either to require SWRCB 4 or the Regional Boards to be held accountable for their collective failures or to comply with the provisions of the CWA 5 or the Porter-Colonge Act. One would then have to question the real motive for the continued meaningless revised 6 updates of illusive policy/enforcement program, unless it is to ensure the continued flow of federal moneys for related 7 CWA programs.

8 In light of record and your past actions, P&A respectfully suggest that USEPA should rescind its' authority for the 9 State of California as the designee for the enforcement of the provisions of the CWA. The real issue is that the waters 10 of the State are threatened by nonpoint source discharges, primarily from agricultural sources. Agricultural discharges 11 have been contributing to the degradation of the waters of the State for decades, and despite the expenditures of 12 billions of dollars to "manage" this source of pollution, neither the dischargers nor the State have provided viable 13 solutions to remediate this threat. P&A and others have petitioned the SWRCB to deal with the issue of agricultural 14 discharges as an unreasonable use of the public's water resources; however, the SWRCB has repeatedly denied our 15 request to have this matter heard before your Board. The State Board, Regional Boards, U.S. Environmental Protection 16 Agency and the nonpoint source discharges are equally responsible for the conditions of the State's water quality 17 dilemma. P&A believes that it is time for an independent review of the Boards' collective failures to protect the waters 18 of the State, and we intend to pursue that option. Enclosed are several more recent comments that P&A have submitted 19 to the government relative to its concerns over nonpoint sources (agricultural discharge) and the ongoing threat they 20 pose to the waters of the State.

21 Respectfully,

22 Patrick Porgans

- 23 PP:sp 1 Swrcbfailuretoprotectwq
- 24 Enclosures

¹P&A's correspondence to John Norton, Chief, Compliance Assurance & Enforcement Unit, State Water Resources Control Board, Re: *Comments to the State Water Resources Control Board's Draft Water Quality Enforcement Policy*, Jan. 30, 2001.

FROM :

FAX NO.

January 30, 2004

Art Baggett, Chairmen and Members of the Board, State Water Resources Control Board

Re: Policy for Implemenation and Enforcement of the Nonpoint Source Pollution Control Program

Attn: Steve Fagundes, Chief, NPS Program Plan Implementation Unit

1 The crux of the issue is that, neither this or any prior policy provide assurance of "real" enforcement/compliance.¹ In 2 fact, the current policy/enforcement program further degrades and delays any remote possibility of near future 3 compliance (2050). Furthermore, as usual the policy does not provide a fail-safe mechaism either to require SWRCB 4 or the Regional Boards to be held accountable for their collective failures or to comply with the provisions of the CWA 5 or the Porter-Colonge Act. One would then have to question the real motive for the continued meaningless revised 6 updates of illusive policy/enforcement program, unless it is to ensure the continued flow of federal moneys for related 7 CWA programs.

8 In light of record and your past actions, P&A respectfully suggest that USEPA should rescind its' authority for the 9 State of California as the designee for the enforcement of the provisions of the CWA. The real issue is that the waters 10 of the State are threatened by nonpoint source discharges, primarily from agricultural sources. Agricultural discharges 11 have been contributing to the degradation of the waters of the State for decades, and despite the expenditures of 12 billions of dollars to "manage" this source of pollution, neither the dischargers nor the State have provided viable 13 solutions to remediate this threat. P&A and others have petitioned the SWRCB to deal with the issue of agricultural 14 discharges as an unreasonable use of the public's water resources; however, the SWRCB has repeatedly denied our 15 request to have this matter heard before your Board. The State Board, Regional Boards, U.S. Environmental Protection 16 Agency and the nonpoint source discharges are equally responsible for the conditions of the State's water quality 17 dilemma. P&A believes that it is time for an independent review of the Boards' collective failures to protect the waters 18 of the State, and we intend to pursue that option. Enclosed are several more recent comments that P&A have submitted 19 to the government relative to its concerns over nonpoint sources (agricultural discharge) and the ongoing threat they 20 pose to the waters of the State.

21 Respectfully,

22 Patrick Porgans23 PP:sp 1 swrcbfailuretoprotectwg

24 Enclosures

¹P&A's correspondence to John Norton, Chief, Compliance Assurance & Enforcement Unit, State Water Resources Control Board, Rc: Comments to the State Water Resources Control Board's Draft Water Quality Enforcement Policy, Jan. 30, 2001.

FAX NO. :

URCE CONVERGENCE

PATRICK PORGANS & ASSOCIATES, INC.

GOVERNMENT REGULATION

Tele: (916) 374-8197 Fax: 372--7679

P.O. Box 1713, W. Sacramento, CA 95691

Nelle

Hand Delievered

To: Regional Director, U.S. Fish & Wildlife Service Art Baggett, Chairman, State Water Resources Control Board Chairman, Central Valley Reg. Water Quality Control Board

From: Patrick Porgans & Associates

RE: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a Source of Water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

Porgans & Associates (P&A) is formally requesting the U.S. Fish & Wildlife Service (USFWS) to pursue administrative relief through the Central Valley Regional Water Quality Control Board (CVRWQCB) and the State Water Resources Control Board (SWRCB) to compel the U.S. Bureau of Reclamation (USBR), San Luis & Delta Mendota Water Authority (SL&DMWA), and all other Central Valley Project (CVP) water contractors to comply with the 2 ppb selenium wetland channel water quality standard/objective for the protection of aquatic resources and to cease impairing the Service's permitted-water right for Salt Slough/wetland channels, which has and continue to pose a threat to public trust resources within the Grassland Bypass

7 Project (GBP) area and the San Luis National Wildlife Refuge Complex (SLNWRC).

8 Synoptic Reflection of the USBR's Ongoing-Unaccountable Destruction of Public Trust Resources:

The USBR is "responsible" for administering the federal Central Valley Project (CVP). The USBR is the single largest provider 9 and purveyor of water in California, exporting on average four-million acre-feet of water from the Sacramento-San Joaquin 10 Delta, primarily to its CVP agricultural contractors in the San Joaquin Valley (SJV) service area. The historical record attests 11 12 to the fact that the USBR is rife with conflicting interests and self-serving directives as water purveyor and custodian of the public's resources. The USBR's conflicts and/or self-serving directives are rendering it ineffective in reconciling its intrinsic 13 regulatory, administrative and contractual and public trust mandates. Its "Catch-22" quandary is compounded by a fragmented 14 15 regulatory and self-serving administrative process that attempts to maintain a status quo profile when confronted with one of 16 its own self-induced resource-related crises. Ironically, during such episodes the USBR tends to have a preoccupation with image-related damage control geared towards reasserting its commitment to the protection of its water contractors at the 17 expense and to the demise of trust resources. This conflict of interest is illustrated by some of the following examples: 18

The USBR and its respective CVP water contractors are the primary parties responsible for the massive 19 0 contamination and deplorable condition of the surface and ground water throughout the entire San Joaquin 20 Valley (SJV). This condition was graphically evidenced in a U.S. Environmental Protection Agency's (EPA) June 1997 21 National Watershed Characterization, Index of Watershed Indicators, which lists the SJV as a "More Serious Water 22 Quality Problems - High Vulnerability" area. According to EPA's map/index, the SJV is the single largest 23 contiguous high water quality vulnerable area in the United States. The SWRCB's record points to the discharge 24 of agricultural drainage water as the primary source of the degradation of the SJR and the ongoing demise and 25 destruction of the San Francisco Bay-Sacramento-San Joaquin Delta Estuary. (Refer to Attachment 1.) 26

- 27 **2** The USBR's and contractors' respective actions are also a primary contributing factor to 120 miles of the San Joaquin 28 River (SJR) classified as a water quality impaired body by the SWRCB.
- Water deliveries from the CVP are the primary factor contributing to water quality degradation in the wetland water supply channel, a source of water for the SLNWRC, and exceedences of EPA's 2 ppb selenium water quality standard for the protection of aquatic life, including wildlife refuge water supply, which threatens public trust resources and permitted water right usage. According to the CVRWQCB, the USBR has not been cited for violating the 2 ppb selenium standard/objective to protect aquatic resources.

FROM

FROM :

FAX NO. :

Nov 12, 2002

2

To: Regional Director, U.S. Fish & Wildlife Service
 Art Baggett, Chairman, State Water Resources Control Board
 Chairman, Central Valley Reg. Water Quality Control Board
 From: Patrick Porgans & Associates

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

- Evidence given at the SWRCB's Bay-Delta Water Right hearings also attest to the fact that the USBR/CVP are
 primarily responsible for the "doubling of salt loads every five years" in the SJV resulting from water deliveries and
 agricultural drainage.
- Ø The San Luis Unit of the CVP supplies water to the Westland Water District (WWD). The WWD is the single largest 4 water district in the United States. In the 1980's WWD was the source of the selenium-laden agricultural drainage 5 return flows responsible for the destruction of tens-of-thousands of migratory birds at the Kesterson National Wildlife 6 7 Refuge. The Kesterson debacle was the subject of a SWRCB hearing/decision (WQ 85-01), that was promulgated 8 not by a government entity, rather via a petition by a private citizen, who appealed a CVRWQCB decision that 9 essentially attempted to downplay the severity of the government-induced selenium-agricultural drainage catastrophe. 10 Ironically, in the SWRCB's Order No. WQ 85-01 issued a Cleanup and Abatement Order to the USBR for Kesterson Reservoir, a 1,280 acre evaporation facility consisting of 12 ponds, requiring appropriate action to mitigate the any 11 12 nuisance condition caused by the operation of Kesterson Reservoir. However, the exception of the Cleanup and 13 Abatement Order, there is no record of the SWRCB holding the USBR accountable for violating water quality 14 standards. Ironically Kesterson and the San Luis Drain were not shut down by the SWRCB, they were closed by an 15 order from the Secretary of the Interior. The USBR was not held accountable for the deaths of those birds as it 16 was not pursued as a Migratory Bird Treaty Act violation by the USFWS.
- 17 🖸 In the late 1980's and early 1990s, the USBR illegally exported hundreds-of-thousands acre-feet of water from the 18 delta, in violation of the terms and conditions of its water right permits.1 SWRCB's Exhibits 19 and 20, (Summary of 19 Recent Decision 1485 Violations), documented over 200 days of violations between Water-Year 1998 through Water 20 Year 1992. (Refer to Attachments.) The SWRCB's record also states that the USBR and the California Department 21 of Water Resources (DWR), collectively illegally impounded and/or exported approximately 325,000 acre-feet of water 22 during that period, valued at \$29,000,000.00. P&A's fought for three years to have the SWRCB hold that hearing to 23 hold the USBR and DWR accountable for violating the terms and conditions of their respective water right permits. 24 Albeit, the SWRCB held the hearing, documented the water quality violations, violations of their respective 25 water right permits and the illegal water export, but opted not to take an enforcement action against either 26 the USBR or DWR. The records also prove that the governments' illegal water exports contribute greatly to the 27 decline, massive destruction and subsequent listing of certain aquatic species as endangered. Ironically, the USBR 28 was not cited for the destruction and/or "take" of the fisheries, as is normally required by the provisions of 29 the federal Endangered Species Act.
- 30 Image: 30 Image:
- In 2002, an estimated 33,000 fish were killed on the Klamath/Trinity River system (some of which are state/federally
 listed as threatened species) resulting from a USBR water-related management issue. P&A contacted the USBR to
 ask if it had been cited for the fish kill. USBR's spokesperson said, no, as no one knows who, if anyone, is at fault.
- 37 The USBR's ongoing contribution to the impairment of the public's waters, resulting from agricultural drainage return flows into

¹ Public Hearing, State Water Resources Control Board, Division of Water rights, Public Hearing, Subject: Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and Suisun Marsh, Nov. 20, 1992.

01/30/04 15:45

EDUM .

	FAX NO.	Jan. 30 2004 03:30PM	P6
To	Regional Director, U.S. Fish & Wildlife Service Art Baggett, Chairman, State Water Resources Control Board Chairman, Central Valley Reg. Water Quality Control Board	Nov. 14, 2002	3
From	Patrick Porgans & Associates	Hand Delivered	

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channele, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right JSAGE

the rivers and Bay-Delta Estuary, and the destruction of fish and wildlife trust resources are without question unquantifiable; 1 however, there is no question regarding its magnitude and/or severity of devastating impacts, which are despicable, 2 unconscionable, contemptible, inexcusable, out-of-control and heretofore without meaningful regulatory accountability. The 3 record indicates it is time for the USBR to be held accountable and the wetland channels, a source of water for the SLNWRC 4 is a an appropriate place to initiate a compliance/enforcement action. 5

6 Supportive Documentation:

Federal government's failure to meet wetlands selenium water supply objective: This letter is being sent to reiterate 7 P&A's longstanding concerns regarding the USBR's, SL&DMWA's, Central Valley Project (CVP) water contractors et al's 8 ongoing exceedences of the 2 ppb selenium wetland water supply objective. Meeting this objective was one of the selling 9 points (deliverables) upon which the GBP was premised. Since the inception of the GBP, P&A has stated its concerns and 10 opposition to the use of the San Luis Drain for the purposes of transporting selenium-laden agricultural subsurface drainage 11 12 as well as tail, tile and storm water from an area of approximately 97,000 acres in the Grassland Watershed (Drainage Project 13 Area) to Mud Slough (north), a tributary of the San Joaquin River. The project uses the lower 28 miles of the San Luis Drain, 14 which is owned by the USBR, and operated under a use agreement by the San Luis & Delta Mendota Water Authority.

15 Phase I of the GBP was besieged with a myriad of problems, miscalculations, exceedances of load limits and /or of 16 the 2ppb selenium water objective in the wetland water supply channels. The CVRWQCB monitoring reports substantiate 17 numerous exceedences of the 2ppb water quality objective between 1996 and 2002 in the wetland channels.

18 Selenium concentrations greater than 2ug/L occurred sporadically in the wetland water supply channels,

19 with the majority of elevated concentrations during February, March, and April. Elevated concentration

20 in the supply channel may he due to a number of factors including elevated selenium levels in supply water,

21 inflows from agricultural subsurface drainage sources outside of the DPA, and local sources such as ground

22 water seepage and surface return flows. The cause of the elevated concentrations in the wetland water 23

supply channels are being investigated by Regional Board staff and local water agencies. Results of early 24

investigation have been published separately (Chilcott, 2000b and Eppinger, et² al., 2002 draft).

25 USBR water major factor in Selenium Exceedences: Supply water to the wetlands is predominately provided from the 26 Central California Irrigation District Main Canal and the Delta Mandota Canal. According to the CVRWQCB's reports elevated levels of selenium into those water sources comes from sumps, groundwater pumping and runoff. Another factor contributing 27 28 to selenium loading is attributed to the practice of "blending" higher quality water with poorer quality drainage water. After 29 nearly a decade of studies, attempting to quantify and qualify sources of selenium contributing to the exceedences in the 30 wetland supply, there is no question source water provided by the USBR is a major factor. This finding was not a revelation 31 to P&A, in fact, this was always a given. However, having had the opportunity to observe the USBR's "performance and 32 conduct" over a period of 30 years, it came as no surprise to P&A that the USBR could not overtly concede to the source-33 selenium contamination connection.

34 Notwithstanding, P&A has made it a point to keep apprized of the plethora of shortcomings, data inconsistencies, selenium 35 load and/or water quality exceedences, and related incongruities attributable to the USBR's "handling" of the GBP, which the 36 record will attest it has documented in detailed. One source of such documentation can be found n P&A's petition to the

² CVRWQCB, Staff Report, Agricultural Drainage Contribution to Water Quality in the Grassland Watershed of Western Merced County, California: October 1998 — Sept. 2000, Jan. 2002 Draft., p. 2.

FAX NO. :

To:	Regional Director, U.S. Fish & Wildlife Service
	Art Baggett, Chairman, State Water Resources Control Board
	Chairman, Central Valley Reg. Water Quality Control Board
-	

From: Patrick Porgans & Associates

Jan. 30 2004 03:30PM P7 Nov. 14, 2002 4

Hand Delivered

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

SWRCB, wherein we appealed the CVRWQCB's approval of the waste discharge requirements for the GBP.³ Please refer
 to your file copy of P&A's petition for all of the specifics.

3 In the Mid-1990s P&A Suggested that the USFWS File a Formal Complaint with the CVRWQCB and SWRCB for 4 the USBR et al's violations of the Services water right permit for the wetland channels: In the very early stages of the GBP proposal, in the mid-1990s, P&A suggested to the USFWS's Sacramento Office that it file a formal complaint with 5 the CVRWQCB and the SWRCB against the USBR et al for impairing the Service's water right permits in the wetland channels. 6 At that time, the USFWS notified the CVRWQCB of its concern for the wetlands and selenium sources and/or exceedences; 7 8 however, it did not make a formal regulatory reguest/action to ensure compliance of the selenium objective for the wetlands. Seven years have passed and the selenium exceedences in the wetland channels continue, placing the public trust resources 9 10 at risk. In the ensuing period, the USBR's contractors and other agriculturalists within the drainage project area have been able to enjoy the benefits of federally subsidized water, obtained a 10 to 15 year grace period wherein they can exceed the 11 12 5ppb selenium objective promulgated by the EPA for the SJR and conduct business as ususal.

68P is the Quintessential Stop-gap measure: Since its inception, P&A has stated for the record that the GBP is nothing more than a stop-gap-measure (salt banking) by the government and its water dependents to sanction the **unreasonable use** of the public's water resources and promote unsustainable agricultural practices, while they are allowed to exceed federal selenium objectives and continue to contribute to the destruction of public trust resources and the degradation of the surface and ground waters of the state. The record also attests to the fact that P&A has consistently notified the USFWS, USBR⁴, CVRWQCB⁵ and the SWRCB⁵ board/staff of our concerns relating to the threat posed by elevated levels of selenium in the wetland channels resulting from agricultural/drainage activities. During the SWRCB's Bay-Delta "Water Rights" proceedings, P&A emphasized to the SWRCB the need to include language in Water Right Decision 1641 a requirement that the USBR's water rights permits address the USBR's need to develop a long-term solution to the self-imposed agricultural drainage problem prevalent within the CVP's SJV, serviced area. The following are excerpts from D-1641:

P&A's Fax to Mike Delamore, USBR, Fresno Office, Fax No: 559 487-5130, Re: Detailed List of Financial Information Porgans & Associates Requested at the Oversight Committee Meeting, February 11, 1999.

³ Patrick Porgans & Associates Petition to Request that the State Water Resources Control Board Rescind the Central Valley Regional Water Quality Control Board's July 24,1998, Decision to Approve Waste Discharge Requirements No. 98-171 for the San Luis & Delta-Mendota Water Authority and United States Department of the Interior, Bureau of Reclamation for the Grassland Channel Project, and that the State Board Schedule a Formal Hearing, August 22, 1998.

⁴ P&A's letter to Roger Patterson, Regional Director, USBR, Attention Laura Allen, Deputy Director, Environmental Affairs Division, Re: Submittal of Written Statements to Correct the Addendum to the Transcription of Flipchart Notes for the GBP Oversight Committee's Jan. 25, 1999 Meeting. Sacramento, CA., Feb. 11, 1999.

⁵ P&A's Fax to Rudy Schnagl, Engineer, CVRWQCB - Sacramento (Fax No: (916) 255-3015), Re: Porgans & Associates Opposition to the San Luis & Delta Mendota Water Authority and U.S. Department of the Interior, Bureau of Reclamation, Grassland Bypass Project (Phase II), Fresno and Merced Counties – Consideration of New Waste Discharge Requirements, and Re-Submittal of Comments to the Grasslands Bypass Project Environmental Impact Statement/Report, 17 pages, Sept. 4, 2001.

FAX NO. :

Jan 30 2004 03:54PM P3

Nov. 14, 2002 5

To: Regional Director, U.S. Fish & Wildlife Service Art Baggett, Chairman, State Water Resources Control Board Chairman, Central Valley Reg. Water Quality Control Board

From: Patrick Porgans & Associates

Hand Delivered

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

State Water Resources Control Board's (SWRCB) Water Right Decision 1641

10.2.1.2 The Effect of Discharges in the CVP Service Area on Vernalis Salinity

Although water quality problems on the San Joaquin River began with the reduction of flows due to upstream 3 development and the advent of irrigated agriculture, they were exacerbated with construction of the CVP. 4 (R.T. pp. 3988, 4781; SDWA 39: SWRCB le, pp. II-15, VIII-2.) The CVP consist of 18 federally operated 5 reservoirs and four reservoirs operated joinily with the DWR. (SWRCB 1e, p. 111-5, SWRCB 167.) The 6 Delta-Mendola Canal and pumping plant first were began operating in 1951. (SDWA 48, pp. 10-11.) The 7 San Luis Drain and the California Aqueduct were completed in 1967. (SWRCB 167, Technical Appendix, 8 pp. [11-11] - [11-13].) SDWA's witness testified that between 1930 and 1950 the average salt load at 9 Vernalis was 750.000 tons per year. Between 1951 and 1997, the salt load has averaged more than 950,000 10 tons per year. Peak loads have exceeded 1,5 million tons per years following extended droughts. (SWDA 11 34A.) Central Valley RWQCB staff testified that from the 1960s onward there has been an increase in salt 12 load and concentrations. (R.T. pp. 4835-4836.) The April through August salt load in the 1980s was 62 13 percent higher than the load in the 1960s and the corresponding annual load increase was 38 percent. 14 (SWRCB le, p. VIIII-11; SWRCB 97.) 15

Central Valley RWQCB staff described geographic sources of salinity based on historical data from the 1977 16 through 1997. (R.T. p. 4891.) The Central Valley RWQCB staff concluded that high salinity at Vernalis is 17 caused by surface and subsurface dischargers to the river of highly saline water. The sources of the dischargers are agricultural lands and wetlands. (R.T. pp. 4857-4858; SEWD 17, p. 5.) Approximately 35 18 19 percent of the salt load comes from the northwest side of the San Joaquin River, and approximately 37 20 percent of the salt load comes from the Grasslands area. (SEWD 7a.) These areas received approximately 21 70 percent of their water supply from the CVP, 20 percent from precipitation and 10 percent from 22 groundwater. (SWRCB 8, p. V-11.) The TDS concentration of agricultural drainage water from the 23 Grasslands area that discharges ti the river through Mud Slough is approximately 4,000 mg/l. (R.T. p. 4869; 24 SWRCB 8, p. VIII-27.) In some cases, drainage water is more than ten times the concentration of the 25 Vernalis salinity standard. (R.T. pp. 7850-7851.) 26

Based upon the above discussion, the SWRCB finds that the actions of the CVP are the principal cause of 27 the salinity concentrations exceeding the objectives at Vernalis. The salinity problem at Vernalis is the result 28 of saline discharges to the river, principally from irrigated agriculture, combined with low flows in the river 29 due to upstream water development. The sources of much of the saline discharge to the San Joaquin River 30 is from lands on the west side of the San Joaquin Valley which are irrigated with water provided form the 31 Delta hy the CVP, primarily through the Delta-Mendota Canal and the San Luis Unit. The capacity of the 32 lower San Joaquin River to assimilate the agricultural drainage has been significantly reduced through the 33 diversions of high quality flows from the upper San Joaquin River by the CVP at Friant. The USBR, through 34 its activities associated with operating the CVP in the San Joaquin River basin, is responsible for significant 35 deterioration of water quality in the southern Delta, (Source: D-1641, pp. 82, 82, and 84.) 36

37 Drainage problems in the San Joaquin Valley threaten water quality, agriculture, fish and wildlife, and 38 public health. (SWRCB 7e.) Although current drainage programs will, in the short-term, assist in meeting

FROM

2

FROM :	FAX NO. :	Jan	30 2004	03:54PM	P4
To:	Regional Director, U.S. Fish & Wildlife Service Art Baggett, Chairman, State Water Resources Control Board Chairman, Central Valley Reg. Water Quality Control Board	Ν	Jov. 14, 200)2	6

From: Patrick Porgans & Associates

Hand Delivered

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Ushas

the Vernalis salinity objective, a long-term solution for drainage management must be developed. (Source.
 D-1641, p. 86.}

The USBR's actions have caused reduced water quality of the San Joaquin River at Vernalis. Therefore,
 this order amends the CVP permit under which the USBR delivers water to the San Joaquin basin to
 require that the USBR meet the 1995 Bay-Delta Plan salinity objectives at Vernalis. The USBR has wide
 latitude in developing a program to achieve this result. (Source: D-1641, p. 87.)

High concentrations of naturally occurring elements, such as selenium, may pose a hazard to wildlife and
 humans when agricultural drainage is discharged to wetlands or water courses. Salt imported by water
 deliveries, accumulation of natural salts in soils and groundwater from irrigation, and lack of a viable long-

10 term salt management plan threaten sustained agriculture in the Valley.⁷ [Emphasis added.]

11 USBR Has Failed to Develop a Viable Long-Tern Solution to Its Self-Imposed Drainage Dilemma: The USBR has 12 yet to come forth with a viable long-term solution to the drainage dilemma. The GBP is nothing less than a selenium/salt 13 banking project, which, the record shows, actually compounds salt and selenium downloading during and subsequent to 14 drought periods. Currently, the USBR is circulating an Administrative Draft report in "response" to Judge Wanger's "Decision" 15 which among other things required that the USBR provide a preferred alternative drainage solution by December 2002. P&A's 16 recent contact with USBR's Public Affairs spokesperson Marian Echeverria confirmed that the scheduled report does not 17 identify the preferred drainage alternative. The fact is that it is simply a "reiteration" on all of the age-old alternatives that 18 heretofore have been recognized as problematic.

19 P&A also submitted comments on the USBR's San Luis Drainage Feature Re-evaluation & EIS,⁸ The following are excerpts:

As stated in *Porgans & Associates* (P&A) November 10, 2001 fax to Mike Delamore, USBR, Fresno Office, herein is the addendum to the comments referenced in that correspondence.

Concerns: In one sense, P&A is encouraged to know that the government is still interested in the unresolved self-22 imposed drainage dilemma it created in conjunction with its federal Central Valley Project water contractors. It is a 23 24 problem that had been well documented by more than 100 years of research, supported by real science and hard 25 data/publications. It is a problem that was identified even before the construction of the initial CVP and San Luis Unit 26 of the project. Ironically, as both the USBR and its contractors knew, in the case with the San Luis Unit, the San Luis 27 Drain was suppose to be built in unison with the water deliveries, because of the known drainage problems within the 28 San Luis Unit (Westland Water District) service area. But paraphrasing one of WWD's initial General Managers, 29 Ralph Brody, there was no real concern about the San Luis Drain (SLD) being built early on, just deliver the water and 30 the drainage facilities would come well before they were really needed.

⁷ San Joaquin Valley Drainage Implementation Program, Manucher Alemi, SJVDMP Coordinator, Department of Water Resources, February 1998, p. 1.

⁸P&A Written Comments to USBR's Jason Phillips, Project Manager, San Luis Drainage Feature Reevaluation & EIS, Drainage Options as Directed by U.S. District Cousitabject: P & A's Public Comments -Addendum to November 10.2001 San Luis Drainage Feature Re-evaluation & EIS --- Public Scoping Meeting, November 2001.

FROM :	OM :
--------	------

FAX NO.

To:	Regional Director, U.S. Fish & Wildlife Service
	Art Baggett, Chairman, State Water Resources Control Board
	Chairman, Central Valley Reg. Water Quality Control Board
r .	

From: Patrick Porgans & Associates

Jan. 30 2004 03:55PM P5 Nov. 14, 2002 7

Hand Delivered

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

1 Unfortunately, the perquisite for the USBR's renewed interest in the drainage issues is not an agency-inspired 2 phenomenon, but the result of a court order. Albeit, it would be disingenuous if P&A did not reflect on the FACT that the USBR has had nearly a half of a century to effectively remedy the self-induced drainage problem. It is a problem 3 that USBR has not only failed miserably to reconcile, but, conversely the record proves its actions have and continue 4 5 to compound the drainage dilemma, which, in some areas of the state, is at or approaching critical mass. Testimony obtained during P&A's cross-examination of two California Central Valley Regional Water Quality Control Board 6 engineers, "experts" in agricultural drainage, during the SWRCB's Bay-Delta "Water Rights" hearings, revealed 7 drainage is doubling the salt loads every five years in the San Joaquin Valley serviced by a portion of the CVP. 8

Conflict of Interest: The official government records attest to the fact that the salt deposition problems in the San 9 Joaquin Valley are worst now then ever; i.e., Bureau's water deliveries are responsible for doubling the salt load in 10 portions of the San Joaquin Valley every five years; the San Joaquin River is classified as water quality impaired, the 11 Bay-Delta is water guality impaired, the San Joaquin Valley, according to the U.S. Environmental Protection Agency's 12 Watershed Index, appears to be the single largest contiguous high water quality vulnerable area in the United States. 13 and the long-term solution to the drainage problem is yet to surface. (Refer to Attached map.) During the last 30 years, 14 P&A has committed its time and resources in a sincere effort to assist the "responsible" government agencies in 15 fulfilling their respective public trust responsibilities to resolve the drainage conundrum. Suffice it to say the 16 government has not only resisted P&A's efforts, it, including the USBR, has exacerbated the problem. 17

18 Potential Solutions According to USBR "Fact Sheet

Since the 1960's, Reclamation has investigated ways to provide drainage service to the western San 19 Joaquin Valley. From the 1980s to present, while in-valley and out-of-valley options were being studied. 20 Reclamation has worked with other Federal agencies, California state agencies, growers, water districts and 21 other stakeholders to develop effective, affordable, and feasible drainage service and drainage management 22 solutions. Several of these efforts have resulted in innovative techniques, and Reclamation continues to 23 support development of these approaches. However, to date, the only proven technologies identified to 24 provide large-scale, long-term drainage service and achievable salt balance on drainage-affected, irrigated 25 lands in the San Joaquin Valley are disposal of salts out-of-valley or disposal to in-valley evaporation 26 ponds. The final range of alternatives will likely include a combination of water treatment (evaporation. 27

28 *chemical, hiological, other) in-valley or out-of-valley disposal.* [Emphasis aded.]

29 Standing Opposition to USBR's Long-term Drainage Solutions:

P&A, in conjunction with the U.S. Fish & Wildlife Service's (USFWS) position, takes exception to the USBR's assertion that evaporation ponds are a proven technology. The USBR's position would have to completely ignore all of the "real" scientific data that documents the adverse environmental costs directly attributable to evaporation ponds. In the interest of time and resources, P&A respectfully refers the USBR to the historical records, wherein, P&A's, the USFWS and other agencies recorded their respective concerns and opposition to the use and/or expansion of evaporation ponds as an in-valley solution or out-of-valley solutions that involve the dumping of agricultural drain water into any water body that drains/empties into the Sacramento-San Joaquin Delta and/or San Francisco Bay Estuary.

37 **Competency of USBR:** P&A's extensive, if not exhaustive review of the record, reveals that one of the primary obstacles 38 impeding any meaningful commitment and/or resolution to reconciling the self-imposed drainage problem is the USBR. The 39 record further attest to the USBR's inability. P&A respectfully suggests that what really needs to be "re-evaluated" is the

FROM :			
	FHA NU.	Jan. 30 2004 03:33PM	P10
To:	Regional Director, U.S. Fish & Wildlife Service	Nov. 14, 2002	8
	Art Baggett, Chairman, State Water Resources Control Board		•
	Chairman, Central Valley Reg. Water Quality Control Board		
From	Patrick Porgans & Associates	Hand Delivered	

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right

Usage

1 USBR's performance and more aptly stated, lack of performance. There have been a plethora of studies, countless meeting, endless proposals, concepts and drainage related theories that defy the principles of sound science, common sense and practicality; however, in spite of a massive expenditure of public funds, time and resources, to this day there is still no remedial solution in sight. One needs to question whether this state of affairs is an enigma, bureaucratic ineptitude or an unresolvable issue rooted in a problematical venture built with the so-called best of intentions, essentially to irrigate desert lands with known unresolvable drainage problems.

7 Continued Destruction of Public Trust Resources and Unreasonable Use of the Public's Water Resources:

The "Re-evalation of the San Luis Drain" if it includes in-valley and/or out-of-valley "solutions" constitutes an unreasonable use 8 of the public's water and a definite threat to public trust resources. As the record will attest, P&A also has formally stated its 9 opposition to the USBR's Grassland Bypass Project (GBP), which utilizes a portion of the San Luis Drain, for discharging 10 drainage water into Mud Slough, a tributary to the San Joaquin River. For all of its "so-called achievements" the GBP has not 11 done away with the toxic trace elements and/or salts contained within the SJV hydrological area: they are simply being banked 12 and stored in the soil profile and in the affected groundwater basin. The data show that the dividends on the salt load within 13 the SJV are doubling every five years. The most condemning commentary on the merits of the GBP were published by the 14 USBR, in an addendum/correction, to Chapter 6 of the Grasslands Project 1998-99 Annual Report, and I quote: "Data for several 15 more years will be necessary before the impact of the Grassland Bypass Project can be quantified with any confidence." As you know 16 the aforementioned addendum/correction to that report was not a voluntary concession by the USBR; it was compelled to take 17 18 this action as a means to assuage legitimate concerns regarding the report, raised by the U.S. Geological Survey (USGS).

19 Concerns Raised in a Recently Published U.S. Geological Report Regarding Toxic Agricultural Drainage

20 In a USGS recently published a report, "Forecasting Selenium Discharges to the San Francisco Bay-Delta Estuary: Ecological 21 Effects of A Proposed San Luis Drain Extension," it states:

22 "Understanding the biotransfer of Se is essential to evaluating the fate of proposed changes in Se 23 dischargers to the Bay-Delta. However, past monitoring programs have not addressed the specific protocols necessary for an element that bioaccumulates. Any future analysis of impacts from Se 24 25 discharges via the SJR or a proposed SLD extension to the Bay-Delta should be at least as complete and 26 could profitably build from the framework presented here. For the Bay-Delta, this new tool is used in sitespecific forecasts to evaluate Se effects based upon the major processes leading from loads through 27 consumer organisms to predators. We conclude that credible protective criteria needs to be applicable to 28 29 vulnerable food webs and to be based on contaminant concentrations in sources such as particulate 30 materials that most influence bioavailability. Bivalves appear to be the most sensitive indicator of Se 31 contamination in the Bay-Delta.

32 Constitutional Conflict - Unreasonable Use of Water:

33 It is imperative that the USBR should remain cognizant of the fact that it only has a right to use the water and that the amended 44 terms and conditions of its water right permits as defined in SWRCB Decision 1641, requires that the USBR find long-term 55 solutions to the agricultural drainage water problems. At many of the USBR's meeting there appears to be an outright aversion 56 by its personnel to discuss and/or disclose the extent of the threat that drainage poses to our civilization and/or the history of 57 salt deposition and its devastating impacts on past civilizations, i.e., the Tigris and Euphrates valleys. P&A respectfully reminds 58 the USBR and its collaborators that, it has been written, and I paraphrase, those who fail to understand history are doomed 59 to repeat its mistakes. Neither the USBR nor its contractors should be slighted for their "good intentions." Conversely, they 50 need to be held accountable for a litany of good intentions that have and continue to contribute to the demise, waste, and 51 destruction of nublic trust resources.

41 destruction of public trust resources.

FROM

FAX NO.

To:	Regional Director, U.S. Fish & Wildlife Service
	Art Baggett, Chairman, State Water Resources Control Board
	Chairman, Central Valley Reg. Water Quality Control Board
From:	Patrick Porgans & Associates

Jan. 30 2004 03:33PM P11 Nov. 14, 2002 9

Hand Delivered

Re: Formal Request that the U.S. Fish and Wildlife Service Pursue Administrative Relief Through the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

1 CVP Capital Costs Repayments During the Last 50 Years are Less than Total Drainage Related Costs:

According to a May 2001 USBR "<u>Cost Allocation Study</u>" report, the outstanding capital debt on the CVP was approximately \$3.3 billion, of which the irrigation water users' cost allocation is approximately \$1,476 billion. Furthermore, according to draft figures obtained from USBR accountants, which are contained in the USBR's <u>Fiscal 2002 Water Rate Book</u>, in nearly a half of century the irrigation water users have only repaid about \$104 million towards the capital debt, which does not contain an interest component, which averages out to \$2 million annually!!! Ironically, the costs for the Kesterson National Wildlife Refuge cleanup fiasco and the related drainage studies and reports exceed the total capital cost repaid to date by all of the CVP's agricultural contractors.

9 Conclusions: Any reasonable person accustomed to dealing with reality cannot categorically deny the validity of the 10 aforementioned facts, but for the sake of discussion, let us not quibble about the seriousness and/or gravity of the 11 abovementioned factors, as they are only symptomatic of the real problem. The drainage dilemma is problematic and will 12 continue as a result of the USBR's unconscionable action to supply water to its customers to irrigate lands with known drainage 13 problems without having a viable long-term cost-effect drainage solution in place. The re-evaluation of the SLD and/or the 14 extension of the GBP is nothing more than delay tactics that will inevitably be at the cost and to the demise of public 15 and the trust resources, i.e., SJR, Trinity River and the Bay/Delta estuary. The GBP EIS/EIR failed to disclose the 16 bloaccumulative impacts of the project on the San Joaquin River and the Estuary and the real economic costs and 17 factors associated with the CVP subsidized water deliveries to promote unsustainable agriculture and/or its impact

18 on sports and commercial fishing.

19 The USBR has referred to the "re-evaluation" of the "drainage alternatives" as an iterative process, which, according to the 20 literal interpretation, means characterized by repetition. P&A concurs that this process has been both repetition and draining.
21 In FACT, P&A is not amenable to "participating" in a reiterate process. Albeit, for the record, this is P&A's final position.

22	No more irrigating desert lands in proximity to seleniferous soils.
23	No Drain
24	No more evaporation ponds.
25	No more water deliveries that conflict with the constitutional reasonable use requirements
26	No more studies
27	No more lands with known seleniuem and/orsalt deposition problems.
28	No more exceedences of selenium objectives in wetland water supply channels.
29	No more interference from the USBR:
30	No more USBR as lead agency; i.e., no more conflict of interests.
31	No more excuses or unaccountability.

⁹ USBR. San Luis Drainage Feature Re-Evaluations, Sept. 2002.

01/30/04 1	.5:	49
------------	-----	----

FROM	FAX NO.	Jan. 30 2004 03:34PM	P12
To:	Regional Director, U.S. Fish & Wildlife Service Art Baggett, Chairman, State Water Resources Control Board Chairman, Central Valley Pea, Water Quality Control Board	Nov. 14, 2002	10
From:	Patrick Porgans & Associates	Hand Delivered	
Re: For	mal Request that the U.S. Fish and Wildlife Service Pursue Administrative Water Quality Control Board and the State Water Resources Cont	Relief Through the Central Valley Region of Board to Compet the U.S. Burea	onal u of

Water Quality Control Board and the State Water Resources Control Board to Compel the U.S. Bureau of Reclamation et al to Cease Violating the Selenium Objective for the Wetland Channels, a source of water for the San Luis National Wildlife Refuge Complex, CA., Which Threatens Public Trust Resources and Permitted Water Right Usage

Reiteration of P&A's Request for the USFWS to Pursue Formal Administrative Action: Because of the USBR and its contractors inability and/or failure to comply with the wetland channels selenium standards/objectives and/or failure to resolve the long-term drainage problems within the CVP service area, it leaves P&A with no other practical alternative but to request that the USFWS initiate formal administrative action against the USBR and its contractors, to ensure that the Service does not continue to compromise its ability perform its public trust responsibilities in accordance with its legal mandates. In the absence of such an action by the USFWS, P&A will then consider petitioning the SWRCB to take an action against the USBR for violating USFWS's permitted water right for the wetland channels. Should you have any questions regarding the contents of this communication, please advise us in writing. Thank you.

9 Respectfully,

3

4

5

6

7

8

-og

- 10 Patrick Porgans
- 11 Defacto Public Servant12 PP:sp III 3 Infnlusbr./wetlandviolations
- 13 cc: List Attached



Kirk C. Rogers, Regional Director Bureau of Reclamation (BOR), Mid-Pacific Region Office 2800 Cottage Way Sacramento, CA 95825 (Original Sent Via U.S. Mail)

Followup Comments from the U.S. Bureau of Reclamation's Jan. 31, 2003 Public Scoping Meeting on the San Luis Drainage - Feature Re-evaluation -- Plan Formulation Report, Dec. 2002

Fax No: (916) 978-5114

Jason Phillip, BOR, Project Manager, SLD Feature Re-evaluation

Porgans & Associates (P&A), Inc., has a longstanding (30 year) interest and commitment to resolve the Bureau of Reclamation's (BOR) and its Central Valley Water contractors' self-imposed drainage dilemma. P&A correspondences and participation is a matter of record and are contained in BOR files. As you know, P&A submitted comments to BOR pertinent to its *San Luis Drainage Feature Re-evaluation Plan Formulation Report*, and also attended the Jan. 31, 2003, Public Scoping meeting held at the Mid-Pacific Regional Office. In addition, over the last 30 years, P&A has expended vast sums of its monetary resources and time as a good-faith gesture to work with BOR and other government agencies to reconcile this tax-draining fiasco. It is with all due respect that P&A offers, for the record, the following comments and/or findings.

General Comments/Findings: The preferred alternative and related gibberish^{*} contained in BOR's \$3.4 million San Luis Drainage Feature Re-evaluation Plan Formulation Report, is an affront to the taxpayer and a real threat to the State's public trust resources. Albeit, it is yet another testament to BOR's ability to expend vast amounts of funds, generate voluminous non-substantive reports, re-invent the wheel in a non creative recitative manner, while reaffirming its innate inability to reconcile its monolithic self-imposed drainage dilemma, consistent with BOR induced calamity, which is diametric to natural phenomenon, common sense and/or the public's interest. Land retirement was not considered formally in the alternative scenario and that this is a fatal flaw, land retirement should be equivalent to drainage service and should be considered as a primary alternative. Perhaps BOR by happenstance overlooked the need for a biological assessment component/monitoring is lacking and/or does not appear to be blatantly evident. In this regard USFWS could be called upon as a prime "pitch-hitter" as a "REAL" team player. On the water/money related issues, P&A urges BOR to get in on the ground floor and take the lead to have all water realized from the re-evaluation efforts be taken away from WWD and set aside in a water retirement program. Furthermore, ALL funds derived from said water retirement program should be used for the purpose of retiring the outstanding capital debt of the CVP and/or used for enhancement of public trust resources that BOR et al has been responsible for destroying.

The proposed "plan" of establishing 5000 acre of evaporation ponds is a recipe for a mega environmental catastrophe, which, if carried out, will be the "Father of ALL Kesterson's." The "plan" features concentrating and making more toxic drain water that will be disposed in the evaporation ponds.

The BOR's proposed preferred alterative in its Re-evaluation Plan Formulation Report of an "in-valley" solution is inconsistent with the California State Water Resources Control Board's directive for an "out-of-valley" drain, which had yet to be reconciled. The *San Luis Drainage Feature Re-evaluation Plan Formulation Report*, and its proposals does not take advantage of the recommendations contained in the BOR's \$50 million plus "Rainbow Report."

* Definition of Gibberish: Esoteric; Formulaic; Unintelligible; Foolish talk; etc. Specific Comments Relative to BOR's Conflicting Roles:

FROM :

Re:

Kirk C. Rogers, Regional Director, Mid-Pacific Region Office

Jan, 30 2004 03:35PM P14

2

February 27, 2003

Followup Comments from the U.S. Bureau of Reclamation's Jan. 31, 2003 Public Scoping Meeting on the San Luis Drainage - Feature Re-evaluation -- Plan Formulation Report, Dec. 2002

Attn: Jason Phillip

1. The primary factor obstructing resolution to the self-induced drainage dilemma is attributable to BOR's dual role as water purveyor and "public trustee." The records substantiates the fact that BOR and its contractors are equally responsible for creating, perpetrating and perpetuating the area-wide drainage disaster.

FAX NO.

- 2. It is essentially preposterous to place even the slightest degree of confidence in BOR to effectively reconcile the drainage conundrum, recognizing that its 50-year attempt to implement a cost-effect and environmentally sound solution to its self-induced drainage conundrum has costs the taxpayers hundreds of millions of dollars, countless studies, endless meetings, is replete with absolute failure, incomprehensible destruction to listed and endangered fish and wildlife species, unimaginable catastrophes, and absolutely no sane solution on the distant horizon, with the exception of the yet-to-be created Father of ALL Kesterson's (5000 acres of evaporation ponds). It is egregious that 20 years after the Kesterson Reservoir debacle, BOR has the impudence to suggest to the public a plan to expand the use of evaporation ponds with its in-valley "alternative", assume liability for the treatment of highly toxic agricultural drainage water, burden the U.S. taxpayers with another \$964 million to treat approximately one-half of the contaminated acreage within the Westland Water District (WWD), serviced by BOR's Central Valley Project (CVP).
- 3 As stated during the Jan. 31 Public Scoping meeting, P&A acknowledges that BOR is in a "catch-22" syndrome; albeit, BOR has to be removed from its inherent duality conflict. It would behave the public to request Congressional oversight hearings to reconcile this never-ending taxpayers life support system to "sustain" a tax subsidized water delivery system that is the primary cause for the water quality impairment of 120 miles of the San Joaquin River and the infamous characterization of the San Joaquin Valley as a "More Serious Water Quality Problem - High Vulnerability" area in the United States.'
- 4. It is important to remind the newcomers at BOR (Denver Dream Team) that the initial capital repayment obligations for the BOR's agricultural water contractors (which includes CVP agriculturalists) was \$3.4 billion of which 47 percent was reduced because of their so-called "inability to pay."² Furthermore, the outstanding capital repayment obligation for the BOR agricultural contractors is in excess of \$1.4 billion. It is extremely difficult to make sense out of BOR logic, that in spite of the fact that billions of dollars have and continued to be expended for the capital component of its water projects. BOR's records attest to the fact that in a period of more than 50 years, the CVP agricultural (irrigation) contractors have only repaid approximately \$111 million in capital costs.³ During that period of time, BOR has delivered more than 100 million acre-feet of water to its agricultural contractors. The capital component repayment of \$111 million is equivalent to an average cost of around \$1.00 per acre-foot of delivered water (exclusive of the operation, maintenance and

¹ U.S. Environmental Protection Agency, National Watershed Characterization," *Index of Watershed Indicators* (<u>http://www.epa.gov/surf)</u>, June 30, 1997.

² U.S. General Accounting Office, Report to the Ranking Minority Members, Committee on Resources, House of Representatives, Bureau of Reclamation: *Information on Allocation and Repayment Costs of Constructing Water Projects*, July 1996, p. 3.

³ U.S. Bureau of Reclamation. Central Valley Project, 2003 Irrigation Water Rates, Schedule of FY 2001 Irrigation Results of Operations and Contractors Net Position at September 30, 2001, 2003, p. 8 of 8.

01/30/04 15:51

FAX NO. :

3

February 27, 2003

Kirk C. Rogers, Regional Director, Mid-Pacific Region Office

Re: Followup Comments from the U.S. Bureau of Reclamation's Jan. 31, 2003 Public Scoping Meeting on the San Luis Drainage – Feature Re-evaluation -- Plan Formulation Report, Dec. 2002 Attn: Jason Phillip

- transportation costs.) Please be advised that these numbers are on the conservative side. In fight of those and other factors, it is extremely disconcerting that BOR would have the audacity to burden the taxpayers with an additional \$964 million for drainage cleanup, and, at the same time, want to accept the responsibility for clean-up of the WWD's toxic drainage water! Back during the Kesterson I debacle, attorneys for the Interior Department acknowledged the potential of criminal liability for the destruction of wildlife resources, which appears to have been a factor in the federal government shutting the SLD and cleaning up Kesterson. In the event BOR take "liability" for the 5000 acres of evaporation ponds and the treatment facilities, would it still be liable for destruction of public trust resources?
- 5. P&A's cursory review of the files indicate that BOR's track-record is second to none for the destruction of public trust resources, degradation of the surface and ground waters of the State of California, proliferation of endless and non-effective studies, and continued waste of taxpayers money in order to protect the vested interests of both it and its respective water contractors. P&A could not find one instance in which BOR was held accountable for the death and/or destruction, listing and/or taking of endangered species pertinent to the construction and/or operation of the CVP. Furthermore, BOR had never been cited for violating its water quality standards obligations related to its California State Water Resources Control Board (SWRCB) water right permits, despite the fact that it was involved in over 200 violations and the illegal export and/or impoundment of more than 300 thousand acre-feet of water during the State's 1987-1992 drought. The SWRCB estimated the value of the water at around \$29 million.

Examples:

- A. In the late 1980's and early 1990s, the USBR illegally exported hundreds-of-thousands acre-feet of water from the Delta, in violation of the terms and conditions of its water right permits.⁴ SWRCB's Exhibits 19 and 20, (Summary of Recent Decision 1485 Violations), documented over 200 days of violations between Water-Year 1988 through Water Year 1992. (Refer to Attachments.) The SWRCB's record also states that the USBR and the California Department of Water Resources (DWR), collectively illegally impounded and/or exported approximately 325,000 acre-feet of water during that period, valued at \$29,000,000.00. P&A's fought for three years to have the SWRCB hold that hearing to hold the USBR and DWR accountable for violating the terms and conditions of their respective water right permits. Albeit, the SWRCB held the hearing, documented the water quality violations of their respective water right permits and the illegal water export, but opted not to take an enforcement action against either the USBR or DWR. The records also prove that the governments' illegal water exports contribute greatly to the decline, massive destruction and subsequent listing of certain aquatic species as endangered. Ironically, the USBR was not cited for the destruction and/or "take" of the fisheries, as is normally required by the provisions of the federal Endangered Species Act.
- B. The San Luis Unit of the CVP supplies water to the Westland Water District (WWD). The WWD is the single largest water district in the United States. In the 1980's WWD was the source of the selenium-laden agricultural drainage return flows responsible for the destruction of tens-of-thousands of migratory birds at the Kesterson National Wildlife Refuge. The Kesterson debacle was the subject of a SWRCB hearing/decision (WQ 85-01), that was promulgated not by a government entity, rather via a petition by a private citizen, who

FROM :

⁴ Public Hearing, State Water Resources Control Board, Division of Water rights, Public Hearing, Subject: Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and Suisun Marsh. Nov. 20, 1992.

01/30/04 15:51

FROM

FAX NO. :

February 27, 2003

Kirk C. Rogers, Regional Director, Mid-Pacific Region Office

Followup Comments from the U.S. Bureau of Reclamation's Jan. 31, 2003 Public Scoping Meeting on the San Luis Re: Drainage - Feature Re-evaluation -- Plan Formulation Report, Dec. 2002

Attn: Jason Phillip

oppealed a CVRWQCB decision that essentially attempted to downplay the severity of the government-induced selenium-agricultural drainage catastrophe. Ironically, in the SWRCB's Order No. WQ 85-01 issued a Cleanup and Abatement Order to the USBR for Kesterson Reservoir, a 1,280 acre evaporation facility consisting of 12 ponds, requiring appropriate action to mitigate the any nuisance condition caused by the operation of Kesterson Reservoir. However, with the exception of the Cleanup and Abatement Order, there is no record that the SWRCB cited the USBR for violating water quality standards. Ironically, Kesterson and the San Luis Drain were not shut down by the SWRCB, they were closed by an order from the Secretary of the Interior. The USBR was not held accountable for the deaths of those birds as it was not pursued as a Migratory Bird Treaty Act violation by the USFWS.

- Ĉ. The CVRWQCB reports document the fact that the USBR's routinely pumps highly contaminated toxic waste from the collector sumps (averaging 228 ppb selenium) which is automatically discharged from the sumps into the Delta Mendota Canal (DMC); one sump even exceeded California's hazardous waste threshold for selenium (1,000 ppb). However, according to Dennis Westcott, Eng., CVRWQCB the USBR has not been cited for this ongoing hazardous waste discharge into the DMC, a source of water for the wetlands.
- D. In 2002, an estimated 33,000 fish were killed on the Klamath/Trinity River system (some of which are state/federally listed as threatened species) resulting from a USBR water-related management issue. P&A contacted the USBR to ask if it had been cited for the fish kill. USBR's spokesperson said, no, as no one knows who, if anyone, is at fault.
- E. Water deliveries from the CVP are the primary factor contributing to water quality degradation in the wetland water supply channels, a source of water for the SLNWRC, and exceedences of EPA's 2 ppb selenium water quality standard for the protection of aquatic life, including wildlife refuge water supply, which threatens public trust resources and permitted water right usage. According to the CVRWQCB, the USBR has not been cited for violating the 2 ppb selenium standard/objective promulgated to protect aquatic resources.
- F. Evidence given at the SWRCB's Bay-Delta Water Right hearings also attest to the fact that the USBR/CVP are primarily responsible for the "doubling of salt loads every five years" in the SJV resulting from water deliveries and agricultural drainage.

Conclusion: P&A is requesting Congress to direct the General Accounting Office (GAO) to conduct a review of BOR's activities, conflicting roles and unaccountability for expenditures of billions of taxpayers funds and destruction of public trust resources in relationship to SLD. Lastly, P&A is looking forward to a responsive approach by the BOR-Team; i.e., that the comment herein and the attached "flip chart questions and scoping issues" will be reflective in the record and the "deliverables." Thank you.

Respectfully,

organ)

Patrick Porgans cc: Congressman George Miller **Attachments**

4



RE: REVISED DEADLINES FOR COMMENTS FOR THE PUBLIC REVIEW DRAFT BASIN PLAN AMENDMENT STAFF REPORT AND TECHNICAL TMDL FOR THE SALT AND BORON DISCHARGES INTO THE SAN JOAQUIN RIVER

TO: MR. GROBER

This fax transmission is in response to the CVRWQCB's request for public comments for the "Draft Basin Plan Amendment Staff Report ad Technical TMDL for the Salt and Boron Discharges into the San Joaquin River." As stated during our telephone conversation on Jan. 15, 2004, Porgans & Associates (P&A) had not received the information package sent out by the Regional Board pertaining to this matter. Apparently, P&A were inadvertently dropped from the mailing list. Needless to say, the late notification will severely limit our comments, as time does not permit us to do so. Albeit, the record will support the fact that P&A has been actively involved in the agricultural drainage/runoff, water quality impairment, and salt banking and loading in the valley and the related impacts to the trust resources of the State. (Please refer to Attachments and Refer to CVRWQCB and SWRCB files,)

Porgans & Associates General Comments to the List of Issues Contained in CVRWQCB's Staff Report:

1. TMDL should propose water quality objectives upstream of Vernalis

Initial Response: Not just establish, but enforced. How about enforcing the existing standard already in place downstream of Vernalis.

2. Use of New Melones Reservoir for dilution is unreasonable use of water

Initial Response: Use of the public's water to irrigate lands without adequate drainage facilities and/or with known drainage problems should be the focus of what constitutes unreasonable use of water; however, this is an issue that P&A has repeatedly petitioned the State to deal with, but to no avail.

4. TMDL should consider groundwater control

Initial Response: Concur. We will provide specific comment in the future.

6. Technical basis is not sound (source analysis, models, etc.)

Initial Response: The record indicates that ALL of the "responsible contributors to the SJR self-imposed drainage dilemma have had decades to resolve all of the technical and related issues of concern. Simply stated, they willfully

FAX NO. :

neglected to obtain the needed technical information, and focused more on how to justify the irrigation of lands that are not sustainable.

7. Proposed implementation lacks specificity

Initial Response: This tactic should not come as a revelation to any party remotely familiar with the CVRWQCB's and the drainers' modus operandi. In fact, it is consistent with their creation of a crisis syndrome and then an at "ground zero" attempt to assuage the public into believing that they are finally going to "manage" the self-imposed crisis.

8. Options identified for implementing U.S. Bureau of Reclamation's load allocations are inappropriate

Initial Response: P&A concurs. We will provide additional comments at a future date. [Refer to attached letters.]

9. Timeline for implementation is unreasonable

Initial Response: The "ballpark" timeline which Mr. Grober alluded to, during our telephone conversation, is conservatively between eight (8) and twenty 20 years to meet the load limits — REALLY!!! In light of the fact that California acknowledges that it has and had a drainage problem in the SJV in the 1890, which was repeatedly referred to prior to and subsequent to the development of the State's two major water projects; i.e., the federal Central Valley Project and the State Water Project. The only thing that may be unreasonable about the timeline is that it is several decades behind schedule, the loads got beep on doubling every five years. The deplorable condition of the SJR is the direct result of the CVRWQCB and the State Water Resources Control Board blatant failure to fulfill their respective "public trust duties" to protect the waters of the State. Instead they chose to serve the political vested interest – major agricultural consortium who rule the valley.

10. Timely Completion of TMDLs

Initial Response: At this point timely completion is not possible in my life time.

Staff Report - Item 20 on page 10:

Delayed adoption of this and other TMDLs could put the Regional Board at risk of losing funds that support TMDL development. TMDLs, when developed and adopted, fulfill the State's obligation to implement the Clean Water Act; completion also facilitates the improvement of water quality in waters of the State. Use of federal money to develop TMDLs therefore assist the State in protecting water quality.

Lack of information, uncertainty, and partial solutions are not adequate justification for delaying completion and adoption of TMDLs. The Clean Water Act requires that TMDLs be developed with the best information available and that they can be phased, if necessary.¹

Initial Response: Now, that there is a potential threat of the CVRWQCB losing Clean Water Act funding, the Regional Board contends that there is no more room for time delays, with the exception of the eight to twenty years.

Please enter P&A comments into the record, and keep us apprized as this "process" continues. Thank you.

Respectfully, Patrick Porgans PP:sp fnl: 1 Cvrwqcb/basinplan/FAX2004

Attachments

¹CVRWQCB's Proposed Amendment to the Sacramento River and San Joaquin River Water Quality Control Plan for the Control of Salt and Boron Discharges into the San Joaquin River – A Continuation of the Dec 2003 Workshop.



SWRCB WATER RIGHTS HEARING - PHASE II: CLOSING ARGUMENT

August 4, 1998

fnl: 🖫1🖬 swrcb.p2.closing argument

Porgans & Associates (P&A) would like to compliment the San Joaquin River Group (SJRG) for the extensive amount of testimony and the collective contribution of the government/and private consultants during Phase II of the hearing process. However, in light of the testimony presented by the proponents of the SJRG agreement, we must recognize the fact that the data relative to the "agreement" is somewhat speculative, inconclusive and extremely limited. The evidence, on the face of it, does not provide a strong enough argument to warrant further consideration and/or approval of the agreement by this board.

8 For the record, I must reiterate that P&A takes strong exception to the board's decision to separate 9 the water quality and water quality issues into two separate phase of the hearing process, such an 10 action is incongruent. My concern relative to the separation of those two critical issues, was affirmed 11 during my cross examination of the fisheries experts when they conceded that water quality and 12 quantity are inextricably linked for fish survival and sustainability. Separating the two issues 13 preempted the introduction of meaningful evidence, upon which the board could make an unbiased 14 and impartial decision relative to the agreement.

In any action that this board takes relative to the SJR it is essential that it keeps in mind that
 according to EPA's data, the SJV is the single largest contiguous "More Serious Water quality Problem - High vulnerability" area in the nation, predominately due to agricultural drainage. (Source:
 U.S. Environmental Protection Agency's Index of Watershed Indicators, 1997.)

In addition, the "experts" conceded to the fact that the experimental design for Vernalis Adaptive 19 Management Program (VAMP) was based upon limited data. More important, the record will attest 20 21 to the fact the proponents also conceded that the agreement cannot guarantee compliance with the 1995 Water Quality Control Plan and/or the doubling of the fish populations. Furthermore doubts have 22 been raised regarding the procurement of all of the funds required for the experiment, and regarding 23 certain risk associated with funding the VAMP/agreement. According to David Kennedy, director of 24 the California Department of Water Resources, a portion of the funds for VAMP would come from the 25 State's General Fund. State funding could amount to approximately \$12 million. 26

The agreement amounts to a 12 year experiment. Further, no one could explain with any degree of specificity as to why that specific period of time was selected. Coincidentally, it is interesting to note that the most recently approved Basin Plan Amendment, adopted by the CVRWQCB has a compliance date for specific toxic trace elements from agricultural discharge [i.e., selenium, molybdenum, boron, etc.,] for the year 2010, for the San Joaquin River (SJR).

SWRCB WATER RIGHTS HEARING - PHASE II: CLOSING ARGUMENT

August 4, 1998

fnl: 🗟1🖬 swrcb.p2.closing argument

Government reports reveal that selenium is especially toxic to fish; nevertheless, the selenium loads allowed to be discharged into the SJR, as contained in the Basin Plan, are 252 percent higher than the 5ppb standard allows.¹ CVRWQCB data also reveal that the 5ppb standard has been consistently violated over the last several years. Between 1986 and 1994 approximately 85,500 pounds of selenium was discharged into the SJR. In relative terms, there was only about 17,400 lbs. of selenium discharged into Kesterson between 1981-85, before it was order closed because of destruction of public trust resources (fish and wildlife).

8 With current selenium loads averaging between 10,000 and 12,000 lbs., being discharged into the 9 river annually, upstream from Vernalis, which exceeds the 5ppb water quality limit routinely, neither 10 the DFG nor the USFWS quantified or qualified the bioaccumulation of selenium in the food chain, 11 which the salmon depend on for survival and/or mortality rates.

The fishery's "experts" conceded that the availability of the 110,000 acre-feet of water is an essential
component of the program; however, there is no guarantee that water will be available when needed.
Coincidentally, the majority of the 110,000 acre-feet of flow will be released during the same period
when selenium discharges are highest into the SJR.

Since water deliveries from government water projects were initiated, as early as 1951, the SJR has experienced serious water quality degradation. Nevertheless, during the last 40 years neither the USFWS nor the DFG has quantified and/or qualified the relative impacts of water exports, deliveries and agricultural return flows on salmon populations, habitat and/or the food chain which they are dependent upon for survival in the SJR.

Although the WQ standard for the protection of aquatic life in the river, as promulgated by EPA in 1992 is 5ppb for the SJR from Sack Dam to Vernalis, the CVRWQCB's data reveals that the standard has been consistently violated in recent years - in some years 11 months has classified as out of 12 months. Furthermore, the CVRWQCB has already designated the entire 130 miles from Sack Dam to Vernalis on the SJR as a water quality-limited segment.

While the agreement makes reference to this 12-year experimental period, it also states that it can essentially be terminated at any time. The agreement states that if for any reason the SJRG fails to provide the 110,000 acre-feet, that the state and federal governments would serve as a backstop. This agreement is in the interest of the water purveyors, and no other entity should be required to provide water in the event this contact is terminated.

Joe Karkoski, Central Valley Regional Water Quality Control Board, A Total Maximum Monthly Load Model for the San Joaquin River, Letter to Interested Parties, 1994. [The information in that report makes the following statement relative to the 252 percent number. "Recognition of seasonal and year type variations in assimilative capacity increases the allowable discharge by 100 percent. Changing the averaging period from four-days to monthly mean increases the allowable load by 24% to 32%. Changing the allowable frequencies of violation from once in every three years to once every five months increases the allowable load by 60% to 120%."]

FROM

FROM :

FAX NO. :

SWRCB WATER RIGHTS HEARING - PHASE II: CLOSING ARGUMENT

August 4, 1998

fnl: 11 swrcb.p2.closing argument

Furthermore, there are no assurances that either DWR or the Bureau of Reclamation (Bureau) would actually provide this amount of water during a critically dry year. I am certain that the board recalls 2 that during the last "drought" both the DWR and the Bureau failed to provide water to meet the terms 3 and condition of their respective water right permits as required by D-1422 and D-1485. At that 4 particular time the Delta was on the verge of an ecological collapse, partially due to the water exports 5 by these agencies. At one point, during that period, the Bureau notified the Board in writing that it had 6 no intention of meeting the Vernalis standard. Based upon the record there are absolutely no 7 assurances that the government or the group is going to be held accountable if either fail to meet the 8 9 flow requirements contained in the agreement.

At best this agreement is a token gesture by those agricultural drainers and water users to buy off on
 their real responsibility relative to using the public's water in a manner consistent with the reasonable
 use provisions of the law, and usurping meaningful action to remedy the deplorable condition of both
 the SJR and the aquatic resources which are dependent upon it for survival and sustainability.

Although it is evident that P&A is concerned about the inherent shortcomings of the agreement, we are even more concerned about the potential adverse ramifications of the agreement which are not explicitly stated therein, i.e., the parties to the agreement's avoiding accepting fault, and/or impairment of their representation water/agents at right.

17 of their respective water/contract rights.

Protection of the river and the aquatic life it sustains is the issue of paramount importance; however,
 this is an issue that is consistently avoided, and the existing condition of the river and its resources
 are indicative of that fact.

21 It is imperative that the board, the water users, and the agricultural drainers cease from fragmenting
 22 the issues. This fragmentation benefits the water users, at the expense of the general public and is
 23 to the demise of their respective public trust resources.

Taking all of those factors into account, and acknowledging that the water users/drainers have had decades to reconcile those factors contributing to the demise of the SJR and its resources, and all of the uncertainties associated with the agreement/model, it would be an injustice for the board to sanction this agreement.

28 In conclusion, I offer the following comment, which is not meant to be derogatory nor offensive to any

29 of the participants. This agreement comes down to some dollars for water, with somebody else paying

30 the bill.

3



NATURAL RESOURCES DEFENSE COUNCIL

January 30, 2004

Steve Fagundes Chief, NPS Program Plan Implementation Division of Water Quality State Water Resources Control Board P.O. Box 100 Sacramento, CA 95812-0100

VIA E-Mail (FAGUS@dwq.swrcb.ca.gov)

Re: Comments on the "Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program

Dear Mr. Fagundes:

On behalf of the Natural Resources Defense Council and its over 110,000 California members, we write now to comment on the draft implementation policy for nonpoint source pollution control.

In general, should the Board move in the direction spelled out in the draft policy, we concur in the specific comments made by the Ocean Conservancy regarding the five elements of a third party program. However, we have a basic concern about whether it is advisable for the Board to do so. By creating a new bureaucratic interface between the Board and the Regional Boards, on the one hand, and dischargers, on the other, it is not at all clear that efficiency and pollution reduction will be the result. At minimum, it is not self-evident that the time and effort Regional Board staff will be required to spend managing third party discharger groups will increase efficiency. There are many examples presently throughout California where discharger coalitions take on the role of well-funded adversaries to the policies of the State of California, not facilitators of environmental performance. Moreover, whether intentional or not, merely being able to contract away pollution reduction responsibility may not lead to better practices in the field. In fact, it may tend to distance the discharger from the specific practices necessary to reduce nonpoint source pollution. In all of these ways, the policy appears to "leap without looking" by endorsing and regularizing approaches that are not supported by empirical evidence. The policy does not appear to be based on experience-or, if it is, that experience is not well documented or described in the policy.

Moreover, we are very concerned that the policy tends to reify a flawed—and illegal—"tiered" approach to reducing nonpoint source pollution. California's Porter-

www.nrdc.org

1314 Second Street Santa Monica, CA 90401 TEL 310 434-2300 FAX 310 434-2399 Mr. Steve Fagundes State Water Resources Control Board January 30, 2004 Page 2

Cologne Act does not contain any blanket regulatory exemption for nonpoint source pollution. Yet the "tiered" approach implicitly does. Recent legislative changes contained in SB 923 have further delimited the situations in which waivers of waste discharge requirements can be issued. Yet, the draft policy is predicated on the assumption that the "tiered" approach is lawful, particularly its non-regulatory aspects. The draft policy provides that its five third-party conditions apply to non-regulatory and entirely voluntary efforts to control discharges of nonpoint pollution. On what basis can third party agreements implement non-regulatory approaches to pollution reduction when all discharges are, absent a waiver drawn in accord with SB 923, subject to waste discharge requirements?

In these ways, while the draft policy focuses on third party agreements, it could and should focus on making the State's approach to reducing nonpoint source pollution consistent with the Porter-Cologne Act (as well as the Clean Water Act). We believe the draft policy should address this important issue, which remains the proverbial "elephant in the room." By not addressing this issue, the draft policy regularizes and facilitates non-regulatory pollution reduction approaches that have so far totally failed to improve water quality and, further, are inconsistent with the plain requirements of the Porter-Cologne Act.

Thank you for the opportunity to comment on the draft proposal. If you have any questions, do not hesitate to contact me at 310-434-2300.

Sincerely,

David S. Beckman Senior Attorney

Advocates for Wild, Healthy Oceans

Pacific Regional Office 116 New Montgomery St. Suite 810 San Francisco, CA 94105 Formerly the Center for Marine Conservation

415.979.0900 Telephone 415.979.0901 Facsimile www.oceanconservancy.org

January 30, 2004

Steve Fagundes Chief, NPS Program Plan Implementation Division of Water Quality State Water Resources Control Board P.O. Box 100 Sacramento, CA 95812-0100



VIA EMAIL: FAGUS@dwq.swrcb.ca.gov

Re: Comments on the "Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (SWRCB Workshop, Jan. 27, 2004, Item 8).

Dear Mr. Fagundes:

Thank you for the opportunity to review and provide comments on the "Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (Draft Policy). As you know, we have closely followed and been involved with California's efforts on the Nonpoint Source Pollution Control Program since 1994, and have great interest in its implementation. We appreciate the substantial amount of time and effort that you and your staff have put into developing the Draft Policy.

1. <u>Porter-Cologne Mandates Administrative Controls on Polluted Runoff Equivalent</u> to Point Source Pollution.

We would like to emphasize at the outset that the Draft Policy, as called for by Section 13369, arises from the federal nonpoint control programs under the Clean Water Act and CZARA, and that (as acknowledged by the Policy) the state process for regulating polluted runoff arises from Water Code §§ 13260 *et seq*. The Policy in Section II.C. correctly describes Porter-Cologne's mandate for controlling polluted runoff; namely, through waste discharge requirements unless those requirements are specifically waived. This mandate is reemphasized in Section III, page A-11, which states that management practice implementation "may not be substituted for actual compliance with water quality requirements," and in Section IV.E., which states that "dischargers are always under one of the administrative tools" (*i.e.*, waivers, WDRs, or discharge prohibitions). Accordingly, we believe that the Draft Policy misstates Porter-Cologne's mandate in Section 3, page A-10, in stating that "[r]egulation of nonpoint sources of pollution is much less prescriptive than point sources." To be consistent and avoid confusion, we ask that this be corrected to read that regulation "has been to date" less prescriptive than for
DRAFT

point sources. We also urge the Board to specifically add a statement minimizing the use of management options 1 and 2 (Section IV.E.) to low-threat discharges; the harm documented to occur from most polluted runoff discharges does not support the use of anything less than management option 3 in most cases.

2. <u>Third Party Programs Should Be Applied Cautiously and in Conformance with</u> <u>Porter-Cologne's Mandates.</u>

Though we appreciate the effort to uniformly apply standards for third-party programs, we do have some concerns about the Draft Policy's apparently heavy reliance on third-party programs to do the "legwork" of implementation and enforcement. Third-party programs are defined broadly as: "programs that neither the SWRCB nor a RWQCB has developed."¹ This can include programs administered by individual dischargers, groups of dischargers, agencies other than the SWRCB or RWQCBs, or any combination of these. Any time the Boards work in partnership with third parties on the implementation of key regulatory responsibilities, the potential exists for a loss of uniformity and relaxing of standards. Although the State Board may choose to share some of its responsibilities, it retains an independent obligation to protect water quality in the state.² The uniform application of the "five key elements" to third-party plans ideally will help ensure that the State Board meets this obligation in those instances where it turns to third parties for implementation assistance and partnerships.

3. <u>All Third-Party Programs Should Demonstrate a High, Not "Reasonable,"</u> <u>Likelihood of Success and Should Contain the Five Key Elements.</u>

The success or failure of third party programs will either further or inhibit the regional boards' ability to meet their own obligations to manage and protect water quality.³ Similarly, success or failure of these programs could either conserve regional board resources or waste them. Efficiency and good governance principles therefore dictate that the regional boards should consistently require a demonstration of a high level of certainty that a program will achieve objectives. Consequently, we disagree with the Draft Policy that only a "reasonable likelihood" of compliance is necessary, and ask that that language be strengthened.

We support the Draft Policy's mandate that all third-party programs be consistent with "Five Key Elements." The application of uniform standards to any programs not solely implemented by the State Board or regional boards will ensure that the boards properly retain their ultimate authority over and responsibility for protecting the health of our waters. We have some specific comments on these elements, as detailed below.

Key Element 1

Federal mandates related to the control of polluted runoff require the state to: (1) control nonpoint sources of pollution; (2) by using best management practices; (3) as quickly as

¹ State Water Resources Control Board, "Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (December 8, 2003) (Draft Policy), at A-12.

² California Water Code § 13000 *et seq*.

³ *Id*.

possible; (4) in order to provide for the attainment of water quality standards and beneficial uses. CWA Section 319 is clear about the goals of a nonpoint source management program; such a program will "control[] pollution added from nonpoint sources to the navigable waters of the state,"⁴ and "provide for utilization of best management practices at the earliest possible date."⁵ CZARA, similarly, is clear about the goals of a nonpoint source management program; such a program must be designed to "achieve and maintain applicable water quality standards under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313) and protect designated uses."⁶ EPA's "Nine Key Elements of an Effective State Program" are similarly clear: such a program must be "designed to achieve and maintain beneficial uses of water."⁷

The goals and objectives of implementation programs, whether administered by the SWRCB, RWQCBs or third-parties, should reflect these federal goals and objectives as well as the requirements of Porter-Cologne, which directly regulates nonpoint source pollution. To accomplish this, the Draft Policy should explicitly require plans – especially third-party plans over which SWRCB has less day-to-day control – to include the goals articulated above. particularly with respect to achieving and maintaining water quality standards expeditiously. Key Element 1 properly requires programs to be specific about their goals and objectives, and to demonstrate a relationship between these objectives and the planned actions, including any required Management Practices (MPs).

We also support the recommendation that that third-party programs "should identify" their participants, but urge the State Board to modify this recommendation into a requirement. As the Draft Policy states, this information is essential if the regional boards are to "ensure that all of the significant sources of the NPS discharges of concern are addressed."

Key Element 2

The Draft Policy requires that third-party programs demonstrate "a reasonable likelihood that the program will attain water quality requirements." However, it is unclear what is meant by "a reasonable likelihood." To comply with Porter-Cologne, the Draft Policy must create a more specific - and higher - standard for identifying when the selected MPs will be considered adequate to meet water quality requirements. Program proponents should be required to document, for example, that a particular MP has been previously used successfully to implement a particular water quality objective. If an MP has never been used previously to implement a particular water quality objective, the project proponents should be required to document and substantiate, at a minimum, the reasons that they believe the MP would be adequate for this purpose. Similarly, the Draft Plan should contain more specific standards for assessing whether implementation of MPs is proceeding properly.

⁴ 33 U.S.C. § 1329(b)(1). ⁵ *Id.* at § 1329(b)(2)(D).

⁶ 16 U.S.C. § 1455b(b)(3).

⁷ United States Environmental Protection Agency, "Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years" (May 1996), available at http://www.epa.gov/OWOW/NPS/guide.html.

Key Element 3

The NOAA/EPA joint Coastal Nonpoint Program Development and Approval Guidance requires that the State NPS program "[i]nclude a schedule for each nonpoint source category or subcategory with milestones for achieving full implementation of the management measures within three years"⁸ Furthermore, the guidance provides that "[t]he state coastal nonpoint program should include milestones established at appropriate intervals within the implementation period, by which progress toward full implementation can be assessed "9 Finally, the California Legislature has repeatedly demanded that the state prepare detailed objectives and milestones for this program.¹⁰ These requirements reflect the fact that a plan to ensure implementation of the management measures would be deficient without clear timetables for completion of activities.

The third-party implementation programs should be required to reflect these principles, and Key Element 3 provides such a requirement. We are concerned, however, about the requirement that the schedule not be longer than what is "reasonably necessary" to achieve program objectives. This does not provide incentive for the programs to work expeditiously to achieve and maintain water quality standards. The Draft Policy should, instead, require that Programs be designed to meet their objectives by some expeditious date specified by the SWRCB, and a process (including enforcement expectations) to ensure the deadline is met.

Key Element 4

As noted above, the Boards' own obligations to ensure achievement of water quality protection make it essential that they scrutinize the effectiveness of third-party programs on an ongoing basis and correct any deficiencies. The public, similarly, should have the tools necessary to review third-party program effectiveness. It is axiomatic that the degree of success or failure of a NPS implementation plan is unknowable in the absence of adequate monitoring. The monitoring and other provisions of Key Element 4 should be specific enough to ensure that third-party programs will be reviewable on an ongoing basis. To ensure the public's review is adequate, we agree that all monitoring programs should provide a permanent, documented record that is available to the public.

Key Element 5

This provision would require that RWOCBs clearly state the consequences for a program's failure to meet its objectives. Although we appreciate the intent of this provision. we believe that it should be more specific. Programs should contain more than a general description of the RWQCB's course of action if monitoring shows that the program is failing to meet its objectives. For example, the Policy should provide for the resumption of primary authority to implement NPS Program by the RWQCB, as appropriate. In addition, we disagree with the provision of the Draft Policy that states that this element is "not binding on the RWQCB."

⁸ National Oceanic and Atmospheric Administration and Environmental Protection Agency, "Coastal Nonpoint Program Development and Approval Guidance" (January 1993) (hereinafter NOAA/EPA Guidance) at 17. ⁹ *Id.* at 36.

¹⁰ SB 499 (1997) and SB 1453 (1998) (Alpert).

Without a mandate that a RWQCB actually follow the course of enforcement action it lays out at the commencement of a third-party program, this element is without substance. The Regional Boards should be required to take action when third-party programs are failing.

4. <u>The Draft Policy Should Clearly Address the Severe Limitations of Certain</u> <u>Management Options.</u>

As discussed above, we have significant concerns about the effectiveness of the "non-regulatory management" management option #1 and the "regulatory-based incentives" management option #2, and urge the Board to add a statement that these should apply only to documented low-threat discharges. Where non-regulatory approaches have been applied but failed to either implement MPs or attain water quality objectives within a relatively short time frame, the Draft Policy should clearly require the RWQCBs to adopt an alternative management option or options and/or conduct enforcement actions. In addition, the Policy should state clearly that the RWQCBs <u>must</u> adopt waste discharge requirements when required to do so by law (*e.g.*, when a waiver is not in the public interest).

5. <u>The Draft Policy Should Specify That Third-Party Programs Administered By</u> <u>Other Agencies Will Be Terminated if Water Quality Objectives Are Not Met.</u>

Monitoring and enforcement are indispensable elements of an effective third-party implementation program. The Draft Policy's provisions on these elements require that third-party programs be accompanied by an explanation of the consequences of noncompliance, and an endorsement of the SWRCB's progressive enforcement policy. We support these provisions, although, as stated above, enforcement should clearly be an <u>obligation</u> of the RWQCBs, rather than an "objective."

In addition, the Draft Policy does not specify a course of action for RWQCBs and the SWRCB to take when a third-party program administered by another agency fails to meet its objectives. The policy states that "[w]hile RWQCBs cannot directly enforce another agency's requirements against a discharger who is out of compliance, the RWQCB can ask the agency to enforce its own requirements."¹¹ Implicit in this provision is that the agency administering the program is not enforcing its requirements in the first place, and may not be inclined to comply when enforcement is requested by a RWQCB. This is not just a hypothetical problem – significant water quality problems have arisen as a result of delegated agencies' failures to properly administer their programs.¹² The Draft Policy should deal explicitly with this issue, and provide that when agencies are failing to properly administer their water quality obligations under an MAA, MOU or informal agreement, then the MAA, MOU, or informal agreement will be terminated.

¹¹ Draft Policy at A-13.

¹² See, e.g. California Senate Office of Research, Timber Harvesting and Water Quality: Forest Practice Rules Fail to Adequately Address Water Quality and Endangered Species (December 2002) at 10.

6. <u>The Board Should Seek Additional Resources to Administer a Proper and Timely</u> <u>Program.</u>

The Draft Policy states that "the need for resources" – together with other factors – could give rise to significant delays in approval of third-party programs. Lack of resources has, of late, become the justification-of-choice for any decision on the part of the Boards to delay or forgo action. While we appreciate the impact of limited resources, we respectfully recommend a more proactive approach.

There are a number of processes by which the Boards could seek to add or reassign staff to its NPS implementation program, a program that is mandated under existing law and is required to meet an immediate and urgent threat to public health and safety. Under Executive Order S-3-03, hires with appropriate experience could be assigned to the program with a successful DF-160 application to the Department of Finance pursuant to Budget Letter 03-42. This exemption application form may not even be necessary, however, if the intradepartmental transfer "does not increase General Fund costs or the costs of a fund that is either transferable to the General Fund or is not solvent."¹³ That could be the case where, for example, experienced staff in vulnerable positions currently funded with General Fund monies are reassigned to the program. The Boards can also budget for new positions as part future budgets.

The Boards can and must work with the Legislature to ensure that their budget contains a reasonable number of needed staff, funded by fees, and work with the Administration to ensure its approval. SB 923 permits – and Executive Order S-3-03 does not prevent – the Boards from using fees to staff this essential and legislatively mandated program. Processes exist to ensure that the needed staff is there; the Board should ensure that these processes are fully and appropriately utilized.

* * *

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to call. Thank you.

Sincerely,

2mole Struck

Linda Sheehan Director, Pacific Regional Office

¹³ See www.dof.ca.gov/html/budlettr/budlets.htm.



February 3, 2004

Art Baggett Chairman State Water Resources Control Board 1001 I Street Sacramento, CA 95814

RE: Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program

Dear Chairman Baggett and Board Members:

The Sacramento Valley Water Quality Coalition¹ has reviewed the State Water Resources Control Board's (SWRCB) December 8, 2003 proposed Policy for Implementation and Enforcement of the Nonpoint Source (NPS) Pollution Control Program (Policy). The Policy articulates two important themes that deserve further attention by the SWRCB and the Regional Water Quality Control Boards when developing and implementing its water quality programs.

The important historical and practical distinction between regulating point source and nonpoint source pollution.

• The unique role that regional and local watershed programs serve in managing nonpoint source pollution in a rural, working landscape.

As a reminder of the distinction between point and nonpoint sources, we first summarize the legislative and regulatory evolution of nonpoint source pollution control. This will be followed by our comments on the proposed Policy, including an articulation of management practice programs the Coalition will implement consistent with the Third-Party Program outlined in the Policy. We strongly encourage the Board to address nonpoint source pollution through the appropriate management measures, not an end-of-pipe regulatory program that does not serve Central Valley agriculture.

THE SWRCB SHOULD RECOGNIZE THE DIFFERENCE BETWEEN POINT SOURCE AND NON-POINT SOURCE POLLUTION AND ASSURE THAT THE REGULATORY FRAMEWORK REFLECTS THESE DIFFERENCES

The federal Clean Water Act and the Porter-Cologne Water Quality Control Act recognize the important practical differences between point and nonpoint sources, and further recognize that a different regulatory framework is necessary for nonpoint sources.

The Coalition's Membership can be seen at www.norcalwater.org.

State Water Resources Control Board Letter February 3, 2004 Page 2 of 3

In 1972, Congress defined point source pollution in the Clean Water Act as that which comes from a discrete conveyance and noted that all other sources that did not fit such a definition were considered nonpoint sources. At the same time, Congress asked the Environmental Protection Agency to adopt guidance regarding nonpoint source control and required states to develop waste treatment management plans. This distinction was critical from the regulatory perspective, as the Federal government took the responsibility to regulate point sources through the National Pollution Discharge Elimination System Program and reserved regulation of nonpoint sources to the State and local governments through adoption of area-wide management plans as prescribed in Section 208 of the Clean Water Act. While agricultural return flows were initially treated as point sources, Congress exempted these sources from the NPDES requirements and subjected them to regulation under Section 208. Section 208 focused on issue identification, initial planning measures and voluntary programs to manage nonpoint sources.

In 1987, Congress amended the Clean Water Act to more aggressively address nonpoint sources by adding Section 319 thereby requiring states to develop nonpoint source management programs, including identification and implementation of best management practices to control nonpoint source pollution. Section 319 clearly acknowledged the complexity of controlling nonpoint source pollution and qualified the requirement to identify and implement management practices by stating that they be selected to reduce pollution to the "maximum extent practicable." EPA has provided guidance documents regarding structural and managerial measures States may utilize in their nonpoint source programs.

The SWRCB has adopted a Nonpoint Source Program consistent with Section 319. The SWRCB must now implement a Conditional Waiver Program for Agricultural Discharges (Conditional Waiver) in a manner that respects these policies and programs. Also, the Boards should adhere to the nonpoint source regulatory framework envisioned by Congress and developed by the SWRCB when addressing Total Maximum Daily Loads and Toxic Hot Spots. Each of these programs can be managed to accommodate the rural landscape and the unique nature of nonpoint source runoff from irrigated lands throughout the Central Valley.

THE POLICY SERVES AS A FRAMEWORK TO ADDRESS NON-POINT SOURCES, INCLUDING RUNOFF FROM AGRICULTURAL LANDS AND MANAGED WETLANDS

With this background in mind, we believe the Third-Party Program advanced in this Policy is a reasonable management option for implementing and enforcing your Nonpoint Source Program. Also, the Third-Party Program appears to be consistent with the three-tier regulatory program outlined in California Water Code § 13369. Each of these management options is appropriately designed for administering a complex nonpoint source program in a rural, working landscape. The SWRCB and RWQCB's consistent adherence to this framework for administration of the Conditional Waiver will provide the most effective means for the agricultural community and managed wetlands operators to ensure the selection, implementation and evaluation of management practices designed to continually improve water quality throughout California's Central Valley.

With respect to the Policy, the "Third-Party" Program advanced by the Sacramento Valley Water Quality Coalition will focus on the management practices that are necessary to improve and enhance water quality in the Sacramento River Basin. State Water Resources Control Board Letter February 3, 2004 Page 3 of 3

The Coalition's Regional Plan includes each of the five key elements specified in the Policy.

1) <u>Explicit Purpose</u>: The Coalition is committed to working with farmers to ensure implementation of management practices designed to protect beneficial use designations in waterbodies throughout the Sacramento River Basin.

2) Describe Management Practices; Develop a Process to Select Management Practices; Ensure Proper Management Practice Implementation: The Coalition is working with existing organizations, including County Agricultural Commissioners, farm advisors at University of California Cooperative Extension, the National Resource Conservation Service, Resource Conservation Districts and Pest Control Advisors to develop an inventory of management practices. As part of the Watershed Evaluation Report, representatives from each of these organizations are advising the Coalition on the development of an Implementation Plan to engage and mobilize farmers to implement management practices consistent with monitoring results. The Coalition is also developing a long-term management practice evaluation system in an attempt to test effectiveness on a regional scale.

3) <u>Timeline</u>: The Coalition has already submitted a Notice of Intent on behalf of growers throughout the Sacramento River Basin indicating the Coalition's intent to provide them coverage and has received approval (Notice of Applicability) for this. The Coalition is prepared to meet the timelines specified in the Regional Board's Conditional Waiver, including the submission of a Watershed Setting and Monitoring and Reporting Program by April 1, 2004, implementation of a monitoring program by July 1, 2004 and submission of an Annual Report on April 1, 2005. Also, the Coalition will advance an Implementation Plan with rational timelines for monitoring, implementation and modification of management practices.

4) <u>Feedback Mechanisms</u>: The Implementation Plan will allow the Coalition to track the impact of management practices on water quality. This Plan will require close collaboration with professional organizations focused on farm management issues to closely monitor, and modify as appropriate, implementation of management practices. These actions will be documented by the Coalition in an Annual Report to the Regional Board each year beginning on April 1, 2005.

5) <u>Consequences</u>: The Coalition is prepared to implement a reasonable water quality management program on behalf of farmers throughout the Sacramento River Basin and is communicating clearly with farmers regarding the potential consequences for individual farmers if the program is ineffective.

We have seen numerous examples over the past several years where the Boards have tried to simplify the complex efforts necessary to address nonpoint sources in rural California by reverting to the same tools the Board has used to regulate point sources. The Board's endorsement of the Coalition's watershed program is a significant step towards addressing this complex problem.

Sincerely,

Jal / Gr

David J. Guy Executive Director Northern California Water Association

Mark E. Biddlecomb Director of Conservation Programs Ducks Unlimited

MEMBERS JIM BATTIN VICE CHAIR SAM AANESTAD ROY ASHBURN DEBRA BOWEN JOHN BURTON MAIRTHA ESCUTIA ROSS JOHNSON BETTY KARNETTE MIKE MACHADO KEWIN MURRAY CHARLES POOCHIGIAN JACKE SPEIER



California State Senate

COMMITTEE ON APPROPRIATIONS

STATE CAPITOL, ROOM 2206 SACRAMENTO, CALIFORNIA 95814 (916) 445-3284

DEDE ALPERT



EXECUTIVE OFFICE

STAFF DIRECTOR

DEPUTY DIRECTOR

ANNE MAITLAND

CONSULTANTS

MAUREEN BROOKS

February 10, 2004

Arthur G. Baggett, Chair State Water Resources Control Board P.O. Box 100 Sacramento, CA 95812-0100

٩

Re: Comments on the "Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (SWRCB Workshop, Jan. 27, 2004, Item 8)

Dear Mr. Baggett:

Thank you for the opportunity to review and provide comments on the "Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (Draft Policy). I have a significant interest in the board's development of a policy to control nonpoint source pollution as the author of SB 227, which directed the State Water Board to develop this guidance consistent with federal nonpoint pollution programs. I also authored SB 390, which sunset as of January 1, 2003, all existing waivers of waste discharge requirements issued under Porter-Cologne and which mandated five-year reviews of new waivers.

SB 227's requirement to develop the Draft Policy arose from the lack of clearly articulated, enforceable mechanisms for controlling nonpoint pollution, which were required under the Clean Water Act and CZARA in order to obtain federal funds. My intent (later illustrated by my authorship of SB 390) was to move the state forward in complying fully with the federal programs, which at the time were the only source of funding for polluted runoff controls generally, and in controlling polluted runoff. The language in Water Code Sec. 13369(a)(2)(A) with regard to the components of the required enforcement guidance must be read in the context of its source; that is, it arose from the federal nonpoint programs under Section 319 and CZARA.

There should be no confusion about this: Porter-Cologne, as articulated elsewhere in the Draft Policy, is <u>the</u> process for regulating polluted runoff in California. SB 227 does not touch on the process for issuing waivers and waste discharge requirements (WDRs) under Porter-Cologne; rather, SB 227 focuses on implementation of federal programs,

1

which, in light of developments prompted by SB 390 in the intervening years, have become far less relevant to the control of polluted runoff in this state.

I recommend that this Draft Policy – which, it must be acknowledged, is being released three years after its mandated due date – be used now as an opportunity to address the dichotomy between the state's polluted runoff efforts pursuant to Porter-Cologne and pursuant to Section 319/CZARA. If the board plans to continue with the federally-derived effort, it should be explicit about the limitations of the federal "tiers" in the context of Porter-Cologne's waiver/WDR mandate.

In particular, the first "tier" refers to "[n]onregulatory implementation of best management practices." This provision, which arose out of the federal programs, is consistent with federal law because federal law does not mandate permits for polluted runoff. It is inconsistent, however, with Porter-Cologne where a polluted runoff discharge warrants a WDR or waiver. It could be consistent with Porter-Cologne where, for example, it is used to prevent discharges from occurring in the first place. The current Draft Policy is not clear on this point. Similarly, the "regulatory-based incentives" tier may have only limited applications where a WDR or waiver is required.

The major changes in the board's implementation of Porter-Cologne since the passage of SB 227 make it critical that the board consistently recognize the supremacy of Porter-Cologne's WDR/waiver requirements as the only regulatory process for the regional boards to follow. Accordingly, it should be clear throughout the Draft Policy that waste discharge requirements for polluted runoff <u>must</u> be issued unless a waiver is issued that is in the public interest and otherwise meets the requirements of SB 390 and SB 923 (Sher, 2003). The Draft Policy could be made consistent with the letter and intent of SB 227 by simply explaining how the federal programs and funding fit into Porter-Cologne's overarching mandate, without attempting to elevate the federal programs to equal or greater significance than the required state process.

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to call.

Sincerely,

SENATOR DEDE ALPERT 39th District

4

cc: Steve Fagundes, Chief, NPS Program Plan Implementation Craig Wilson, Chief Counsel