April 15, 2004

STATE WATER RESOURCES CONTROL BOARD
WORKSHOP SESSION--DIVISION OF WATER QUALITY
MAY 4, 2004

ITEM 6

SUBJECT

CONSIDERATION OF A RESOLUTION ADOPTING THE POLICY FOR THE IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM AND APPROVING THE FUNCTIONAL EQUIVALENT DOCUMENT

DISCUSSION

On December 14, 1999, the State Water Resources Control Board (SWRCB) approved Resolution No. 99-114, adopting *the Plan for California's Nonpoint Source (NPS) Pollution Control Program* (NPS Program Plan). The NPS Program Plan was developed in collaboration with the Regional Water Quality Control Boards (RWQCBs) and the California Coastal Commission to meet the requirements of section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 and Section 319 of the Clean Water Act. The NPS Program Plan was subsequently approved by the U.S. Environmental Protection Agency and the National Oceanic and Atmospheric Administration on July 17, 2000.

In securing this approval, the SWRCB committed to requiring implementation of 61 NPS management measures (MMs) designed to prevent and control pollution in six NPS related land use categories by 2013 through discharger implementation of site-specific management practices (MPs). Federal approval also required the SWRCB to provide assurances that it has the legal authority to implement and enforce the NPS Program Plan. In providing these assurances, the SWRCB cited the mandates and authorities granted it and the RWQCBs by the Porter-Cologne Water Quality Control Act (Porter-Cologne Act).

In 1999, Senate Bill 227 (California Water Code section 13369) was enacted, requiring the SWRCB to describe the process by which the SWRCB and the RWQCBs will implement and enforce the NPS Program Plan. The Policy for the Implementation and Enforcement of the NPS Pollution Control Program (NPS Implementation Policy) (Attachment A) proposed for adoption describes this process.

The Porter-Cologne Act obligates the SWRCB and RWQCBs to address all ongoing or proposed discharges of waste, including nonpoint sources that can affect water quality. The administrative tools provided by the Legislature to carry out this obligation include waste discharge requirements (WDRs), waivers of WDRs, and basin plan prohibitions. These are the administrative tools available to the RWQCBs to prevent or control NPS discharges in the manner they deem most appropriate, subject to SWRCB review.

The RWQCBs also have primary responsibility for ensuring that there are appropriate NPS control implementation programs in place to meet water quality objectives and to protect the beneficial uses of the waters of the State. Most NPS discharges are the result of land use and land management practices. RWQCB efforts to engage dischargers in NPS control through implementation of MPs have focused on outreach and education, and encouraging NPS control implementation activities through third-party efforts. Organizationally, these have included, community, professional, and discharger groups and other local state and federal agencies with which dischargers already have a working relationship. A third-party, by definition, is any entity that is not the SWRCB or a RWQCB or an actual discharger under the SWRCB's or RWQCBs' administrative permitting and enforcement jurisdiction.

There are no SWRCB policies that expressively recognize the role of third-party programs in water quality control, nor are there minimum criteria for NPS implementation programs. The proposed NPS Implementation Policy describes the statutory and regulatory authorities of the SWRCB and RWQCBs to prevent and control NPS pollution, the structure of a third-party NPS implementation program, and five key, structural elements applicable to all NPS implementation programs.

A draft copy of the NPS Implementation Policy was circulated December 18, 2003 and a public hearing was held February 4, 2004. Eight organizations and individuals submitted written comments and representatives of three of the commenting organizations made oral statements at the public hearing. Changes to the original draft were made and a Revised Draft NPS Implementation Policy has been circulated. The key changes made in the revised draft were to clarify that the five key elements apply to all NPS implementation programs, not just to third-party programs, and to require that the RWQCBs find that a third-party program has a high likelihood of successfully achieving water quality objectives prior to approving or endorsing the program.

A draft Functional Equivalent Document (FED) (Attachment B) has been prepared to comply with the California Environmental Quality Act, Public Resources Code §21000 et seq. The draft FED concludes that the adoption of the proposed NPS Implementation policy has no potential to adversely impact the environment. Based on the draft FED, including the Environmental Checklist, a draft Certificate of Fee Exemption (Attachment C) has also been prepared that concludes that adoption of the proposed NPS Implementation Policy will not, individually or cumulatively, have an adverse effect on wildlife resources, as defined in California Department of Fish and Game Code §711.2. Responses to comments submitted to the original draft of December 8, 2003 have been attached to the FED.

POLICY ISSUE

Should the SWRCB adopt the NPS Implementation Policy and approve the draft FED?

FISCAL IMPACT

SWRCB and RWQCB staff work associated with or resulting from this action can be accomplished within budgeted resources.

RWQCB IMPACT

Yes, all RWQCBs.

STAFF RECOMMENDATION:

That the SWRCB:

1. Adopt the NPS Implementation Policy (Attachment A).

2. Approve the draft FED for the proposed NPS Implementation Policy (Attachment B).

3. Authorize the SWRCB Executive Director, or designee, to sign the Certificate of Fee Exemption (Attachment C).

4. Authorize the SWRCB Executive Director or designee to transmit the NPS Implementation Policy to the Office of Administrative Law for review and approval in compliance with the Administrative Procedure Act.

D R A F T

April 15, 2004

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2004-

A RESOLUTION TO ADOPT THE POLICY FOR THE IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM AND APPROVE THE FUNCTIONAL EQUIVALENT DOCUMENT

WHEREAS:

1. On December 14, 1999, the State Water Resources Control Board (SWRCB) approved Resolution No 99-114, adopting the Plan for California's Nonpoint Source (NPS) Pollution Control Program (NPS Program Plan).

2. The NPS Program Plan was developed in collaboration with the Regional Water Quality Control Boards (RWQCBs) and the California Coastal Commission to meet the requirements of section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 and section 319 of the Clean Water Act.

3. The NPS Program Plan subsequently received joint federal approval from the United States Environmental Protection Agency and the National Oceanic and Atmospheric Administration on July 17, 2000.

4. Through the NPS Program Plan, the State committed to implementation of 61 identified NPS control management measures designed to control pollution in six NPS related land use categories through discharger implementation of site-specific management practices.

5. In 1999, Senate Bill 227 (California Water Code [CWC] Section 13369) was enacted, requiring the SWRCB to describe the process by which the SWRCB and the RWQCBs will implement and enforce the NPS Program Plan.

6. All dischargers and discharges of waste that could affect the waters of the State are subject to the regulatory and enforcement authorities provided in the CWC, including waste discharge requirements (WDRs), waivers of WDRs, and basin plan prohibitions conditioned to require NPS control implementation actions.

7. The CWC also provides the SWRCB and RWQCBs a wide range of enforcement authorities to ensure compliance with the regulatory orders they issue.

8. The SWRCB prepared and circulated a draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Implementation and Enforcement Policy) that describes the process by which the SWRCB and the RWQCBs will implement and enforce the NPS Program Plan.

9. The SWRCB prepared and circulated a draft Functional Equivalent Document (FED) in accordance with the provisions of the California Environmental Quality Act and California Code of Regulations, title 14, §15251(g).

10. The SWRCB held a public hearing on February 3, 2004 and a workshop on May 4, 2004, on the draft NPS Implementation and Enforcement Policy and FED. The SWRCB has carefully considered all testimony and comments received on this matter and has determined that adoption of the proposed Policy has no potential to adversely impact the environment.

11. The SWRCB finds, based on the draft FED, including the Environmental Checklist and hearing record, that adoption of the proposed NPS Implementation and Enforcement Policy will not individually or cumulatively have an adverse effect on wildlife resources, as defined in Fish and Game Code §711.2.

THEREFORE BE IT RESOLVED THAT:

The SWRCB:

1. Adopts the proposed NPS Program Implementation and Enforcement Policy (Attachment A).

2. Approves the draft FED for the proposed Policy (Attachment B).

3. Authorizes the SWRCB Executive Director, or designee, to sign the Certificate of Fee Exemption, which is attached to this resolution (Attachment C).

4. Authorizes the SWRCB Executive Director or designee to transmit the policy and administrative record to OAL for approval.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of the resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 20, 2004.

_____

Debbie Irvin
Clerk to the Board

Attachment A

DRAFT

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

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State Water Resources Control Board

California Environmental Protection Agency

~~December 8, 2003~~
April 16, 2004

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

Guidance for Developing An Integrated Program for Implementing and Enforcing the "Plan for California's Nonpoint Source Pollution Control Program"

I. INTRODUCTION

In December 1999, the State Water Resources Control Board (SWRCB), in its continuing efforts to control nonpoint source (NPS) pollution in California, adopted the *Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan) (SWRCB, 1999). The NPS Program Plan upgraded the State's first *Nonpoint Source Management Plan* adopted by the SWRCB in 1988 (1988 Plan) (SWRCB, 1988). Upgrading the 1988 Plan with the NPS Program Plan brought the State into compliance with the requirements of section 319 of the Clean Water Act (CWA) and section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). This document, the SWRCB *Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Implementation and Enforcement Policy), explains how the NPS Program Plan will be implemented and enforced and, in so doing, fulfills the requirements of California Water Code (CWC) section 13369 (a)(2)(B).

To continue receiving federal funds to implement the State's NPS pollution control program, the State was required to obtain approval of the NPS Program Plan from the U. S. Environmental Protection Agency ~~(U.S. EPA)~~ and the National Oceanic and Atmospheric Administration ~~(NOAA)~~. Federal approval required the SWRCB to provide assurances that it has the legal authority to implement and enforce the NPS Program Plan. In providing these assurances, the SWRCB cited the mandates and authorities granted it and the Regional Water Quality Control Boards (RWQCBs) by the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). The Porter-Cologne Act designates the SWRCB and RWQCBs as the State agencies with primary responsibility for water quality control in California and obligates them to address all discharges of waste that could affect the quality of the waters of the State, including potential nonpoint sources of pollution. To carry out this mandate, the Porter-Cologne Act has provided the SWRCB and RWQCBs with:

- Planning authority to designate beneficial uses of the waters of the State, establish water quality objectives to protect those uses, and develop implementation programs to meet water quality objectives and maintain and/or restore designated beneficial uses;

- Administrative permitting authority in the form of waste discharge requirements (WDRs), waivers of WDRs, and basin plan prohibitions; and

- Enforcement options to ensure that dischargers comply with permitting requirements.

D R A F T

Version Date: ~~December 8, 2003~~
April 16, 2004

This NPS Implementation and Enforcement Policy explains how these Porter-Cologne Act mandates and authorities, delegated to the SWRCB and RWQCBs by the California Legislature, will be used to implement and enforce the NPS Program Plan. The policy also provides a bridge between the NPS Program Plan and the *SWRCB Water Quality Enforcement Policy* (Enforcement Policy) (SWRCB, 2002).

The information provided in this policy is designed to assist all responsible and/or interested parties in understanding how the State's NPS water quality control requirements will be implemented and enforced. The parties involved include the SWRCB and the RWQCBs, federal, state and local agencies, individual dischargers, designated third-party participants and any other interested public and private parties.

In addition to using the Porter-Cologne Act's planning, permitting, and enforcement authorities to prevent and control nonpoint sources of pollution, the SWRCB and RWQCBs have implemented a broad program of outreach, education, technical assistance and financial incentives. This program is supplemented by collaborative efforts with other agencies and non-governmental organizations (NGOs) to help implement and coordinate the use of their programs that contribute to NPS control. The goal is to provide an integrated statewide approach to controlling nonpoint sources of pollution. In structuring this document, a review of the Porter-Cologne Act is provided in Section II, including an overview of the Act related to planning requirements, and administrative permitting authorities; Section III provides history and background on development of the State's NPS pollution control program; Section IV discusses the structure of the NPS implementation program including statewide implementation, and the mandatory five key elements of an NPS implementation program~~,~~; and ~~integration of the management options into NPS pollution control; and~~ Sections V and VI discuss RWQCB compliance assurance, implementation success, and future considerations.

D R A F T

II. STATUTORY AND REGULATORY BACKGROUND

A. Overview of the Porter–Cologne Water Quality Control Act

The Porter-Cologne Act is the principal law governing water quality control in California. It establishes a comprehensive program to protect water quality and the beneficial uses of waters of the State. The Porter-Cologne Act applies broadly to all State waters, including surface waters, wetlands, and ground water; it covers waste discharges to land as well as to surface and groundwater, and applies to both point and nonpoint sources of pollution.[1]

The Legislature has declared that it is the policy of the State that:

1. The quality of all the waters of the State shall be protected;
2. All activities and factors that could affect the quality of ~~s~~State waters shall be regulated to attain the highest water quality that is reasonable; and
3. The State must be prepared to exercise its full power and jurisdiction to protect the quality of water in the ~~s~~State from degradation.[2]

The Porter-Cologne Act is administered regionally, within a framework of statewide coordination and policy involving both the SWRCB and RWQCBs.[3] The SWRCB adopts State policy for water quality control and statewide water quality control plans, in addition to regulations that are binding on the RWQCBs. The RWQCBs each govern one of the nine hydrologic regions into which California is divided, adopting regional water quality control plans (basin plans) for their respective regions.[4] Basin plans are reviewed and updated on a triennial basis. The SWRCB must approve basin plans, or any amendments thereto, before they become effective.[5] Statewide plans adopted by the SWRCB supersede any RWQCB-adopted plans to the extent of any conflict. The RWQCBs also issue permits and waivers to implement basin plan water quality requirements and, when necessary, take enforcement actions.[6] The SWRCB adopts statewide general permits.[7] The SWRCB also reviews RWQCB decisions on petitions for review.[8] The primary point of contact for dischargers and other interested parties to receive information regarding the laws, regulations and programs related to NPS pollution control is at the regional level.

B. Porter-Cologne Act Water Quality Control Act Planning Requirements

Planning authority under the Porter-Cologne Act extends to any activity or factor which may affect water quality.[9] For example, factors which affect water quality include not only waste discharges, but also saline intrusion, reduction of waste assimilative capacity caused by reduction in water quantity, hydrogeologic modifications, watershed management projects, and land use.[10]

Water quality control plans designate beneficial uses of water, establish water quality objectives to protect those uses, and provide a program to implement the objectives.[11] The beneficial use designations and water quality objectives, together with the State's antidegradation policy,[12] constitute water quality standards for purposes of the CWA.[13] The water quality control plan implementation programs are required to describe the nature of actions that are necessary to meet water quality objectives, including recommendations for action by both private and public entities.[14] Implementation programs also must include a time schedule and describe proposed monitoring activities to assess compliance with water quality objectives.[15]

C. The Porter-Cologne Water Quality Control Act and Waste Discharge Regulation

The Porter-Cologne Act provides that "All discharges of waste into the waters of the ~~s~~State are privileges, not rights."[16] Furthermore, all dischargers are subject to regulation under the Porter-Cologne Act including both point and NPS dischargers.[17] In obligating the SWRCB and RWQCBs to address all discharges of waste that can affect water quality, including nonpoint sources, the legislature provided the SWRCB and RWQCBs with administrative permitting authority in the form of administrative tools (waste discharge requirements [WDRs], waivers of WDRs, and basin plan prohibitions) to address ongoing and proposed waste discharges. 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.

The SWRCB and RWQCBs use their permitting authorities to implement the requirements of applicable State policies and state and regional water quality control plans. Permits take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of CWC section 13241.[18]

With the exception of persons discharging into community sewer systems, any person discharging or proposing to discharge waste that could affect water quality must file a report of waste discharge (RoWD) with the appropriate RWQCB, unless the RWQCB waives the filing.[19] A RoWD also is required if a discharger proposes a material change in the character, volume, or location of a discharge.[20] The RWQCB must then determine the appropriate action to take, either issuing WDRs to the discharger, or conditionally waiving the requirements.[21] WDR~~aste discharge requirement~~s can prohibit the discharge of waste or certain types of waste, either under specific conditions or in specified areas. As an alternative, the RWQCB may prohibit the discharge of waste or certain types of waste in a water quality control plan.[22]

Because a RWQCB may choose to use the basin planning process to adopt some of these administrative approaches, there is some overlap between the planning and administrative processes. A categorical waiver of waste discharge requirements, for instance, could be adopted as a RWQCB basin plan amendment. The SWRCB and RWQCBs have broad discretion in how they use the administrative tools provided by the Porter-Cologne Act.

D R A F T

1. Waste Discharge Requirements

The RWQCBs have primary responsibility for issuing WDRs. The RWQCBs may issue individual WDRs to cover individual discharges or general WDRs to cover a category of discharges.[23] WDRs may include effluent limitations or other requirements that are designed to implement applicable water quality control plans, including designated beneficial uses and the water quality objectives established to protect those uses and prevent the creation of nuisance conditions. As in a basin plan prohibition, a WDR may specify certain conditions under which, or areas where, the discharge of waste or certain types of waste will not be permitted. Dischargers operating under a WDR must submit an annual fee to the appropriate RWQCB to cover administrative costs. The fee schedule is determined by the SWRCB, based upon factors such as total flow, volume, number of animals or area involved, etc. These fees help provide the SWRCB and the RWQCBs with resources to administer the ~~NPS~~WDR program.

The SWRCB also can issue general WDRs under specific conditions.[24] Violations of WDRs may be addressed, for example, by issuing Cleanup and Abatement Orders (CAOs) or Cease and Desist Orders (CDOs), assessing administrative civil liability or seeking imposition of judicial civil liability or judicial injunctive relief.

2. Waivers of Waste Discharge Requirements

The requirements for a discharger to submit a RoWD or for a RWQCB to issue WDRs may be waived by the RWQCB or SWRCB for a specific discharge or a specific type of discharge if the ~~state~~SWRCB or ~~regional board~~RWQCB determines, after a public meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest.[25] All waivers are conditional and may be terminated at any time. Except for waivers for discharges that the SWRCB or a RWQCB determines do not pose a significant threat to water quality, waiver conditions must include, but need not be limited to, individual, group or watershed-based monitoring.[26] Waivers may not exceed five years in duration, but may be renewed. Prior to renewing a waiver, the SWRCB or RWQCB must determine whether the discharge in question should be subject to general or individual WDRs.

CWC section 13269(e) provides that "the regional boards and the state board shall require compliance with the conditions pursuant to which waivers are granted…." Therefore, even where the RWQCBs decide to waive the requirement to submit a RoWD for general WDRs, the RWQCBs are encouraged to have an enrollment process for coverage under the waiver of WDRs so that the RWQCBs can identify the dischargers who are required to comply with the general waiver of WDRs. Although the RWQCBs retain their prosecutorial discretion to decide how to ensure compliance with their conditional waivers, the language of section 13269(e), makes it clear that the legislature intends that the RWQCBs allocate some of their resources to ensuring that dischargers are in compliance. ~~As of January 1, 2004~~ Following SWRCB adoption of a fee schedule, RWQCBs are authorized to collect annual administrative fees to establish and implement waivers of WDRs.[27]

There are many different ways for the RWQCBs to ensure compliance. In the event of noncompliance, the RWQCB could rescind the waiver, or terminate its applicability to individual dischargers, and issue WDRs in its place. If the waiver leaves significant discretion with the discharger to determine how to comply with the waiver's conditions, the RWQCB could adopt a new waiver that is more directive in terms of the actions that the dischargers must take in order to comply with the waiver. In order to be enforceable, waiver conditions should be clearly specified.

Potential enforcement actions include issuance of a notice of violation (NOV), an informal enforcement action which notifies the discharger of the violation of the waiver condition and the reasonably expeditious time within which compliance must be achieved to avoid proposed adoption of WDRs. Other formal enforcement actions that may be taken include CAOs, CDOs, notices to comply (NTC), and time schedule orders.

3. Prohibitions

Pursuant to CWC section 13243, RWQCBs may prohibit discharges of waste or types of waste either through WDRs or through waste discharge prohibitions specified in a basin plan. A RWQCB may amend a basin plan to prohibit a particular discharge or a particular type of discharge or to conditionally prohibit a discharge. A conditional prohibition may include specific conditions under which application or enforcement of the prohibition for a particular discharge or particular type of discharge may be waived. In some cases, RWQCBs may waive application of the prohibition for the planning and permitting period of projects or activities. RWQCBs may also use conditional basin plan prohibitions as the primary administrative tool for implementation programs - for example, in cases where a RWQCB desires to prohibit discharges unless certain procedural or substantive conditions are met. Basin plan prohibitions are extremely useful because, once adopted, they allow a RWQCB to take direct and immediate enforcement action by issuing CAOs or CDOs, or assessing civil liabilities, even in the absence of WDRs. Therefore, they allow RWQCBs to respond in a timely manner where NPS pollution generated by certain activities is creating an emergency or a problem that is not otherwise being remedied in an adequate or timely manner.

D. Porter-Cologne Act Enforcement Options

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 SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. These options range from informal NOVs to formal actions defined in the Porter Cologne Act. Formal actions range from NTCs to civil administrative remedies, and can include referrals for criminal penalties. Both the Enforcement Policy and common RWQCB practice recognize the merit of progressive enforcement---that is, initially taking whatever level of enforcement is appropriate, considering the RWQCB workload and the circumstances of the case, and applying increasingly severe remedies where necessary to correct a problem.

III. DEVELOPING THE STATE'S NPS POLLUTION CONTROL PROGRAM

The State's NPS Program has been developed in conformance with the CWA, CZARA, and the Porter-Cologne Act. The CWA requires the SWRCB to develop and implement an NPS pollution control program and provides funding for this purpose. The NPS Program Plan was the State's response to this requirement, as well as to additional federal requirements for the inclusion of management measures (MMs) consistent with the CZARA *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution to Coastal Waters* (USEPA, 1993). As described above, the Porter-Cologne Act provides the SWRCB and RWQCBs with the authority and administrative tools to implement the CWA and CZARA requirements.

The Porter-Cologne Act also provides the definition of "waste" that is integral to understanding the SWRCB's and RWQCBs' NPS pollution control authorities and responsibilities. "Waste" is broadly defined to include sewage and "any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation".[28] This definition includes all Attorney General interpretations of the terms "sewage", "industrial waste", and "other wastes" under the Porter-Cologne Act's predecessor legislation.[29] The Attorney General has interpreted the latter terms to include wastes from a wide variety of activities. As a result, it is clear that "discharges of waste" are not limited to discharges resulting from waste disposal activities, but also include releases of pollutants as part of other activities, including all nonpoint sources of waste.[30]

In the Porter Cologne Act, the term "discharge of waste" includes all discharges, point and nonpoint, including agricultural return flows and storm water discharges. The CWA distinguishes between point and nonpoint sources of pollution. Under the CWA, a point source is identified as a discernible, confined, and discrete conveyance, such as a pipe, ditch, or channel; however, irrigated agricultural return flows and agricultural storm water runoof are excluded. Nonpoint pollution sources generally are sources of water pollution that do not meet the definition of a point source as defined by the CWA. NPS pollution typically results from contact between pollutants and land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. Consequently, the most successful control of nonpoint sources is achieved by prevention or by minimizing the generation of NPS discharges.

~~Regulation of nonpoint sources of pollution is much less prescriptive than point sources and~~ ~~m~~Most NPS management programs typically depend, at least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution. As originally used in the CWA and its implementing regulations, the term "BMP" officially referred only to practices that had been formally adopted by the SWRCB through its continuing planning program. Informally, however, prior to adoption of the NPS Program Plan, the term became generally used to refer to any type of practice for NPS control, whether formally approved or not. In this policy, the term "MP" has replaced the formerly used term "BMP" when referencing practices that have not been formally adopted by the SWRCB.

MPs may include, but are not limited to, structural and non-structural (operational) controls. They may be applied before, during and after pollution producing activities to eliminate or reduce the generation of NPS discharges and the introduction of pollutants into receiving waters. Successful MP implementation typically requires: (1) adaptation to site-specific or regional-specific conditions; (2) monitoring to assure that practices are properly applied and are effective in attaining and maintaining water quality standards; (3) immediate mitigation of a problem where the practices are not effective; and (4) improvement of MP implementation or implementation of additional MPs when needed to resolve a deficiency**.** MP implementation, however, may not be substituted for actual compliance with water quality requirements. The U.S. Court of Appeals for the Ninth Circuit, in *Northwest Indian Cemetery Protective Ass'n v. Peterson*, held that BMPs [MPs] in a certified water quality

management plan were not "…standards in and of themselves. Adherence to the BMPs [MPs] does not automatically assure compliance …the federal statute [CWA] contemplates that any activity conducted pursuant to a BMP [MP] can be terminated or modified if the conducted activity resulted in a violation of water quality standards."[31]

There are many programs provided by state and federal agencies, as well as NGOs, to assist dischargers. These programs can help dischargers understand how their operations can cause NPS pollution and help them choose and implement MPs to prevent or control NPS pollution. In addition, many of the programs provide financial as well as technical assistance.

Since the early 1990s, using CWA § 319(h) funds, the SWRCB and RWQCBs have reached out to dischargers with technical and educational information and financial support to assist with MP implementation. Other informal RWQCB programs have encouraged development of watershed groups to facilitate NPS pollution control efforts. Additional technical expertise and/or financial assistance are provided through the grant and loan sources of other state and federal agencies. These include resource conservation districts (RCDs), University of California Cooperative Extension and the Natural Resources Conservation Service. In addition, there are State agencies, other than the SWRCB and RWQCBs, with programs and authorities related to NPS control, that help implement the NPS Program Plan by coordinating their programs and activities. Under the leadership of the SWRCB and the California Coastal Commission (CCC), an Interagency Coordinating Committee (IACC) meets regularly to actively promote and coordinate inter-agency NPS pollution control activities.[32]

IV. STRUCTURING ~~THIRD-PARTY~~ AN NPS CONTROL IMPLEMENTATION PROGRAM TO ACHIEVE ~~NPS IMPLEMENTATION PROGRAMS~~ WATER QUALITY OBJECTIVES

An NPS control implementation program is a program developed to comply with SWRCB or RWQCB WDRs, waivers of WDRs, or basin plan prohibitions. Implementation programs for NPS pollution control may be developed by a RWQCB, the SWRCB, an individual discharger or by or for a coalition of dischargers in cooperation with a third-party representative, organization, or government agency. The latter programs are collectively known as "third-party" programs and the third-party role is restricted to entities that are not actual dischargers under RWQCB/SWRCB permitting and enforcement jurisdiction. These may include NGOs, citizen groups, industry groups, including discharger groups, watershed coalitions, government agencies, or any mix of the above. Although a third-party program may be comprised solely of dischargers, the reason it is a third-party is because the entity that represents the dischargers is not an actual discharger.

A. ~~Definition of a Third-Party NPS~~ Challenges of Statewide NPS Pollution Control Implementation ~~Program~~

~~For the purposes of this policy, a Third-Party NPS implementation program is a program developed by one or more third parties to comply with WDRs, a waiver of WDRs, or a basin plan prohibition governing NPS pollution. In this policy, these programs are referred to as Third-Party Programs. Third-Party Programs are programs that neither the SWRCB nor a RWQCB has developed.~~The challenges to implementing statewide prevention and control of NPS pollution discharges are significant. The RWQCBs ~~are the agencies~~ have the primary responsibility for ensuring that ~~there are~~ appropriate NPS control implementation programs are in place throughout the State.~~ to meet water quality objectives and to protect the beneficial uses of the waters of the State. To fulfill these responsibilities, the RWQCBs may approve or endorse Third-Party Programs in many ways. These~~ RWQCB responsibilities include, but are not limited to, ~~adopting a program that includes~~ issuing WDRs or a waiver of WDRs for individual dischargers or a category of NPS dischargers, or adopting a basin plan amendment that addresses NPS dischargers.

~~There are many potential organizational approaches to developing an appropriate Third-Party Program.~~ Given the extent~~, and~~ nature, and diversity of sources of NPS pollution discharges, ~~of the State's water~~ the RWQCBs need to be as creative and efficient as possible in devising approaches to prevent or control NPS pollution. A primary advantage of the development of third-party programs is their ability to reach multiple numbers of dischargers who individually may be unknown to the RWQCB.~~ if California's water quality protection and restoration goals are to be achieved. A Third-Party Program may be developed by or for an individual discharger or through a collective effort for a group of dischargers.~~

A RWQCB may use whatever mix of organizational approaches it deems appropriate. Coalitions~~ Group~~ of dischargers may differentiate themselves in many ways: regionally, sub-regionally, by watershed, discharge characteristics, discharger community type, or through participation in some other publicly or privately developed program. Though dichargers participate in third-party programs, organizationally, the programs must be managed by someone other than a discharger. For example, there are organizations or entities already involved in NPS management programs. ~~In addition to the agencies with which MAAs and MOUs have been executed, there are situations where other agencies or organizations are involved in NPS pollution control efforts with and without a formal agreement with the SWRCB or a RWQCB. Several~~ RWQCBs have had experience working with industry groups, both formally and informally, to develop education and self-regulation within a particular industry. Other organizations have become active in NPS pollution prevention and land restoration efforts through CWA §319(h) grants, State bond grants, or the State Revolving Fund loan program. Many of the partnerships formed to take advantage of these financial resources have developed into self-sustaining third-party organizations. Some are affiliated with RCDs or have developed as part of the

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Coordinated Resource Management Planning ~~(CRMP)~~ approach; others are watershed groups or have developed their own organizational structure based on other geographic or industry-specific factors. In some situations the organizations accomplish their goals through a mix of public and private partnership efforts. ~~The RWQCB staff has worked with these groups at various levels.~~

RWQCBs are not required to endorse or approve any specific program or type of program. Each program brought before a RWQCB or SWRCB must be individually judged on its merits. The scale against which it will be measured will assess its potential to result in the implementation of actions to successfully prevent or control discharges of nonpoint sources of pollution. The ultimate goal of any NPS control implementation program must be to protect the beneficial uses of the State's waters.

~~B. Statewide Implementation and the Use of Third-Party Programs~~

~~The RWQCBs are the agencies with primary responsibility for ensuring that there are appropriate NPS control implementation programs in place to meet water quality objectives and to protect the beneficial uses of the waters of the State.[33] To fulfill these responsibilities, the RWQCBs may approve or endorse Third-Party Programs in many ways. These include, but are not limited to, adopting a program that includes issuing WDRs or a waiver of WDRs for a category of NPS dischargers, or adopting a basin plan amendment that addresses NPS discharges throughout the region.~~

~~There are many potential organizational approaches to developing an appropriate Third-Party Program. Given the extent and nature of NPS pollution of the State's waters, the RWQCBs need to be as creative and efficient as possible if California's water quality protection and restoration goals are to be achieved. A Third-Party Program may be developed by or for an individual discharger or through a collective effort for a group of dischargers. Groups of dischargers may differentiate themselves in many ways: regionally, sub-regionally, by watershed, discharge characteristics, discharger community type, or through participation in some other publicly or privately developed program. Though dischargers participate in Third-Party Programs, organizationally, they may be managed by someone other than the dischargers. There are organizations or entities already involved in NPS management programs, for instance, RCDs, watershed groups, and some industry groups such as the dairy industry. A RWQCB may use whatever mix of organizational approaches it deems appropriate, as long as it can provide a rational explanation for why it is treating some dischargers differently than other dischargers (e.g., because one group of dischargers is actively participating in a watershed group's efforts, while another is not).~~

~~C~~B. Third-Party Programs Administered by State Agencies Other than the SWRCB or RWQCBs

There are agencies, in addition to the SWRCB and RWQCBs, with the authority to implement programs to meet water quality objectives and protect beneficial uses. Several of these agencies are formally linked to the RWQCBs and SWRCB through memoranda of understanding (MOUs) or management agency agreements (MAAs). MOUs and MAAs are important for NPS regulation because they delineate the roles and responsibilities of individual agencies ~~with respect~~ in the State's efforts to control~~ling~~ NPS pollution sources. In all cases, agencies with regulatory power act in accordance with their own authorities and processes.

There are two general types of MOUs: (1) cooperative agreements made with other agencies or organizations that are able to provide information or technical or financial assistance to further the State's goal of preventing or controlling nonpoint sources of pollution; and (2) cooperative agreements made with land management agencies with authority to control NPS discharges through inclusion of MPs in their land lease agreements.

With an MAA, the SWRCB may designate another agency as a management agency to take the lead in implementing NPS pollution control. The actions taken by these agencies are taken under their own authorities and using their own regulatory processes. The fundamental purpose of the SWRCB/RWQCBs when applying the management agency approach is to achieve, through the capabilities of a management agency, at least the same degree of control over NPS pollution as could be attained through direct regulation under SWRCB/RWQCB authority, but to do so more efficiently.

The SWRCB and RWQCBs may not delegate their NPS authorities and responsibilities to another agency, and may not indefinitely defer taking necessary action if another agency is not properly addressing a NPS problem. However, where another agency is constructively involved in NPS efforts, the SWRCB and RWQCB should seek to take those efforts into account and, where appropriate, take advantage of these third-party efforts. Not only does this avoid unnecessary duplication of effort, it can leverage the SWRCB's and RWQCBs' limited staffing and financial resources. While another agency's actions pursuant to an MOU or MAA do not fulfill the RWQCBs' obligation to use its administrative tools to address the relevant NPS discharges, another agency's actions can serve, for example, as the basis, in part or in whole, for a RWQCB waiver of WDRs for the activities covered in these agreements.

If water quality problems persist, the RWQCBs may not indefinitely defer enforcement action to other agencies. While the 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. In addition, a RWQCB can enforce the conditions or requirements contained in the waiver, WDR, or prohibition that addresses the underlying discharge of waste. Consistent with a particular MAA, the lead agency

under an MAA may be given an opportunity to achieve compliance before the RWQCBs take necessary action.

The RWQCBs also have developed partnerships with other agencies that are in a position to take quick and decisive enforcement action. The California Department of Fish and Game, for instance, may take action against a problem discharger under its own laws and regulations, working with either the local county district attorney's office or the attorney general's office.

The RWQCBs have broad flexibility and discretion in fashioning NPS management programs, and are encouraged to be as innovative and creative as possible, and, as appropriate, to build upon Third-Party Programs. The State Board, in turn, is encouraged to establish a program that recognizes and honors successful and outstanding third-party efforts.

~~D~~C. The Key Elements of an NPS Pollution Control Implementation Program

Before approving or endorsing a specific ~~Third-Party P~~ NPS pollution control implementation program, ~~the~~a RWQCB must determine that there is a high~~reasonable~~ likelihood ~~that~~ the ~~Third-Party P~~implementation program will attain the RWQCB's stated water quality objectives. This will include consideration of the MPs to be used, and the process for ensuring their proper implementation as well as assessment of MP effectiveness. Depending on the program, it also ~~will~~may include other factors such as the level of discharger participation. ~~and the effectiveness of the MPs implemented.~~ NPS dischargers have had and will continue to ~~receive~~have many opportunities to take advantage of the available technical and financial assistance programs administered through the SWRCB, ~~as well as~~ in addition to the assistance offered by other programs. A first step in the education process offered by these programs often consists of discharger assessment of their lands or operations to determine NPS problems, followed by the development of a plan to correct those problems. It is important to re~~member~~cognize that the development of a plan is only the first step in developing an implementation program that address~~es~~ ~~the~~a discharger's NPS ~~problems~~pollution discharges. Implementation of the plan, including any necessary iterative steps to adjust and improve the plan and/or implementation must follow the planning stage.

Prior to developing an NPS control implementation program or recognizing an ~~Third-Party P~~implementation program developed by dischargers or third-parties as sufficient to meet ~~their~~ RWQCB obligations to protect water quality, a RWQCB~~s~~ shall ensure that the program meets the requirements of the five key structural elements described below. While the RWQCBs are free to use the administrative tool(s) that they determine to be most appropriate for a particular ~~Third-Party P~~implementation program, all implementation programs will have the five structural elements in common. Development of Elements 1 and 2 are the primary responsibility of those who are developing the implementation program~~the Third-Party~~. Elements 3 and 4 may require ~~Third-Party~~ consultation with ~~a~~ the appropriate RWQCB. Element 5 shall be developed

by the RWQCB. ~~Ultimately, a Third-Party Program's adherence to a structure based on the five key elements also may serve other purposes, including determining whether NPS control projects qualify for grant funding.~~

For ~~Third-Party P~~implementation programs ~~that primarily are~~ developed by non-regulatory parties, factors such as availability of funding~~,~~; a demonstrated track record or commitment to NPS control implementation~~,~~; and a level of organization and group cohesion that facilitates NPS implementation ~~is~~are among the critical factors that must be taken into account. For regulatory programs, the availability of staff resources to administer the implementation may be a major concern.

~~Third-Party P~~NPS control implementation programs shall include the following five key elements:

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KEY ELEMENT 1: An NPS control implementation program's ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

Existing and potential beneficial uses of the waters of the State are identified through a public process. RWQCBs establish water quality objectives to protect those uses, and a program to implement the objectives. The State also is required to adopt and implement an antidegradation policy designed to protect water quality that is higher than that necessary to protect the designated beneficial uses. For purposes of this policy, the term "water quality requirements" will be used to include water quality objectives established to protect beneficial uses and any higher level of water quality needed to comply with the State's antidegradation policy.

An NPS control implementation program ~~Third-Party Program~~ must be specific as to the water quality requirements it is designed to meet. For example, if the program relies upon dischargers' use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements ~~in question~~. The program also should ~~identify which~~ provide other information as required by the RWQCB, including but not limited to the identification of participant dischargers. ~~are expected to participate, so that~~ T~~t~~he RWQCB ~~can~~must be able to ensure that all ~~of~~ the significant sources of the NPS discharges of concern are addressed.

KEY ELEMENT 2: An NPS control implementation program shall include a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program's stated purpose(s), the process to be used to select or develop MPs, and the process to be used to ensure and verify proper MP implementation.

~~The~~A RWQCB must be able to determine that there is a ~~reasonable~~high likelihood that the program will attain water quality requirements. This will include consideration of the MPs to be used and the process for ensuring their proper implementation. It also will include other factors such as the level of discharger participation and the effectiveness of the MPs implemented.

Although MPs must be tailored to a specific site and circumstances, 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. A schedule assuring MP implementation and assessment, as well as adaptive management provisions must be provided. 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. (See also Key Element 3.) Although MP implementation never may be substitute for meeting water quality requirements, MP implementation assessment may, in some cases, be used to measure nonpoint source control progress.

KEY ELEMENT 3: Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program shall include a specific time schedule and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.

The Porter-Cologne Act (CWC §13242[b] and § 13263[c]), the NPS Program Plan, and the NPS Implementation and Enforcement Policy recognize that there are instances where it will take time to achieve water quality requirements. The effort may involve all or some of various processes, including: identification of measurable long term and interim water quality goals and a timeline for achieving these goals; identification and implementation of pollution control MPs, as well as provision for maintenance of the implementation actions and provision for additional actions if initial actions are inadequate; and, in the case of third-party organizations, identification of a responsible third-party to lead the efforts.

In considering approval of specific interim goals and the time necessary to achieve those goals, a RWQCB may consider such factors as the necessity of providing for significant capital outlays for MP implementation, the presence of a severely degraded waterbody, and whether or not an NPS control implementation program ~~Third-Party Program~~ is a component of a larger TMDL implementation program. The time schedule may not be longer than that which is reasonably necessary to achieve an NPS implementation program's water quality ~~the Third-Party Program's~~ objectives. Preliminary development of the time schedule shall be undertaken by the ~~Third-P~~party responsible for developing the NPS control implementation program. The RWQCB may amend and must approve the time schedule. If the RWQCB later determines that additional time is necessary to complete the program, it may make further

amendments to the time schedule or issue an enforcement order that contains a compliance schedule.

KEY ELEMENT 4**:** An NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.

Verification measures to determine whether an ~~Third Party P~~NPS control implementation program is meeting its stated purpose is a key element of all NPS control implementation programs. If the ~~Third Party P~~program depends upon an iterative MP approach, in addition to verification of proper MP implementation (Key Element 2), feedback mechanisms are needed to clearly indicate whether and when additional or different MPs or MP implementation measures must be used, or other actions taken. Designing the appropriate types and frequency of verification and feedback measures (e.g. reporting, inspection, monitoring, etc.) is an integral part of implementation ~~Third-Party P~~program development and success.

In all cases the ~~Third-Party P~~NPS control implementation program should describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs are being properly implemented and are achieving the program's objectives and/or to provide feedback for use in adaptive management. These efforts are necessary to determine whether the program is on time and on track in achieving its goals.

Depending on the water quality problem, the cause, the beneficial uses at risk, and the purpose for which the monitoring will be used (e.g. adaptive management or regulatory purposes) the appropriate type(s) of monitoring should be used. Some monitoring approaches include photo monitoring; assessing residual dry matter on rangelands; various indicators of healthy instream habitat; riparian and wetland habitat structure, density and cover; and bioassessment. Some programs may involve collecting and reporting ambient water quality monitoring data. Those programs should be consistent with the SWRCB Surface Water Ambient Monitoring Program (SWAMP) Data Quality Management Plan (DQM), which provides for more than one level of data quality. The DQM approach to data quality recognizes that the rigor needed to monitor for regulatory purposes may not be necessary for other purposes. Consequently, the SWAMP DQM provides data quality and reporting objectives for both regulatory and screening studies. Regardless of which approach is used, all monitoring programs should be reproducible, provide a permanent/documented record and be available to the public.

KEY ELEMENT 5**:** Each RWQCB shall make clear, in advance, the potential consequences for failure to achieve an NPS control implementation program's stated purposes.

A RWQCB action to approve or endorse an NPS control implementation ~~Third-Party P~~program shall contain a general description of the course of action or actions to be taken if verification/feedback mechanisms indicate or demonstrate that the program is failing to achieve its stated objectives. ~~Depending on the particular program, some of the courses of action may be initiated by the RWQCB, a third-party agency or private entity, or both.~~ Although not binding on the RWQCB, this element should be written with the objective of creating clear expectations and reinforcing the obligations that dischargers, third parties, and other agencies, in addition to the RWQCBs, have accepted in agreeing to implement ~~the Third-Party Program~~an NPS control implementation program. This element also has the advantage of requiring the examination of proposed programs with respect to options for enforcement should the program not proceed as well as expected.

Clear expectations regarding potential RWQCB responses to inadequate or ineffective programs, including but not limited to adopting a revised program or the taking of an enforcement action, provides dischargers and the public with greater certainty regarding the process. RWQCB options will vary significantly, depending on the structure of the program. (e.g., which administrative tool or tools are being utilized, whether third-party regulatory or land use agencies, or private entities are coordinating the dischargers' efforts, etc.) While not all programs need be directly enforceable, any enforcement limitations that might be encountered should be well understood by the RWQCB prior to approving or endorsing an ~~Third-Party P~~NPS control implementation program.

In cases of individual noncompliance, selective enforcement actions may be taken. In cases of third-party noncompliance, an effort to revise the ~~T~~third-~~P~~party ~~P~~program is an alternative. Generally, prior to initiating major revisions to a program, informal contact with dischargers, group representatives, or other third parties, if any, will be attempted in order to redirect unsuccessful efforts. However, although the direction and efforts of a particular ~~T~~third-~~P~~party ~~P~~program are being undertaken as a group effort, with group designated or accepted leadership, if the group or third-party fails to follow through on their commitments, any RWQCB enforcement action taken will be against individual dischargers, not the third-party.

~~C. Integrating CWC §13369 Management Options Into NPS Pollution Control~~

~~California's first, statewide formal strategy for controlling NPS pollution was established in 1988 when the SWRCB adopted California's first nonpoint source management plan. The 1988 Plan provided a broad outline of management options described as "general management approaches" considered useful in addressing NPS problems. The~~

management options later were included in the NPS Program Plan and subsequently described in CWC §13369(a)(2)(A), as: (1) Non-regulatory implementation of management practices, (2) Regulatory-based incentives for management practices, and (3) The adoption and enforcement of waste discharge requirements that will require the implementation of management practices.

Although the terms used to express the management options have changed slightly over time, the underlying definitions have remained fairly consistent. The management option concept was never an attempt to establish rigid boundaries around NPS control actions, but was an attempt to recognize and acknowledge the many differing attitudes and potential responses to the State's efforts to control NPS pollution.

A RWQCB's approach regarding a NPS source discharge may have components of more than one management option, and the management options do not provide an exhaustive list of all of the ways to control NPS pollution. As described in the 1988 Plan, for example, WDRs could impose effluent limitations rather than, or in addition to, an obligation to conduct specified MPs. In addition, although there is not a direct correlation between the three administrative tools, which are available to the RWQCBs (see Section IIC above) and the three management options, dischargers are always under one of the administrative tools. For example, depending upon the specific contents of a particular administrative tool, waivers of WDRs could be characterized as Option 1 and/or Option 2, while some WDRs and conditional prohibitions could be characterized as Option 2 and/or Option 3. Consequently, the three management options provide only a general outline for categorizing many RWQCB NPS pollution control efforts. The actual contents of the administrative tool that implements a particular NPS implementation program are of greater import than the management option used to characterize the administrative tool. Additional information about "management options" is provided below.

Management Option 1: Non-Regulatory Implementation of MPs

The "non-regulatory implementation" option is characterized primarily by implementation actions or programs where a RWQCB does not directly impose obligations on dischargers to implement NPS control MPs. These actions or programs may rely upon discharger NPS pollution control actions implemented under the administration of Third-Party Programs, as described above, if those programs incorporate the five key elements as outlined above. Where existing Third-Party Programs do not contain all five of the elements, the parties responsible for managing these programs should generally be asked by the RWQCBs to voluntarily supplement their programs with additional measures designed to meet the five elements. If they do so, the entire program could be considered as "non-regulatory implementation". Where a third party does not choose to include these elements as part of its program, the RWQCBs will need to establish the supplemental elements. Another example of "non-regulatory implementation" is where dischargers determine that it is feasible to completely prevent all discharges of waste. If a RWQCB determines there is no remaining threat of discharges that could affect the quality of waters of the State, it loses jurisdiction to impose an obligation to conduct MPs.[34]

~~Management Option 2: Regulatory- Based Incentives for MPs~~

~~The "regulatory-based incentives" option includes those programs where the RWQCBs provide incentives to dischargers to implement specific MPs, but do not explicitly mandate their use. Relief from substantive or procedural requirements, such as reduced frequency of monitoring or reporting or elimination of a requirement to obtain RWQCB approval or licensed professional certification of discharger-specific NPS pollution management plans, if otherwise required, are among the types of incentives that are available to a RWQCB.~~

~~Management Option 3. Waste Discharge Requirements that Require MP Implementation~~

~~This management option is characterized as direct regulation and is more prescriptive than "non-regulatory implementation" and "regulatory-based incentives," in that the RWQCBs may use WDRs to mandate the use of specific MPs as further described below. The Porter-Cologne Act states that a RWQCB may not "specify the design, location or type of construction" required to achieve compliance with water quality standards. However, RWQCBs may prescribe the use of a specific MP as long as the RWQCBs also explicitly allow a discharger to substitute another MP of their own choosing that will achieve the same level of water quality protection. This provides dischargers with flexibility and managerial control over their operations. In addition to MPs, WDRs may also include effluent limitations, receiving water limitations, monitoring and reporting provisions, and other requirements.~~

V. RWQCB Compliance Assurance

Typically, the RWQCBs have regulated individual dischargers, rather than groups of dischargers who are represented or coordinated by third parties. Individual dischargers, including both landowners and operators, continue to bear ultimate responsibility for complying with a RWQCB's water quality requirements and orders. Generally, under the Porter-Cologne Act, the RWQCBs cannot take enforcement actions directly against non-discharger third parties. As part of the fifth element described above, the RWQCBs will need to explain how significant non-compliance can be addressed in Third-Party Programs. 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. Individual dischargers need to be informed as to what individual discharger actions or inactions will lead to individual enforcement. This explanation is necessary so that participating dischargers understand the ramifications of non-compliance, even if that non-compliance is by a third party they have selected as their representative. Options short of individual enforcement actions could include RWQCB actions such as changing a program to remove some autonomy, or developing sequential enforcement phases related to triggering events built into the program. Ultimately, the ineffectiveness of a group through which a discharger

participates in NPS control efforts cannot be used as an excuse for lack of individual discharger compliance.

The SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. Both the Enforcement Policy and common RWQCB practice also recognize the merit of progressive enforcement. With progressive enforcement, a RWQCB implements enforcement through an "...escalating series of actions that allows for the efficient and effective use of enforcement resources to: (1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance."

VI. IMPLEMENTATION SUCCESS AND FUTURE CONSIDERATIONS

This policy provides a template for NPS pollution control in California. However, the ability of the SWRCB and RWQCB to aggressively implement and enforce the State's NPS Program in a reasonable timeframe is directly linked to the resources available—both staff and budget—to carry out the program. The SWRCB recognizes that it needs to provide strong support for the RWQCBs' efforts through available technical and financial oversight and assistance. Statewide, a diverse array of parties participate in various ways to implement NPS pollution control measures. However, in most situations, the primary participants are the RWQCBs and NPS dischargers. The RWQCBs are expected to develop their own priorities and schedules for addressing the specific types of NPS pollution present within their regions.

Successful implementation of the NPS Program largely depends on two factors: the ability of the RWQCBs to use their administrative authorities and limited resources in creative and efficient ways, and the willingness of dischargers to implement MPs and other strategies that effectively prevent or control NPS discharges. To help accomplish this goal, dischargers are urged to take advantage of the many technical and financial assistance programs available to assist them and described earlier in this document.

Current land use management practices that have resulted in NPS pollution have a long and complicated physical, economic and political history. 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 ~~old habits~~ the use of practices that have resulted in current NPS pollution discharges and ~~cultural~~the barriers to change. Therefore, it is expected that it will take a significant amount of time for the RWQCBs to approve or endorse NPS control implementation p~~Third-Party P~~rograms throughout their regions, and even longer for those programs to achieve their objectives.

A rigorous dedication to periodic evaluation of all aspects of the program and an adaptive management approach will facilitate the road to success. Statewide implementation of the NPS program is predicated not only on individual NPS discharger actions to adopt and adapt alternative MPs, but upon the development and adaptation of self-determined management structures that encourage and support these changes. Much is known about the MPs that most effectively prevent and control polluted runoff. Less is understood about the alternative

alliances and management structures - the ~~T~~third ~~P~~party ~~P~~programs - that most efficiently and effectively will result in the watershed or industry-wide actions needed to control NPS pollution statewide. In addition to the public and private financial resources dedicated to this purpose, this effort will require a conscious willingness to experiment, evaluate and adapt management approaches that will support and bring us closer to our ultimate goal -- that of controlling NPS pollution to protect the quality of waters of the State in accordance with the mandates of the Porter-Cologne Act.

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SWRCB, 1999. Plan for California's Nonpoint Source Pollution Control Program. Division of Water Quality, Sacramento, CA. December 1999.

SWRCB, 2002. Water Quality Enforcement Policy. Office of Statewide Initiatives, Sacramento, CA. February 2002.

USEPA, 1993. Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters. January 1993.

END NOTES

1. CWC 13050[e],13260[a],13263[a],13376,13377. See also Lake Madrone Water District v. State Water Resources Control Board (1989) 209 Cal.App.3d 163, 171-175, 256 Cal.Rptr. 894 (Lake Madrone); Tahoe-Sierra Preservation Council v. State Water Resources Control Board (1989) 210 Cal.App.3d 1421, 1435, 259 Cal.Rptr. 132; 63 Ops.Cal.Atty.Gen. 51, 53-359 (1980) (Tahoe-Sierra).
2. See Water Code section 13000
3. See Water Code section 13000
4. (CWC sections 13200, 13201)
5. (CWC section 13245)
6. (CWC sections 13168, 186)
7. (CWC sections 13263(i), 13377; 40 Code of Federal Regulations [CFR] section 122.28; Cal. Code of Regulations [CCR] Title 23, section 2235.2)
8. (CWC section 13320; CCR, Title 23, sections 2050-2068)
9. (CWC sections 13000, 13050(i), 13140, 13142, 13241)
10. See discussion in Chief Counsel's Statement for the State Nonpoint Source Management Program Administered by the State Water Board and the Regional Water Boards (October 1988), pp. C-1 through C-2. See also Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program, pp. 3-4 (1969).
11. (CWC section 13050[j], 13241) The State Water Resources Control Board and the Regional Water Quality Control Board must consider the factors specified in CWC section 13241 when adopting or revising water quality objectives.
12 The federal antidegradation policy is contained in 40 C.F.R. sec. 131.12. The state is required to adopt and implement an antidegradation policy consistent with the federal policy. The federal policy establishes three tiers of water quality protection. The first tier establishes a minimum requirement that existing instream uses and the level of water quality necessary to protect those uses be maintained and protected. The second tier is designed to protect high quality waters by establishing prerequisites for allowing degradation of these waters. The third tier addresses outstanding national resource waters.
13. (See 33 U.S.C. sec. 1313(c); 40 CFR sections 131.3[i], 131.6)
14. (CWC section 13242)
15. (CWC section 13242)
16. CWC section 13263[g]
17. CWC section 13260
18. CWC section 13263[a]
19. (CWC sections 13260, 13269)
20. (CWC section 13264)
21. (CWC sections 13263, 13269)
22. (CWC section 13243)
23. (CWC section 13263[a] and [i]
24. (CWC section 13263[i])
25. CWC section 13269(a)(1)
26. CWC section 13269 (a)(2)
27. CWC section 13269(a)(4)(A)
28. (CWC section 13050[d])
29. Lake Madrone, supra, fn. 1, 209 Cal.App. 3d at 169, 256 Cal.Rptr. 894; see Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969) (Final Report), App. A, p. 23.
30. See e.g., Lake Madrone, supra, fn. 1 (release of accumulated sediment from a dam held a discharge of waste). See also discussion in Sawyer, State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow (1988) Pacific L.J. 1267, 1273-1275.
31. Northwest Indian Cemetery Protective Association vs. Peterson, (Ninth Circuit 1986) 795 F.2d688, 697, revised on other grounds (1988) Lung vs. Northwest Indian Cemetery Protective Association 485 U.S. 439 [108 S.Ct. 1319.99 L.Ed.2d.
32. Statewide information about IACC agencies and their activities is currently available at http://www.swrcb.ca.gov/nps/iacc.html.
33. CWC section 13001
34. CWC section 13260

Attachment B

Draft

Functional Equivalent Document

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

December 2003

Division of Water Quality
STATE WATER RESOURCES CONTROL BOARD
California Environmental Protection Agency

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P.O. Box 100
Sacramento, CA 95812-0100

To request copies of the proposed Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program and the draft Functional Equivalent Document, please call Millie Arestad at (916) 341-5966.

Documents also are available at:

http://www.swrcb.ca.gov

Notice of Filing

To: Any Interested Person

From: State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

Subject: Notice of Filing submitted under section 21080.5 of the Public Resources Code

Project Proponent: State Water Resources Control Board (SWRCB)

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

Contact Person: Steve Fagundes (916) 341-5487

Project Location: State of California

Project Description: The Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Implementation and Enforcement Policy) was developed in response to the requirements of California Water Code section 13369(a). 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."

This notice is to advise that the SWRCB is considering adoption of the NPS Implementation and Enforcement Policy. Action on this Policy will be taken in accordance with an exemption under section 21080.5 of the Public Resources Code from the requirements to prepare an Environmental Impact Under the California Environmental Quality Act (CEQA) (Public Resources Code 2100 et seq.) and other applicable laws and regulations.

Copies of the Functional Equivalent Document can be downloaded from the SWRCB web site at (http://www.swrcb.ca.gov). Compact disc copies can be obtained from the Contact Person named above.

Comments on the proposed NPS Implementation and Enforcement Policy should be submitted by January 30, 2004.

Signed:_____ Date: December 18, 2003

Stan Martinson, Chief
Division of Water Quality
State Water Resources Control Board

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SECTION I. INTRODUCTION

Nonpoint source (NPS) pollution is the most serious water quality problem facing California. In 1988, the State Water Resources Control Board (SWRCB) adopted California's first *Nonpoint Source Management Plan* (1988 Plan). In spite of the investment of significant resources to address NPS pollution and improve water quality, NPS discharges continue to be responsible for the major water quality problems facing California. In December 1999, the SWRCB, in its continuing effort to control NPS discharges upgraded the 1988 Plan with adoption of the *Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan), jointly developed by the SWRCB and the California Coastal Commission (CCC). Adoption of the NPS Program Plan brought the State into compliance with section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) and upgraded the 1988 Plan to comply with U.S. Environmental Protection Agency (U.S. EPA) requirements. The NPS Program Plan committed the State to the implementation of 61 NPS control management measures (MMs) by the year 2013, with the goal of controlling NPS pollution and restoring the quality of the State's waters. MM implementation is to be achieved through NPS discharger implementation of self-determined management practices (MPs) designed to prevent or control nonpoint sources of pollution. In 1999, Chapter 5.4 was added to the California Water Code (CWC). Among its requirements was the provision that the SWRCB develop guidance describing the process by which the SWRCB and the Regional Water Quality Control Boards (RWQCBs) will implement and enforce the State's NPS management plan. In response to this requirement, the SWRCB developed and proposes adoption of the *Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Implementation and Enforcement Policy), the subject of the proposed action described in this document.

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PURPOSE OF DOCUMENT

The purpose of this document is to present the SWRCB's analysis of the need for and the effects of the proposed NPS Implementation and Enforcement Policy. The SWRCB must comply with the requirements of the California Environmental Quality Act (CEQA) when adopting state policy for water quality control. CEQA authorizes the Secretary of the Resources Agency to certify a regulatory program of a State agency as exempt from the requirements to prepare an Environmental Impact Report (EIR), Negative Declaration, or Initial Study if certain conditions are met. The process that the SWRCB is using to adopt the proposed Policy has received certification from the Resources Agency to be "functionally equivalent" to the CEQA process (Title 22, Code of Regulations, Section15251(g)). Therefore, this report is called a Functional Equivalent Document (FED) and fulfills the requirements of CEQA for preparation of an environmental document. The environmental impacts that could occur as a result of the proposed action are discussed under Section VI, "Environmental Effects of the Proposed Policy", and summarized in an Environmental Checklist in Section VII.

BACKGROUND

Nonpoint sources of pollution or polluted runoff are the result of a broad range of human activities. These include activities related to agricultural production, range management and animal containment operations; residential and commercial irrigation and landscape care; timber harvest; construction; and runoff from driveways, streets and highways. Sources of water are equally broad and could include rainfall, irrigation water, and wash water or drainage of any kind that is not a point source. The result is water moving across the landscape, paved or unpaved, and picking up and carrying with it any pollutants it encounters. Eventually, both water and pollutants enter our natural waterways, degrading water quality to the point that beneficial uses are affected and, in many cases, waterways become unfit for human or wildlife use.

To control nonpoint sources of pollution, the 1988 Plan was adopted by the SWRCB in response to the 1987 amendments to the Clean Water Act (CWA), the primary federal water quality protection statute. These amendments included a new section 319 titled, "Nonpoint Source Management Programs". Section 319 required the states to develop assessment reports and management programs describing the states' nonpoint source problems and setting forth a program to address these problems. Section 319 also authorized federal grants to the states to support implementation of the Management Programs. However, Congress appropriated no funds for the program until 1990. Since then, however, California has received and disbursed over $48,600,000 in federal grants to public and private collaborators for implementation of CWA 319(h) NPS control demonstration projects. These projects are

designed to provide "hands on" education and outreach on the prevention and control of NPS pollution and the restoration of the state's water bodies. Recipients include hundreds of California partnerships formed to provide leadership roles, and made up of public and private agencies and organizations throughout the state. Additional funds for NPS control and stream restoration have been made available through the State Revolving Fund Loan program, State Propositions 13, 40, and 50 and the Clean Beaches Initiative.

The State's 1988 Plan provided for a management program that focused on discharger implementation of self-selected methods, measures, or practices to meet their NPS control needs. Today these measures are known as management practices (MPs). They include, but are not limited to, structural and non-structural controls (e.g. operation and maintenance procedures). They can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

In recognition and acknowledgement of the many differing discharger attitudes toward their NPS control responsibilities, the 1988 Plan also described three general management approaches that might be adopted to address NPS problems. These ranged from the voluntary NPS control implementation actions taken by responsible dischargers to the need for the RWQCBs to issue waste discharge requirements (WDRs) and potentially take enforcement actions to achieve NPS control compliance.

In 1990, Congress enacted CZARA, in an additional effort to protect coastal waters from NPS pollution. In passing CZARA, Congress noted the link between coastal water quality and land use activities. At the same time the State was required to update the 1988 Plan to remain eligible for funding for water quality and coastal protection by U.S. EPA and the National Oceanographic and Atmospheric Administration (NOAA). In response, the SWRCB, in cooperation with the RWQCBs and the CCC developed the NPS Program Plan, to meet CZARA requirements and to update the state's 1988 Plan. The NPS Program Plan was conditionally approved by U. S. EPA and NOAA in 1998. To receive full approval, the SWRCB and CCC were required to show that they possessed the authority to implement and enforce the NPS Program Plan. The SWRCB complied with this requirement by citing the authorities given to it by the State's Porter-Cologne Water Quality Control Act (Porter-Cologne Act). The SWRCB and the CCC adopted the NPS Program Plan, and it was subsequently approved by U.S. EPA and NOAA in July 2000.

NPS pollution is the single greatest threat to water quality in California. According to statistics developed by U.S. EPA, 54 percent of California's polluted waterways are contaminated only by nonpoint sources. Another 45 percent are polluted by a combination of both point and nonpoint sources. The CWA section 305(b) report on water quality, which California submitted to U. S. EPA in 2003, included the State's CWA section 303(d) list of impaired waterbodies. The list approved by U. S. EPA includes 685 water quality limited segments and 1,883 water segment-pollutant combinations (i.e., waters that do not meet the water quality objectives established to protect designated beneficial uses). The CWA requires that total maximum daily loads (TMDLs) be established for all waters on the CWA section 303(d) list. To ensure water quality standards are met and beneficial uses are protected, allocations of pollutant loads to all sources are established for the pollutant(s) in question through the TMDL process.

SECTION II. EXISTING REGULATORY CONDITIONS

FEDERAL CLEAN WATER AND STATE PORTER-COLOGNE WATER QUALITY CONTROL ACT

Current regulatory requirements for the control of nonpoint sources of pollution are found in both federal and State law. Those requirements are briefly discussed below.

The CWA is the principal federal statute governing water quality protection. The Porter-Cologne Act is the principal State statute governing water quality protection. The Porter-Cologne also authorizes the State to implement the federal CWA (CWC section 13000).

The CWA requires the states to adopt water quality standards. For the purposes of the CWA, water quality standards are the designated beneficial uses of the state's waters, criteria to protect those uses, and an antidegradation policy. In California, the SWRCB and RWQCBs have adopted water quality standards through their planning processes. The standards consist of designated beneficial uses, water quality objectives (which are equivalent to criteria) to protect these uses, and an antidegradation statement. Upon approval by U.S. EPA, the beneficial use designations and water quality objectives become federally approved standards.

For point source discharges to surface waters, the principal means by which water quality standards are implemented is through a permit program established under the CWA. In states with approved programs (including California), the state, rather than the U.S. EPA, has primary responsibility for issuing and administering permits. Under the CWA, however, NPS discharges are not subject to federal permitting requirements, nor are discharges to ground water. Nevertheless, under the CWA, the State is required to plan for water quality control of nonpoint sources of pollution, as well as to plan for control of point sources of pollution. In addition, water quality standards apply to the receiving water, regardless of whether the waterbody receives point or NPS discharges, or both.

The Porter-Cologne Act designates the SWRCB and RWQCBs as the State agencies with primary responsibility for water quality control in California and obligates them to address all discharges of waste that could affect the quality of the waters of the State, including potential nonpoint sources of pollution as well as point sources. To carry out this mandate, the Porter-Cologne Act has provided the SWRCB and RWQCBs with:

1. Planning authority to designate beneficial uses of the waters of the state, establish water quality objectives to protect those uses, and develop programs to implement those water quality objectives;

2. Administrative permitting authority in the form of WDRs, waivers of WDRs, and basin plan prohibitions; and

3. Enforcement options to ensure that dischargers comply with permitting requirements.

The Porter-Cologne Act applies broadly to all State waters, including surface waters, wetlands, and ground water; it covers waste discharges to land as well as to surface and groundwater, and applies to both point and nonpoint sources of pollution. In the Porter-Cologne Act, the legislature has declared that it is the policy of the State that:

1. The quality of all the waters of the State shall be protected;

2. All activities and factors that could affect the quality of state waters shall be regulated to attain the highest water quality that is reasonable; and

3. The State must be prepared to exercise its full power and jurisdiction to protect the quality of water in the State from degradation.

Planning authority under the Porter-Cologne Act extends to any activity or factor that may affect water quality. All water quality control plans are required to include implementation programs that must describe the nature of actions that are necessary to meet water quality objectives. Implementation programs also must include a time schedule and describe proposed monitoring activities to assess compliance with water quality objectives.

In obligating the SWRCB and RWQCBs to address all discharges of waste that can affect water quality, including nonpoint sources, the Legislature provided the SWRCB and RWQCBs with administrative permitting authority in the form of administrative tools. These administrative tools are WDRs, waivers of WDRs, and basin plan prohibitions and these are used to address ongoing and proposed waste discharges. The SWRCB and RWQCBs use their permitting authorities to implement the requirements of applicable federal requirements, State policies, and State and regional water quality control plans. 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 State Water Resources Control Board Enforcement Policy* (SWRCB Enforcement Policy), approved by the SWRCB in 2002, defines the enforcement options available to a RWQCB. These options range from an informal Notice of Violation to formal actions described in the Porter Cologne Act.

TOTAL MAXIMUM DAILY LOAD (TMDL) ACTIVITIES

As noted earlier, the CWA requires the State to develop TMDLs on all water bodies and water-body segments on the CWA section 303(d) list. TMDLs must account for all the pollutant sources that caused the CWA section 303(d) listing—including both point and nonpoint sources. The TMDL is a numerical quantity that identifies the present and near future maximum load of pollutants from point and nonpoint sources, in addition to those from background sources, that is necessary to achieve State water quality standards for a specific receiving water. The TMDL determined load also must take into account seasonal variations and an adequate margin of safety.

After TMDLs are established at a level necessary to achieve applicable water quality standards, waste (for nonpoint sources) and/or waste load (for point sources) allocations are made to the identified sources or parties who must take action to meet the allocations. The source allocations may be specific to agencies or persons (businesses), or by source category or sector. State developed TMDLs also include an implementation plan that describes the actions that will be taken to alleviate the impairment. Implementation plans identify enforceable features (e.g., prohibitions) and triggers for RWQCB action (e.g., performance standards). The TMDL implementation plans are incorporated into regional basin plans as enforceable basin plan amendments. The SWRCB is developing a TMDL Implementation Policy with a number of requirements that parallel those of NPS Implementation and Enforcement Policy. A monitoring strategy also must be developed upon which performance evaluation can be based and thus provide information that could indicate or document the need for adaptive management activities or consideration of revisions for phased TMDLs.

To date 19 TMDLs have gone through the full approval process including approval by U. S. EPA and 132 are at various stages of development or approval at the RWQCBs or the SWRCB.

SECTION III. PROJECT DESCRIPTION

PROJECT DEFINITION

The project is the development of a State policy (NPS Implementation and Enforcement Policy) that provides guidance describing the process by which the SWRCB and RWQCBs will implement and enforce the NPS Program Plan. The policy recognizes the RWQCBs' responsibility to ensure that appropriate NPS implementation programs are in place to achieve the State's water quality goals and to protect water quality from NPS pollution. The policy provides guidance on the following aspects of NPS implementation programs:

(1) The use, responsibilities, and benefits of third-party programs in NPS implementation programs; and

(2) The key elements of an NPS implementation program. These include:

(a) A statement of the implementation program's ultimate objectives;

(b) A discussion of the potential MPs expected to be implemented to achieve the objectives, a selection process for the MPs, and a process to verify their implementation;

(c) A time schedule, where necessary, with appropriate milestones to achieve objectives;

(d) Feedback mechanisms to ascertain whether the program is achieving objectives; and

(e) Advance notice by the RWQCBs of potential consequences for failing to achieve the objectives.

STATEMENT OF GOALS

The SWRCB's goals for this project are to:

(1) Provide consistent statewide guidance on the role of third-party programs in implementing and enforcing the NPS Program Plan;

(2) Provide consistent statewide guidance on the key elements of a NPS implementation program; and

(3) Recognize the RWQCBs' responsibility to ensure that appropriate NPS implementation programs are in place to restore and maintain water quality standards and to protect state waters from NPS pollution.

PROPOSED ACTION

The proposed action is SWRCB adoption of the NPS Implementation and Enforcement Policy outlined in the Project Definition.

SECTION IV. ENVIRONMENTAL SETTING

California presents a variety of environmental conditions, which range from the snow-covered peaks of the Sierra Nevada Mountains to the hot dry desert of Death Valley. Between these two extremes are almost unlimited climatic variations and precipitation patterns. The Pacific Ocean shoreline on the west presents one of the most scenic and unique coastlines in the world. The eastern boundary borders basin and range country. Between the mountain ranges to the east and the coastal ranges to the west are troughs and valleys aligned in a general north-south direction. The Sacramento, San Joaquin, and the Imperial Valleys in the north, central and south, respectively, form the major agricultural areas of the state, with the San Joaquin Valley having the distinction of being among the most agriculturally productive areas in the world. In addition to these major agricultural areas, the environmental conditions in California are favorable to specialty crops. The Salinas Valley in the central coast region is one of the few places in the world where artichokes are grown commercially and the Napa Valley in northern California is renown for its vineyards and wine. Crops grown in the state include most food crops, fruits and nuts, citrus, cotton and a variety of vegetables. The extensive agriculture in the State depends on irrigation water supplies with consequent runoff problems.

For water quality management, section 13200(a) of the Porter-Cologne Act divides the State into nine separate hydrologic regions. California is a state of geologic contrasts with the highest (Mount Whitney) and the lowest (Death Valley) elevations only 81 miles apart. The variety of environmental conditions in the state is a reflection of the variation in geology, topography, climate, vegetation, and land-use found in the many areas of the State. These factors, which account for different ecological conditions, as they relate to the nine different regions of the State, are discussed separately below. In addition, brief summaries of water quality conditions in each region are presented. The sources of the information provided in this section are the RWQCB basin plans and regional Watershed Management Initiative chapters and updates as prepared by each RWQCB, unless otherwise specified.

North Coast Region (Region 1)

Porter-Cologne Act section 13200(a) describes the North Coast Region as that which comprises all basins, including the Klamath Lake and Lost River Basins, draining into the Pacific Ocean, from the California-Oregon state line to the southern boundary of the watershed of the Estero de San Antonio and Stemple Creek in Marin and Sonoma counties.

The northern part of the state bordering Oregon includes the Klamath Mountains, the Cascade Ranges, and the Modoc Plateau. The Klamath Mountains include a number of individual ranges: the South Fork Mountains, the Trinity Alps, the Scott Mountains, the Salmon Mountains and the Siskiyou Mountains. The Siskiyou Mountains form the most northerly arc, the trend swinging from north to northeast and east across the California-Oregon border.

Most of the rivers in this region have been dammed, and their reservoirs provide a significant amount of the water used in other sections of the State, with agriculture using up to 80 percent of the State's water. The area provides important habitat for both aquatic and terrestrial wildlife, its rivers support significant commercial and recreational fisheries, and various agricultural activities—primarily grazing and dairy operations occur throughout the region. Private timber harvest operations dominate many of the areas.

The North Coast Region is divided into two natural drainage basins: the Klamath River Basin and the North Coast Basin, encompassing a total area of approximately 19,390 square miles. The region covers all of Del Norte, Humboldt, Trinity and Mendocino counties; major portions of Siskiyou and Sonoma counties; and small portions of Glen, Lake and Marin counties.

Precipitation in the Pacific Northwest is generally high, varying annually in the Klamath Mountains from 40 to more than 80 inches annually, and occurring mainly during the winter season. Parts of the Klamath River Basin receive between 60 to 125 inches of rain per year. Precipitation, in general, is greater in this region than for any other part of California, and damaging floods are always a potential hazard. However, ample precipitation, in combination with the mild climate found over most of the North Coast Region, has provided a wealth of fish, wildlife and scenic

resources. In addition to supplying habitat for numerous terrestrial species, the numerous streams and rivers support anadromous, coldwater and warm-water fisheries.

Tidelands and marshes also are extremely important to many species of waterfowl and shore birds, both for feeding and nesting. Cultivated lands and pasture lands provide supplemental food for many birds, including small pheasant populations. Tideland areas along the north coast provide important habitat for marine invertebrates and nursery areas for forage fish, game fish and crustaceans.

There are 14 major surface water hydrologic units in the North Coast Region. While the region constitutes only about 12 percent of the total area of California, it produces almost 40 percent of the annual runoff for the state. This runoff contributes to flow in surface water streams, storage in lakes and reservoirs and replenishes groundwater.

Approximately two percent of California's population resides in the North Coast Region. The largest urban centers are the greater Eureka area of Humboldt County and the greater Santa Rosa area in Sonoma County including the Highway 101 corridor. The major industries in the region are logging and timber milling/production activities, vineyards and wineries, commercial and recreational fishing and tourism.

NPS Water Quality Problems

Sediment, siltation and elevated temperatures are the dominant water quality problems found in north coast streams, followed by the presence of excessive nutrients, organic enrichment and low dissolved oxygen levels. Other water quality problems include the presence of pathogens and mercury and high pH levels.

For sediment and siltation water quality problems, the identified potential sources include silviculture, logging road construction and maintenance, removal of riparian vegetation, land development, streambank modification and destabilization, the draining and filling of wetlands, hydromodification, private and county road construction and maintenance, sand and gravel extraction, and urban runoff.

Elevated water temperatures are associated with removal of riparian vegetation, the draining and filling of wetlands, agricultural water diversions, hydromodification, and sand and gravel extraction. Nutrient and organic enrichment/dissolved oxygen problems are associated with range and pasture grazing, intensive animal feeding operations, manure lagoon operation and maintenance, surface and sub-surface agricultural return flows and the draining and filling of wetlands.

San Francisco Region (Region 2)

Section 13200(b) of the Porter-Cologne Act defines the San Francisco Bay Region as that which comprises San Francisco Bay, Suisun Bay, from the Sacramento and San Joaquin Rivers westerly from a line which passes between Collinsville and Montezuma Island and follows then the boundary common to Sacramento and Solano counties and that common to Sacramento and Contra Costa counties to the westerly boundaries of the watershed of Markely Canyon in Contra Costa county, all basins draining into the bays and rivers westerly from this line, and all basins draining into the Pacific Ocean between the southerly boundary of the north coastal region and the southerly boundary of the watershed of Pescadero Creek in San Mateo and Santa Cruz counties.

The San Francisco Bay/Estuarine system conveys the waters of the Sacramento and San Joaquin Rivers into the Pacific Ocean, contributing most of the freshwater inflow to the Bay. Many small rivers and streams supplement this freshwater flow. The rate and timing of these freshwater flows are among the most important factors influencing physical, chemical and biological conditions in the estuary. Most of the freshwater flow from the Sacramento/San Joaquin system, however, is trapped upstream by dams, canals and reservoirs of State, federal and local water diversion projects. The San Francisco Bay system functions as the only drainage outlet for waters of the Central Valley. It also marks the natural topographic separation between the northern and southern coastal mountain ranges. The region's waterways, wetlands, and bays form the nucleus of the fourth largest metropolitan region in the United States. The region includes all or major portions of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano and Sonoma Counties.

The San Francisco Bay system presents highly dynamic and complex environmental conditions that support an extraordinarily diverse and productive ecosystem. Within sections of the Bay lie deepwater channels adjacent to large expanses of very shallow water. Salinity levels range from hypersaline to fresh water, with water temperatures varying considerably throughout the Bay system. These factors greatly increase the number of species that can live in the estuary and enhance its biological stability.

Deepwater channels in the San Francisco Bay system, marshlands, freshwater streams, and rivers provide a wide variety of habitats, which have become increasingly vital to the survival of several plant and animal species as other estuaries are reduced in size or lost to development. These areas sustain rich communities of crabs, clams, fish, birds and other aquatic life and serve both as important wintering sites for migrating waterfowl and as spawning areas for anadromous fish.

Most of the region enjoys a milder climate than inland areas of the state. The coastal area receives moderate amounts of precipitation.

Major population centers include San Francisco, Oakland, and the areas of San Jose, Santa Clara and Monterey along with their associated outlying communities.

NPS Water Quality Problems

Impaired water quality related to pesticides from nonpoint sources such as agricultural drainage and residential landscape pesticide use is a major problem throughout San Francisco Bay, adjacent bays and tributary rivers and creeks. Atmospheric deposition also is a major source of some of these compounds, including dioxin and furan compounds that are among the most toxic in existence, are environmentally persistent, bioaccumulate, and are thought to be human carcinogens. In addition, the presence of polychlorintaed biphenyls (PCBs) from unknown NPS sources has lead to innumerable health advisory warnings regarding fish consumption.

Mercury pollution continues to be a significant legacy problem, with drainage from historic mining operations and from current operations. In addition, sediment and siltation have severely degraded some bay and ocean tributary streams, which otherwise would provide habitat for steelhead. Pollution from sediment and siltation is present throughout the region as a result agricultural, construction and land development activities.

Tomales Bay and its tributaries are polluted by pathogens and nutrients from agricultural operations, primarily grazing, dairies and other confined animal facilities. Some ocean and bay beaches are polluted with high coliform counts, and stream flow regulation and modification have led to low dissolved oxygen levels, and high levels of salinity, total dissolved solids (TDS), and chlorides in some water bodies.

Central Coast Region (Region 3)

The Central Coast Region is described in the Porter-Cologne Act section 13200(c) as comprising all basins, including the Carrizo Plain in San Luis Obispo and Kern Counties, draining into the Pacific Ocean from the southerly boundary of the watershed of Pescadero Creek in San Mateo and Santa Cruz Counties to the southeasterly boundary, located in the westerly part of Ventura county, of the watershed of Rincon Creek.

The region is dominated by a rugged seacoast and three parallel ranges of the Southern Coast Mountains. Ridges and peaks of these mountains, the Diablo, Gabilan and Santa Lucia Ranges, reach to 5,800 feet. Between these ranges lie the broad valleys of the San Benito and Salinas Rivers. These Southern Coast Ranges abut the west to east trending Santa Ynez Mountains of the Transverse Ranges that parallel the southern exposed terraces of the Santa Barbara Coast.

The trend of the mountain ranges, relative to onshore air mass movements, imparts a marked climatic contrast between seacoast, exposed summits, and interior basins. Variation in terrain, climate, and vegetation account for a multitude of different landscapes. Sea cliffs, sea stacks, white beaches, cypress groves and redwood forests along the coastal strand contrast with dry interior landscapes of small sagebrush, short grass, and low chaparral.

The region has three times the volume of average annual precipitation as the Los Angeles Region. Nevertheless, for the most part the climate is considered arid. Traditionally, the region has had agriculture and related food processing as major industries, but oil production, tourism and manufacturing contribute significantly to the economy. The region is home to the Salinas Valley, which is one of a very few places in the world that grow artichokes commercially. Other commercially grown and exported crops include lettuce, strawberries, garlic, onions, kiwi, avocados and wine grapes.

NPS Water Quality Problems

Nutrients, sediments, pesticides and pathogens, including high fecal and total coliform levels, are the primary causes for CWA section 303(d) listings in this region. High pathogen levels primarily are attributed to grazing operations and failing septic systems. Listings include the majority of central coast beaches as well as rivers and streams, marshes and sloughs, and lagoons and bays. Agricultural runoff, both from irrigated agriculture and agricultural storm water runoff, is responsible for high pesticide and nutrient levels. Sediments and siltation from a variety of sources also contribute to severely degraded water quality. Primary sources include land development and construction, road construction, silviculture and agricultural operations. Secondary sources include grazing, hydromodification and stream channelization and alteration.

Los Angeles Region (Region 4)

The Los Angeles Region is described in Porter-Cologne Act section 13200(d) as comprising all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between the San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and the San Gabriel River drainages.

Most of the region lies within the western portion of the Transverse Ranges. The San Andreas transform fault system cuts through the ranges extending northwesterly for over 700 miles from the Salton Sea in southern California to Cape Mendocino in northern California. The Transverse Ranges have a conspicuous east-west trend unlike other major ranges in the continental United States. Major mountain ranges in the region include: the San Gabriel Mountains, Santa Susana Mountains, Simi Hills, and Santa Ynez Mountains, with the San Gabriel Mountains being the most prominent range.

Rain storms formed as a result of moist air from the west and northwest raised by the mountain ranges are common from November through March, followed by dry summers. Extreme variations in temperature, humidity, precipitation and cloud cover result from the topographic variability of the region. The coastal plains and islands, with their mild rainy winters and warm dry summers, are noted for their "Mediterranean" type of climate. The inland slopes and basins are characterized by more extreme temperatures and little precipitation. Average annual rainfall in the region is approximately 15 inches.

The geologic and climatic diversity is the basis for diverse plant and animal communities. Chaparral is the most common form of native vegetation, while oak woodland is dominant in some areas. Riparian vegetation associated with rivers and creeks in the region provides essential habitat and transportation corridors for wildlife, and support an abundance and diversity of species.

Insufficient water supplies to meet both urban and agricultural demands have required the region to rely on imported supplies for over fifty percent of the demand for many years. Major watersheds of the region include those of the Ventura, Santa Clara, Los Angeles and San Gabriel Rivers, and Calleguas, Malibu, and Ballona Creeks. Coastal waters in the region include bays, estuaries, harbors, beach offshore areas, and open ocean.

Water is imported into the region through the Los Angeles Aqueducts, the California Aqueduct and the Colorado River Aqueduct. This water presents varying water-quality problems including turbidity, hardness and organic pollutants. Treatment of this water leads to other water quality concerns such as trihalomethanes. There is also extensive use in the region of reclaimed water.

NPS Water Quality Problems

Most of the region's bays, harbors, and shoreline have elevated levels of PCBs, the pesticide - DDT, chlordane and polyaromatic hydrocarbons (PAHs) that have resulted in the closure of over thirty beaches and resulted in over 75 coastal fish consumption advisories. High levels of bacteria and viruses pollute rivers, creeks and lakes throughout the region. Other water bodies have been polluted by high nutrient levels. As a consequence, extensive algal growth occurs in some water bodies and others are in various stages of eutrophication. Heavy metals, pesticides and other organic and inorganic chemicals from nonpoint sources have been identified as the principal pollutants affecting rivers, harbors, estuaries, lagoons and creeks. Almost all of the recognized wetlands of the region have elevated levels of lead, zinc, chromium and copper as well as PAHs, DDT, chlordane, dieldrin, and PCBs. Many water bodies have been identified as having between 10 to 15 water body/pollutant combinations. The Los Angeles RWQCB only lists the sources as NPS pollution, it does not list the particular activity generating the pollution.

Central Valley Region (Region 5)

Section 13200(g) of the Porter-Cologne Act describes the Central Valley Region as comprising all basins, including the Goose Lake Basin, draining into the Sacramento and San Joaquin Rivers to the easterly boundary of the San Francisco Bay Region near Collinsville. The Central Valley RWQCB has two offices in the Sacramento Valley, one in Sacramento and one in Redding, and one office in the San Joaquin Valley in Fresno.

The basins are bounded by the crests of the Sierra Nevada Mountains on the east and by the Coast Range and the Klamath Mountains on the west. They extend about 400 miles from the California-Oregon border southward to the headwaters of the San Joaquin River. A third basin, the Tulare Lake Basin, also comprises part of the region. Located at the lower end of the San Joaquin Valley, this basin receives the drainage of the San Joaquin Valley south of the San Joaquin River, including that from the Kaweah and Kings Rivers. Although larger in area than the San Joaquin Basin (16,400 square miles), the Tulare Lake Basin has no outlet to the ocean and about one-third of the State's irrigated land.

The Sacramento and San Joaquin River Basins cover about one fourth of the total area of the State and about 45 percent of the State's irrigated land. They furnish about 51 percent of the State's water supply. Surface waters from the two drainage basins meet and form the Sacramento-San Joaquin Delta, which ultimately drains into San Francisco Bay. Principal streams of the Sacramento River Basin include the Sacramento River and its larger tributaries, the Pit, Feather, Yuba, Bear and American Rivers to the east, and Cottonwood, Stony, Cache and Putah Creeks to the west. Major reservoirs and artificial lakes include: Shasta, Oroville, Folsom, Clear Lake and Lake Berryessa.

The San Joaquin River Basin covers 15,880 square miles and includes the entire area drained by the San Joaquin River. The principal streams in this basin are the San Joaquin River and it larger tributaries: the Cosumnes, Mokelumne, Calaveras, Stanislaus, Tuolumne, Merced, Chowchilla and Fresno Rivers. Major reservoirs and lakes include Pardee, New Hogan, Millerton, McClure, Don Pedro and New Melones.

The Sacramento and San Joaquin Valleys are noted for their agricultural productivity, which generates most of the income in the region. The irrigation needs of agriculture are met by a combination of waters from the valleys' rivers, water imported from the Trinity River in northern California, and from groundwater sources.

NPS Water Quality Problems

Water quality issues principally relate to NPS pollution resulting from land management practices related to livestock grazing, irrigated and non-irrigated agriculture, road and building construction, and timber harvest. Runoff from urbanized areas and abandoned mines and activities associated with active mining operations and hydromodification (e.g., dams, water diversions and stream channel disturbances) contribute to NPS problems. Principal pollutants include pesticides such as diazinon, chlorpyrifos, malathion and parathion and other carcinogenic agents, some of which result from agricultural aerial deposition. The Central Valley contains over 5,700 miles of agriculturally dominated water bodies (ADWs). An ADW is a water body receiving greater than 50 percent of its flow from agricultural discharges, during a significant portion of the irrigation season.

Other pollutants include mercury, copper and zinc from abandoned and active mining operations, pathogens and high ammonia, TDS and biological oxygen demand (BOD) levels from dairies and other confined animal operations.

Lahontan Region (Region 6)

The Lahontan Region is described in section 13200(h) of the Porter-Cologne Act as comprising all basins east of the Santa Ana, Los Angeles and Central Valley Regions from the California-Oregon boundary to the southerly boundary located in Los Angeles and San Bernardino Counties of the watersheds draining into Antelope Valley, Mojave River Basin and Dry Lake Basin near Ivanpah.

The region historically has been divided into North and South Lahontan Basins at the boundary between the Mono Lake and East Walker River watersheds. It is about 570 miles long and covers a total area of 33,131 square miles.

This region includes the highest (Mount Whitney –14,384 feet) and lowest (Death Valley – 282 feet below sea level) points in the contiguous United States. Like much of the rest of California, the region has a highly diverse landscape. The region includes the eastern slopes of the Warner, Sierra Nevada, San Bernardino, Tehachapi, and San Gabriel Mountains, and all or part of other ranges including the White, Providence, and Granite Mountains. Valleys in the region include the Madeline Plains and Surprise, Honey Lake, Bridgeport, Owens, Antelope and Victor Valleys. The Mojave Desert is primarily a plain, dotted with numerous hills and small mountainous elevations.

Climate within the region varies dramatically. The rain shadow areas of the eastern slopes of the Sierra Nevada Mountains receive very little rainfall, while the peaks register up to an average of 70 inches of precipitation from the west, most in snowfall. The desert areas receive less than 2 inches annually. Temperature extremes recorded in the region vary between 45º F at Boca in Truckee to as high as 134º F in Death Valley.

The varied topography, soils, and microclimates of the region support a corresponding variety of plant and animal life leading to what can be considered "ecological islands". These specialized ecological niches support several specially evolved/adapted plant and animal species that are unique to each of the "ecological islands". During the Gold Rush period in California's history, several sites in the foothills were extensively mined. In addition, mining for silver and other minerals has been going on since the 1860s, particularly at higher elevations. The abandonment of mines, after the deposits are exhausted, has left this area with major water contamination problems connected with these sites.

Recreational and scenic attractions of the region include Eagle Lake, Lake Tahoe, Mono Lake, the Mammoth Lakes, Death Valley and many wilderness and scenic river systems. Tourism and resource extraction form the backbone of the economy in the region. Agriculture and defense-related activities provide lesser contributions.

There are over 700 lakes and 3,170 miles of streams in the region. Water quality in most of the higher elevation water bodies is very good to excellent. Desert waters generally are of poor quality because of high concentrations of salt and minerals such as arsenic and selenium. These problems are further compounded by NPS geothermal, agricultural, and storm water discharges. A large volume of the water from the region is allocated by court decisions, federal law, and interstate agreements to other parts of the State, as well as to Nevada.

<u>NPS Water Quality Problems</u>

Sediment/siltation water quality problems exist throughout the region, including the Lake Tahoe watershed, as a result of grazing, silviculture, land development, construction activities, hydromodification, streambank modification and destabilization, and recreational facility development and activities. Grazing also is responsible for high nutrient and pathogen levels, the removal of streamside vegetation and high coliform levels. Recreational activities, including marina operations and boating activities, and failing septic systems have contributed to pollution from pathogens and nutrients.

Colorado River Basin Region (Region 7)

The Colorado River Basin Region is described in Porter-Cologne Act section 13200(i) as comprising all basins east of the Santa Ana and San Diego Regions draining into the Colorado River, Salton Sea, and local sinks from the southerly boundary of the Lahontan Region to the California-Mexico boundary.

The region covers 20,000 square miles in the southeastern portion of California and includes Imperial County and portions of San Bernardino, Riverside and San Diego Counties. On the northeastern side it is bounded by the state of Nevada, on the north by the New York, Providence, Granite, Old Dad, Bristol, Rodman and Old Mountain Ranges, on the west by the San Bernardino, San Jacinto and Laguna Mountain Ranges, and on the south by the Republic of Mexico.

The Salton Sea is a significant feature of the region. Located on the site of a pre-historic lake, it is the largest inland body of water in California. It is a drainage reservoir for irrigation return flows and storm water from Coachella Valley, Imperial Valley, and Borrego Valley, as well as drainage from Mexicali in Mexico.

The San Andreas Fault Zone cuts diagonally across the southwesterly portion of the region and borders the highlands on the northeast side of the Salton Trough. Borrego Valley is a typical valley formed by the San Jacinto Fault. The Coachella and Imperial Valleys were created when the Colorado River formed a delta that isolated the Salton Trough from the Gulf of California. Lakes that formed as a result, dried out and left the flat and fertile lands that form the present day valleys.

The Colorado River supplies water for use in the region. Drainage to the river is from a 200-mile long strip of watershed, which ranges from 7 to 40 miles in width and is referred to as the East Colorado River Basin. The Metropolitan Water District based in Los Angeles diverts Colorado River water near Parker Dam through the Colorado River Aqueduct for export to coastal counties. Parker Dam forms Lake Havasu. At the Palo Verde Diversion Dam, water is diverted for irrigation to Palo Verde Valley and at Imperial Dam, water is diverted to the All-American Canal, which conveys water in California to Bard Valley and to the agricultural areas of Imperial and Coachella Valleys. Agriculture is the mainstay of the region.

Drainage waters resulting from Colorado River diversions and use, which do not return to the Colorado River, drain into the Salton Sea. The portion that does not drain into the Colorado River forms the West Basin. Lake Cahuilla in Coachella Valley also is used to store Colorado River water for irrigation and recreational purposes.

The region has the driest climate in California with mild winters and hot summers. Temperatures range from below freezing to 120º F. Higher elevations in the region get snow and the mean seasonal precipitation in the upper San Jacinto and San Bernardino Mountains ranges from 30 to 40 inches. Lower elevations receive very little rainfall—an average of about four inches along the Colorado River. Precipitation over the entire area occurs primarily from November through April, and August through September.

Many areas in the region are inhabited by animals tolerant to arid conditions, including small rodents, coyotes, foxes, birds and a variety of reptiles. Along the river banks and in the mountains where water is more abundant, deer, bighorn sheep and a diversity of small animals exist. Practically all species of fish found in the region were introduced. The Salton Sea provides a sport fishery as it is the site of a National Wildlife Refuge for waterfowl. The region also provides habitat for certain endangered/threatened species of wildlife including the desert pupfish, razorback sucker, Yuma Clapper rain, black rail, least Bell's Vireo, yellow-billed cuckoo, desert tortoise, and peninsular bighorn sheep.

<u>NPS Water Quality Problems</u>

Sediment and the contaminants carried by sediments, including selenium, pesticides and bacteria, are the constituents of most concern in this region. Most of the pollution is associated with agricultural return flows.

Santa Ana Region (Region 8)

The Santa Ana Region is described in Porter-Cologne Act section 13200(e) as comprising all basins draining into the Pacific Ocean between the southerly boundary of the Los Angeles Region and a line which follows the drainage divide between Muddy and Moro Canyons from the ocean to the summit of the San Joaquin Hills; thence along the divide between lands draining into Newport Bay and into Laguna Canyon to Niguel Road; thence along Niguel Road and Los Aliso Avenue to the divide between Newport Bay and Aliso Creek drainages; thence along the divide and the southeasterly boundary of the Santa Ana River drainage to the divide between the Baldwin Lake and Mojave Desert drainages; thence along that divide to the divide between the Pacific Ocean and Mojave Desert drainages.

The east-west alignment of the crest of the San Gabriel and San Bernardino Mountains separates the Santa Ana River Basin from the Mojave Desert. In the south, the regional boundary divides the Santa Margarita River drainage area from that of the San Jacinto River, which normally terminates in Lake Elsinore. The Santa Ana River cuts through the Santa Ana Mountains near Corona and flows down onto the Orange County coastal plain. The region's boundary along the Pacific Ocean extends from just north of Laguna Beach to Seal Beach and the Los Angeles County line. Newport Bay, Anaheim Bay-Huntington Harbor, and coastal wetlands associated with the bays are significant features of the region.

The region is geologically active because the San Andreas Fault and its large branches, the San Jacinto, Elsinore-Whittier, and the Newport-Inglewood Faults all lie within its boundaries. The San Jacinto Fault near San Bernardino affects groundwater flows associated with the Santa Ana and San Jacinto Rivers. The Elsinore-Whittier Fault passes under the Prado Dam as it trends from the northwest toward the south east. In addition to these major faults, there are many branching, connecting and parallel faults in the region.

The region was once home to extensive agricultural activities, including citrus orchards and dairies. While most of the citrus industry has disappeared in the face of growing population pressure, a significant number of dairies still exist in the region. Both of these agricultural activities are believed to have contributed to heavy nitrate and other salt contamination of the region's groundwaters.

The region is the smallest of the nine regions of the state (2,800 square miles) yet one of the most densely populated areas in the state with over four million residents. The climate of the region is classified as Mediterranean; it is generally dry in summers with mild, wet winters. The average annual rainfall is about fifteen inches, most of it occurring between November and March. Most of the region would be near-desert, but for the influence of modern civilization.

The two major rivers in the region, the Santa Ana and the San Jacinto, are insufficient to meet the water demands of the region's population. Water is imported and managed by four municipal water districts (MWDs): the San Bernardino Valley MWD, Chino Basin MWD, Western MWD, and Orange County MWD, through a Santa Ana River Watermaster. The four water agencies also formed the Santa Ana Watershed Project Authority (SAWPA), which is a forum for a discussion of water issues, as well as a joint powers agency that can build projects of common interest to two or more members.

NPS Water Quality Problems

Pathogens and nutrients are the pollutants most often listed as impairing the waters in this region. In a very few instances, dairies and agriculture were listed as the sources. However, in most cases the source was listed (CWA section 303[d] list) as an unknown NPS. This was also the case for water bodies that were listed as polluted by coliform and enterococci bacteria, pesticides, sediment and siltation, TDS, and those affected by eutrophication.

San Diego Region (Region 9)

The San Diego Region is described in Porter-Cologne Act section 13200(f) as comprising all basins draining into the Pacific Ocean between the southern boundary of the Santa Ana Region and the California-Mexico boundary.

The region encompasses most of San Diego County, parts of southwestern Riverside County, and southwestern Orange County. It is situated within the Peninsular Range Physiographic Province of California. One of the most

prominent physical features of the region is the northwest trending Peninsula Range, which includes from north to south, the Santa Ana, Tibia, Palomar, Vulcan, Cuyamaca and Laguna Mountains. The region is divided into a coastal plains area, a central mountain-valley area, and an eastern mountain-valley area. The coastal plains area is deeply dissected by streams draining to the Pacific Ocean; its surface ranging from sea level to 1200 feet and extending from the coast inland in a band about 10 miles in width. The central mountain-valley area is characterized by ridges and basins, which extend from the coastal plain northeastward to the Elsinore Fault zone. To the northeast of the Elsinore Fault zone is the eastern mountain-valley area. Surrounding mountains including Red Mountain, Cahuilla Mountain and Bachelor Mountain range from 4000 to 7500 feet.

The water resources in the region are classified as coastal waters, surface waters, ground waters, imported waters, and reclaimed waters. Coastal waters include bays, harbors, estuaries, beaches and open ocean. Deep draft commercial harbors include San Diego Bay and Oceanside Harbor and shallower harbors include Mission Bay and Dana Point Harbor. Tijuana Estuary, Sweetwater Marsh, San Diego River Floor Control Channel, Kendal-Frost Wildlife Reserve, San Dieguito River Estuary, San Elijo Lagoon, and Santa Margarita River Estuary are the important estuaries of the region.

There are thirteen principal stream systems in the region originating in the western highlands and flowing to the Pacific Ocean. From north to south these are Aliso Creek, San Juan Creek, San Mateo Creek, San Onofre Creek, Santa Margarita River, San Luis Ray River, San Marcos Creek, Escondido Creek, San Dieguito River, San Diego River, Sweetwater River, Otay River, and the Tijuana River. Most of these streams are interrupted in character, having both perennial and ephemeral components due to the rainfall pattern in the region. Surface water impoundments capture flow from almost all the major streams. Many of the surface water impoundments are a blend of runoff and imported water.

Imported surface water supplies almost 90 percent of the water used in the region, the remaining 10 percent is made up of the surface water sources discussed above. The Metropolitan Water District of Southern California supplies this imported water through its member agencies. The San Diego County Water Authority recently signed a historic agreement with the Imperial Irrigation District, which provides a secure supply of water for the next 45 to 75 years for the region's growing population. Use of reclaimed water also is on the rise in the region. This is obtained through extensive treatment of municipal wastewater to produce a reliable supply for non-potable purposes such as irrigation of parks, agriculture, greenbelts, golf courses and freeway landscaping.

NPS Water Quality Problems

For a majority of the region's water bodies, pathogen indicators are listed as a pollutant/stressor. Potential sources, however, are not specifically identified, but listed as NPS or unknown NPS. Other pollutants for which potential sources are not identified include TDS, phosphorus, nitrogen and nitrates. Other pollutants include cadmium, copper, lead, zinc, PAHs, PCBs, and mercury. At lease 5 water bodies or water body segments are listed as eutrophic and 15 ocean shoreline sites are listed for bacteria indicators.

SECTION V. ANALYSIS OF ISSUES, ALTERNATIVES AND ENVIRONMENTAL IMPACTS

ISSUE A. THIRD-PARTY PROGRAMS' ROLE IN NPS POLLUTION CONTROL

(1) PRESENT STATE POLICY

Currently, there is no State policy that describes the role of third-party programs for NPS pollution control in the state's overall NPS pollution control program.

(2) ISSUE DESCRIPTION

In California NPS pollution has had a major impact on water quality throughout the state. Every two years, the SWRCB is required to submit a report on the State's water quality to the U. S. EPA pursuant to Section305(b) of the CWA. Included in the report is the CWA section 303(d) list—a list of waters, identified by the State, which do not meet applicable water quality standards after the application of certain technology-based controls. The listed water bodies and water-body segments are known as "impaired." Impaired waters are waters that either no longer support beneficial uses or the water quality standards necessary to support these beneficial uses.

The CWA section 303 (d) list, which must be updated every two years, was last updated in 2002. Following adoption by the SWRCB, the list was approved by U.S. EPA. The 2002 list revealed the growing scope and complexity of NPS problems in California. Both the number of impaired water bodies or water-body segments and the number of water body/pollutant combinations had increased. The State list now includes 685 impaired water bodies or water-body segments and 1883 pollutant/water body or segment combinations. Nonpoint sources of pollution dominate the list.

In 1999, the SWRCB adopted the NPS Program Plan to meet updated federal requirements and to continue to be eligible for federal funds for NPS control. The NPS Program Plan committed the State to prevent and control NPS pollution. The SWRCB proposed to meet this commitment through implementation of 61 MMs designed to "Ensure the protection and restoration of the State's water quality, existing and potential beneficial uses, critical coastal areas (CCAs) and pristine areas…" (NPS Program Plan, p2). The 61 MMs identified by the State fell within six NPS pollution categories: agriculture, forestry, urban areas, marinas and recreational boating activities, hydromodification, and wetlands/riparian areas/and vegetated treatment systems. The MMs are State determined goals that are to be achieved through discharger implementation of MMs and MPs. MPs are, for the most part, to be selected by the discharger.

The SWRCB sought to implement the NPS Program Plan through an extensive program of outreach, education and demonstration projects. Since the early 1990s, the SWRCB and RWQCBs have worked with NPS dischargers to provide information and guidance on NPS prevention and control measures. U. S. EPA provided funds for this effort under CWA section 319. Since most NPS discharges are the result of land use and land management practices, SWRCB and RWQCB efforts also involved development of extensive collaborative relationships with community, professional and discharger organizations and other local, State, and federal agencies with land and resource management authority, expertise, and programs. This broad effort sought to take advantage of the technical and financial assistance programs of other agencies and organizations, as well as to provide additional education to potential NPS dischargers.

Currently, there are a variety of third-party programs that focus on NPS pollution control. These include, for example, programs by watershed groups, resource conservation districts (RCDs), and other organizations. Under existing law, the RWQCBs can take advantage of the efforts of these entities to assist the RWQCBs in effectively addressing NPS pollution's impacts on water quality and, in particular, in achieving the goal of implementing the MMs identified in the State's NPS Program Plan.

The legislature has provided the SWRCB and RWQCBs the administrative tools (WDRs, waivers of WDRs and Basin Plan Prohibitions) required to regulate NPS discharges. However, as noted above, NPS discharges are varied and myriad. To effectively use the administrative tools to achieve statewide prevention and control of NPS pollution sources, the RWQCBs need to develop creative and innovative strategies through which they can

reach and regulate tens of thousands of NPS dischargers, many of whom currently may be individually unknown to the RWQCBs. Much of this effort can be accomplished most efficiently and effectively by working through third parties with whom dischargers already have a regulatory or organizational relationship, or with whom they are potentially affiliated through common geographic boundaries or NPS generating activities.

Under existing law, there are various ways in which the RWQCBs can use third-party programs in their NPS pollution control programs. For example, the RWQCBs can conditionally waive regulation of a particular nonpoint pollution source based on the existence of an adequate third-party program that addresses this source. The RWQCBs can conditionally waive regulation of individual discharges or discharge categories if the waiver is consistent with any applicable water quality control plans and is in the public interest. The RWQCBs' current and past practice has been to waive regulation of certain types of NPS discharges where another entity is adequately regulating the discharges. For example, the RWQCBs typically waive regulation of discharges from on-site septic systems that are adequately regulated by local health agencies. The SWRCB and RWQCBs have also entered into memoranda of understanding and management agency agreements with other agencies that delineate the roles and responsibilities of these agencies in addressing NPS pollution. These agreements may also provide the foundation for a waiver.

Similarly, the RWQCBs can adopt individual or general WDRs for NPS discharges that build upon third-party programs. These WDRs can, for example, require that the dischargers either participate in an acceptable third-party NPS program or, alternatively, submit individual pollution prevention plans that detail how they will comply with the WDRs. Likewise, the RWQCBs can adopt discharge prohibitions, which include exceptions based on third-party programs. For example, a RWQCB can except from the discharge prohibition those discharges that are adequately addressed in an acceptable third-party NPS pollution control program.

The RWQCBs can also rely on appropriate third-party programs when they engage in water quality control planning for NPS pollution. Each statewide plan or regional basin plan must contain an enforceable implementation program to achieve the plan's water quality objectives. Implementation programs must include a description of the nature of the actions necessary to achieve the objectives, a time schedule for the actions to be taken, and the surveillance and monitoring activities that will be implemented to determine compliance with the water quality objectives [CWC §13050(j); § 13244]. In some cases, the RWQCBs may be able to craft implementation programs that are based on or that take advantage of existing third-party NPS programs.

Hence, the RWQCBs have various mechanisms to take advantage of existing third-party NPS programs in the boards' pollution control efforts.

(3) ALTERNATIVES

Alternative 1. No action. Under this alternative, the RWQCBs would continue to use third-party programs in NPS pollution control but there would be no State policy that expressly recognizes the role of these programs in water quality control.

Alternative 2. Establish State policy that expressly recognizes the role of third-party programs in NPS pollution control.

(4) STAFF RECOMMENDATION

Adopt Alternative 2.

ENVIRONMENTAL IMPACT ANALYSIS

There will be no significant adverse environmental impacts associated with establishing Sate policy that expressly recognizes the role of third-party programs in NPS pollution control. Existing law already provides for RWQCB use of third-party programs, in concert with use of the administrative tools (WDRs, waivers of WDRs, and basin plan prohibitions) the Legislature has provided the RWQCBs, to regulate nonpoint sources of pollution. Third-party programs that address NPS pollution are currently in-place. Hence, expressly

recognizing the role of third-party programs in NPS pollution control will not change the existing physical environment.

Further, the ability to use effective third-party programs to facilitate the implementation of NPS control measures is critical to statewide prevention and control of NPS pollution discharges. Currently these discharges are causing significant adverse environmental effects throughout the State; degraded water quality and loss of designated beneficial uses are the result. California's diverse geography and myriad sources of NPS pollution generating activities make reliance on third-party programs a necessary feature of the SWRCB NPS pollution control strategy. The RWQCBs, with limited staff and resources, are being challenged to reach and regulate tens of thousands of NPS dischargers, a majority of whom may be individually unknown to the RWQCBs.

NPS discharge control relies on discharger implementation of self-determined MPs designed to prevent or control NPS pollution of the State's waters. Third-party programs are NPS control implementation programs that neither the SWRCB nor a RWQCB have developed, though board staff typically may be consulted at various stages of third-party program development. Third-party programs are programs developed by other responsible parties or agencies with which dischargers have an affiliation. Currently, there are a variety of third-party type programs dedicated to NPS pollution control efforts.

ISSUE B. CRITERIA FOR RWQCB APPROVAL OR ENDORSEMENT OF THIRD-PARTY PROGRAMS

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(1) PRESENT STATE POLICY

Currently, there is no State policy that establishes minimum criteria that must be met in order for a RWQCB to approve or endorse a particular third-party NPS implementation program.

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(2) ISSUE DESCRIPTION

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As explained above, there are various existing third-party NPS programs and the RWQCBs have several existing legal tools under which they may be able to use these programs to address NPS pollution. These tools include WDRs, waivers of WDRs, prohibitions, and basin plan amendments. The statutory requirements that apply to these tools are briefly discussed below.

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Under existing law, WDRs must "implement any relevant water quality control plans . . ., and . . . take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of [Water Code] Section13241." (CWC §13263) The requirements can also include a time schedule and can require monitoring reports. (*Id.* §§13263(c), 13267) The requirements can, in addition, prohibit the discharge of waste under certain conditions or in specified areas. (*Id.*§13243)

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Waivers, likewise, must be consistent with any applicable water quality control plans and must be in the public interest. (*Id.* §13269). They are conditional, and the conditions must include the performance of individual, group, or watershed-based monitoring, unless the relevant discharges do not pose a significant water quality threat. (*Ibid.*)

Basin plans, under existing law, must include water quality objectives, beneficial use designations, and a program to implement the objectives. (*Id.* §13050(j)) The implementation program must describe the nature of actions that are necessary to achieve objectives, including recommendations for appropriate action by any entity, public or private. (*Id.* §13242) The program also has to contain a time schedule for the actions and a description of the surveillance that will be done to determine compliance with objectives. (*Ibid.*) Like waste discharge requirements, basin plans can include discharge prohibitions. (*Id.* §13243).

Hence, any WDRs, conditional waivers, prohibitions, or basin plan amendments that build upon or take advantage of an existing third-party NPS implementation program must meet the minimum statutory requirements applicable to that administrative tool. Aside from the general requirements applicable to each

tool, however, there are no criteria that apply across-the-board to RWQCB approval or endorsement of third-party NPS implementation programs.

(3) ALTERNATIVES

Alternative 1: No action. Do not specify criteria for RWQCB approval or endorsement of third-party NPS implementation programs. This alternative will not foster statewide consistency among the RWQCBs. Nor will it assist the regulated community in figuring out what attributes of a third-party NPS implementation program will facilitate favorable RWQCB action on the program.

Alternative 2: Establish minimum criteria for third-party NPS implementation program. This alternative will promote statewide consistency among the RWQCBs.

(4) STAFF RECOMMENDATION

Adopt Alternative 2.

ENVIRONMENTAL IMPACT ANALYSIS

There would be no adverse environmental impacts associated with adoption of the proposed policy to establish criteria for RWQCB approval or endorsement of a third-party program. As described above under "Issue Description", under existing law the legislature has provided RWQCBs the legal tools to prevent or control NPS pollution and statutory requirements applicable to these tools. Among the statutory requirements are provisions governing RWQCB use of the legal tools, and requirements related to basin plan implementation programs and implementation actions taken to meet water quality objectives, including actions implemented through third-party programs. Adoption of a policy establishing minimum criteria that must be met for a RWQCB to endorse or approve a third-party NPS control implementation program will not result in adverse environmental impacts to the environment. To the contrary, it will promote statewide consistency in the implementation of the NPS Program Plan.

ISSUE C. IDENTIFICATION OF CRITERIA FOR RWQCB ACTION ON THIRD-PARTY PROGRAMS

(1) PRESENT STATE POLICY

Currently, there are no established uniform criteria to guide RWQCB action on third-party NPS implementation programs.

(2) ISSUE DESCRIPTION

State law specifies certain minimum criteria and optional features for the administrative tools that RWQCBs may use to regulate NPS pollution. Generally speaking, all of the administrative tools share certain common characteristics. First, whatever tool the RWQCB selects, it must be consistent with water quality standards contained in any applicable water quality control plan. Second, monitoring is allowed or required, in some cases, whether the tool selected is WDRS, a conditional waiver, a prohibition, or a basin plan amendment. Third, a time schedule generally can be included, if appropriate, to implement actions necessary to comply with applicable water quality standards. Fourth, the RWQCBs typically require NPS dischargers to implement MPs to control pollution, in lieu of complying with numeric effluent limits, regardless of the administrative tool used by the RWQCBs. The RWQCBs are authorized to require dischargers to identify the MPs that they will use and to verify their implementation.

The following criteria for RWQCB approval or endorsement of a third-party NPS implementation program are consistent with the general characteristics described above:

Key Element 1: The objectives of an NPS control implementation program shall be explicitly stated and must, at a minimum, address NPS pollution in a manner designed to achieve State and regional water quality standards, including whatever higher level of water quality the RWQCB determines is appropriate in accordance with antidegradation principles.

Key Element 2: The NPS control implementation program shall include a discussion of the MPs that are expected to be implemented to ensure attainment of program objectives, and a discussion of the process to be used to verify proper MP implementation.

Key Element 3: Where a RWQCB determines it is necessary to allow time to achieve water quality standards, the NPS control implementation program shall include a specific time schedule and corresponding quantifiable milestones designed to measure progress toward reaching the program's objectives.

Key Element 4: The NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine if the program is achieving its stated objectives or if further MPs or other measures are needed.

Non-point source pollution is the primary water quality problem facing California today. NPS problems often are described as intractable because of the many individual sources involved and the intrinsic nature of its diffusion across the landscape. A statewide program must, of necessity, be designed to encompass not only the many sources of NPS pollution, but to accommodate the broad regional, geographic and climatic differences associated with the California landscape as well as the myriad activities involved. Against this background of multiple NPS sources and multiple landscape conditions and situations, successful NPS pollution control can be achieved only with individually focused implementation programs relevant to specific activities and specific water bodies and water quality standards. Key Element 1 recognizes this baseline imperative by requiring that individual "Implementation Program Objectives" be specific as to the NPS water quality problems they are designed to address as well as relevant to the water quality standards established by the appropriate RWQCB.

Further, in accepting or endorsing a specific NPS implementation program, in order to meet its statutory obligations, the RWQCBs must be able to track progress. There are several steps to this process. First, they must be able to evaluate the MPs proposed and have reasonable expectations that the MPs chosen will meet program objectives, as required by Key Element 2. In addition, a realistic implementation schedule must be established commensurate with the severity of the NPS problem and the difficulty in implementing solutions so that an independent determination can be made of progress toward achieving the goals of the implementation plan, (Key Element 3). Finally, feedback mechanisms must be established to show that discharger efforts are being successful or indicate that additional or alternative efforts are needed (Key Element 4). These verification requirements are analogous to those required of the SWRCB and RWQCBs, in whole or in part, by the CWC, the CWA, and the CZARA. All water quality control plans developed by the SWRCB or RWQCBs must include enforceable water quality standards and require schedules of compliance that include monitoring and reporting requirements.

Aggregating dischargers through appropriate third-party entities facilitates the statewide development of a network of actions or NPS management programs devoted to controlling NPS pollution. Most NPS management programs, whether developed by dischargers individually or collectively through group participation, typically depend upon individual discharger implementation of MPs. In agreeing to approve or endorse an NPS implementation program, the RWQCB needs to be assured that discharger actions are likely to meet RWQCB established water quality goals within a reasonable timeframe. Key Elements 1, 2, 3, and 4 of the NPS Implementation and Enforcement Policy seek to provide these assurances by establishing baseline criteria, which all NPS implementation programs must meet. As stated above, individual and third-party NPS implementation programs function as implementation components of the SWRCB adopted NPS Program Plan. The implementation policy criteria reflect the requirements that the Legislature, through the CWC, has determined the SWRCB and RWQCBs must meet in developing implementation program for the water quality control plans they develop.

The NPS Implementation and Enforcement Policy also recognizes that implementation programs developed by third parties or individual dischargers may not meet all of the requirements necessary to satisfy the criteria established in the CWC and which have been restated as Key Elements 1 through 4. To the extent a program does not meet these requirements, the RWQCBs must supplement these programs to meet the CWC requirements. This can be accomplished most effectively through use of the administrative tools the Legislature has provided (WDRs and basin plan prohibition requirements, and waiver conditions).

(3) ALTERNATIVES FOR SWRCB ACTION

Alternative 1. No action. Rely on the minimum criteria and optional features for each administrative tool to guide RWQCB action on third-party NPS implementation programs. Do not specify criteria that would apply uniformly to all RWQCBs and all administrative tools selected by the RWQCBs that rely upon third-party NPS implementation programs.

Alternative 2. Adopt policy language which establishes criteria for RWQCB approval or endorsement of third-party NPS control implementation plans, including the requirements of Key Elements 1, 2, 3 and 4. The SWRCB/RWQCB would continue the current program of outreach, education, technical assistance, and demonstration projects to the extent funds would be available. However, their use would be integrated into a broader, structured program. This provides greater assurance that these activities would result in discharger implementation of improved MPs targeted toward specific water quality problems. In addition, the MPs implemented would be required to be implemented according to standards of installation, review and adaptive management that would more fully assure progress in improving water quality.

(4) STAFF RECOMMENDATION

Adopt Alternative 2.

ENVIRONMENTAL IMPACT ANALYSIS

There would be no adverse environmental impacts associated with establishment of uniform criteria to guide RWQCB action on third-party NPS implementation programs. The minimum criteria identified in key elements one through four of the NPS Control Implementation and Enforcement Policy are consistent with the general characteristics of the minimum criteria and optional features State law requires the RWQCBs to follow in using the administrative tools (WDRs, basin plan prohibitions and waivers) the Legislature has provided to regulate nonpoint sources of pollution. SWRCB adoption of policy identifying these minimum criteria would not result in adverse environmental impacts.

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ISSUE D. ADVANCE NOTICE OF POTENTIAL ENFORCEMENT ACTIONS SHOULD IMPLEMENTATION PROGRAMS FAIL TO ACHIEVE THEIR STATED GOALS

(1) PRESENT STATE POLICY

Currently, there is no state policy that requires that RWQCBs notify dischargers of the potential enforcement consequences of noncompliance with a third-party NPS implementation program's goals.

(2) ISSUE DESCRIPTION

The introduction to the SWRCB Enforcement Policy adopted in 2002 states:

" In the Porter-Cologne Water Quality Control Act (Porter-Cologne), the Legislature declared that the state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation…' (California Water Code section 13000). Porter-Cologne grants the Boards the authority to implement and enforce water quality laws, regulations, policies and plans to protect the groundwater and surface waters of the state."

The policy later states that "Enforcement not only protects the public health and the environment, but also creates an 'even playing field', ensuring that dischargers who comply with the law are not placed at a competitive disadvantage by those who do not."

Historically, although the Porter-Cologne Act provides the RWQCBs with authority to take both informal and formal enforcement actions to assure water quality protection, the RWQCBs have taken very few such actions against NPS dischargers. Instead, they have relied on outreach and education programs coupled with technical and financial assistance and collaboration with other organizations and agencies to encourage dischargers to implement MPs to prevent and control nonpoint sources of pollution. Lack of enforcement was also due to the NPS program's emphasis on giving dischargers the opportunity to correct NPS problems prior to more stringent RWQCB actions, and partly due to the absence of site-specific water quality information and discharger requirements upon which to base an enforcement action.

In requiring the SWRCB to develop guidance "for the purpose of describing the process by which the state board and the regional boards will enforce the state's nonpoint source management plan" (CWC 13369 (a)(2)(B)) the Legislature has indicated the need for greater use of the RWQCBs' enforcement authorities to successfully achieve NPS pollution control.

Continued deterioration of water quality, as evidenced by the monitoring programs of State, local and federal agencies, the expanding CWA section 303(d) list, continued loss of beneficial uses, and court orders requiring more stringent RWQCB water quality protection from nonpoint sources of pollution, have shown that outreach, education, and technical assistance efforts are not enough to solve the State's NPS water pollution problems. Development of NPS implementation programs incorporating Key Elements 1 through 4, described previously, will provide baseline requirements for discharger implementation actions. At the same time it will also provide specific requirements against which the need for an enforcement action can be measured and proceeded upon.

The RWQCBs as well as dischargers need to anticipate the possibility that implementation programs, as initially developed, may not live up to projected NPS pollution prevention and control expectations, and to anticipate the consequences thereof. Implementation programs may not fully or partially succeed for many reasons, from lack of a clear understanding of the cause of the problem, to selection of the wrong or inadequate MPs, to lack of discharger participation. Providing dischargers prior knowledge of the actions a RWQCB may take, including enforcement options, in response to lack of progress in controlling nonpoint sources of pollution under a particular implementation program creates greater incentive for developing an implementation program that has the most likelihood of success.

Individual dischargers need to be aware that, even if they are involved in third-party programs, they remain individually responsible for their discharges. They need to know ahead of time what actions or inactions on their part can potentially cause enforcement actions to be taken against them individually. In addition, as members of a third-party arrangement, they need a clear description of the potential enforcement consequences of not meeting RWQCB criteria for third-party group performance. Clarity and certainty about RWQCB options and potential enforcement consequences, should NPS control implementation plans not meet projected NPS control results, also fulfills the requirements of CWC 13369(a) (2) (A).

The following Element 5 would ensure that dischargers are on-notice of the potential enforcement consequence of failing to achieve a third-party NPS implementation program's goals:

Key Element 5: Each RWQCB shall make clear, in advance, the potential consequences for failing to achieve the NPS implementation program's stated goals.

(3) ALTERNATIVES FOR SWRCB ACTION

Alternative 1. No action. Do not specify the potential consequences of failing to achieve the NPS implementation program's goals. This option does not provide dischargers notice of the potential enforcement consequences of failing to attain a third-party NPS implementation program's goals.

Alternative 2. Adopt policy language (Key Element 5) that provides dischargers notice of the potential enforcement consequences of failing to meet a third-party NPS implementation program's goals.

(4) STAFF RECOMMENDATION

Adopt Alternative 2.

ENVIRONMENTAL IMPACT ANALYSIS.

There are no adverse environmental impacts associated with the RWQCBs giving advance notice of the enforcement actions that may be taken to ensure NPS control water quality compliance. The Porter-Cologne Act requires the SWRCB and RWQCBs to be prepared to exercise the State's full power and jurisdiction to protect the quality of the waters in the State from degradation. To fulfill this mandate, the SWRCB and RWQCBs have been granted the authority to implement and enforce water quality laws, regulations, policies and plans to protect the State's groundwaters and surface waters. The SWRCB Enforcement Policy provides a description of the various informal and informal enforcement actions a RWQCB may take. To provide advance notice of the particular enforcement actions a RWQCB may take in response to a situation where a third-party NPS control implementation program does not meet expected progress in controlling NPS creates greater incentive to develop an implementation program that has the most likelihood of success. No changes to the environment nor environmental impacts are associated with such actions.

SECTION VI. ENVIRONMENTAL CHECKLIST

A. Background

1. Name of Proponent: State Water Resources Control Board

2. Address and Phone Number of Proponent: Division of Water Quality
P.O. Box 100, Sacramento, CA 95812-0100
(916) 341-5560

3. Date Checklist Submitted: December 2, 2003

4. Agency Requiring Checklist: Resources Agency

5. Name of Proposal, if applicable: Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Implementation and Enforcement Policy)

B. Environmental Impacts
(Explanations are included on attached sheets).

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	Potentially Significant Impact	Potentially Significant Unless Mitigation Incorporated	Less Than Significant Impact	No Impact
I. LAND USE AND PLANNING.				
Would the proposal:				
a. Conflict with general plan designation or zoning?	[ ]	[ ]	[ ]	[X]
b. Conflict with applicable environmental plans or policies adopted by agencies with jurisdiction over the project?	[ ]	[ ]	[ ]	[X]
c. Be incompatible with existing land use in the vicinity?	[ ]	[ ]	[ ]	[X]
d. Affect agriculture resources or operations (e.g. impacts to soils or farmlands or impacts from incompatible land uses)?	[ ]	[ ]	[ ]	[X]
e. Disrupt or divide the physical arrangement of an established community (including a low- income or minority community)?	[ ]	[ ]	[ ]	[X]
II. POPULATION AND HOUSING.				
Would the proposal:				
a. Cumulatively exceed official regional or local population projections?	[ ]	[ ]	[ ]	[X]
b. Induce substantial growth in an area either directly or indirectly (e.g., through projects in an undeveloped area or extension of major infrastructure)?	[ ]	[ ]	[ ]	[X]
c. Displace existing housing especially affordable housing?	[ ]	[ ]	[ ]	[X]

	Potentially Significant Impact	Potentially Significant Unless Mitigation Incorporated	Less Than Significant Impact	No Impact
III. GEOLOGIC PROBLEMS				
Would the proposal result in or expose people to potential impacts involving:				
a. Fault rupture?	[ ]	[ ]	[ ]	[X]
b. Seismic ground shaking?	[ ]	[ ]	[ ]	[X]
c. Seismic ground failure, including liquefaction?	[ ]	[ ]	[ ]	[X]
d. Seiche, tsunami, or volcanic hazard?	[ ]	[ ]	[ ]	[X]
e. Landslides or mudflows?	[ ]	[ ]	[ ]	[X]
f. Erosion, changes in topography or unstable soil conditions from excavation, grading or fill?	[ ]	[ ]	[ ]	[X]
g. Subsidence of the land?	[ ]	[ ]	[ ]	[X]
h. Expansive soils?	[ ]	[ ]	[ ]	[X]
i. Unique geologic or physical features?	[ ]	[ ]	[ ]	[X]
IV. WATER				
Would the proposal result in:				
a. Changes in absorption rates, drainage patterns, or the rate and amount of surface runoff?	[ ]	[ ]	[ ]	[X]
b. Exposure of people or property to water related hazards such as flooding?	[ ]	[ ]	[ ]	[X]
c. Discharge into surface water or other alteration of surface water quality (e.g. temperature, dissolved oxygen or turbidity)?	[ ]	[ ]	[ ]	[X]
d. Changes in the amount of surface water in any water body?	[ ]	[ ]	[ ]	[X]
e. Changes in currents or the course or direction of surface water movements?	[ ]	[ ]	[ ]	[X]
f. Change in the quantity of groundwaters, either through direct additions or withdrawals, or through interception of an aquifer by cuts or excavations or through substantial loss of groundwater recharge capability?	[ ]	[ ]	[ ]	[X]
g. Altered direction or rate of flow of groundwater?	[ ]	[ ]	[ ]	[X]
h. Impacts to groundwater quality?	[ ]	[ ]	[ ]	[X]
i. Substantial reduction in the amount of groundwater otherwise available for public water supplies?	[ ]	[ ]	[ ]	[X]

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	Potentially Significant Impact	Potentially Significant Unless Mitigation Incorporated	Less Than Significant Impact	No Impact
V. AIR QUALITY				
Would the proposal:				
a. Violate any air quality standard or contribute to an existing or projected air quality violation?	[ ]	[ ]	[ ]	[X]
b. Expose sensitive receptors to pollutants?	[ ]	[ ]	[ ]	[X]
c. Alter air movement, moisture, or temperature, or cause any change in climate?	[ ]	[ ]	[ ]	[X]
d. Create objectionable odors?	[ ]	[ ]	[ ]	[X]
VI. TRANSPORTATION/CIRCULATION				
Would the proposal result in:				
a. Increased vehicle trips or traffic congestion?	[ ]	[ ]	[ ]	[X]
b. Hazards to safety from design features (e.g. farm equipment)?	[ ]	[ ]	[ ]	[X]
c. Inadequate emergency access or access to nearby uses?	[ ]	[ ]	[ ]	[X]
d. Insufficient parking capacity on- site or off- site?	[ ]	[ ]	[ ]	[X]
e. Hazards or barriers for pedestrians or bicyclists?	[ ]	[ ]	[ ]	[X]
f. Rail, waterborne or air traffic impacts?	[ ]	[ ]	[ ]	[X]
g. Conflicts with adopted policies supporting transportation (e.g., bus turnouts, bicyclists racks)?	[ ]	[ ]	[ ]	[X]
VII. BIOLOGICAL RESOURCES				
Would the proposal result in impacts to:				
a. Endangered, threatened or rare species or their habitats (including but not limited to plants, fish, insects, animals, and birds)?	[ ]	[ ]	[ ]	[X]
b. Locally designated species?	[ ]	[ ]	[ ]	[X]
c. Locally designated natural communities (e.g. oak forest, coastal habitat, etc.)?	[ ]	[ ]	[ ]	[X]
d. Wetland habitat (e.g. marsh, riparian and vernal pool)?	[ ]	[ ]	[ ]	[X]
e. Wildlife dispersal or migration corridors?	[ ]	[ ]	[ ]	[X]
VIII. ENERGY AND MINERAL RESOURCES				
Would the proposal:				
a. Conflict with adopted energy conservation plans?	[ ]	[ ]	[ ]	[X]

		Potentially Significant Impact	Potentially Significant Unless Mitigation Incorporated	Less Than Significant Impact	No Impact
b.	Use non- renewable resources in a wasteful and inefficient manner?	[ ]	[ ]	[ ]	[X]
c.	Result in the loss of availability of a known mineral resource that would be of future value to the region and the residents of the State?	[ ]	[ ]	[ ]	[X]
IX.	HAZARDS				
	Would the proposal involve:				
a.	A risk of accidental explosion or release of hazardous substances (including, but not limited to: oil, pesticides, chemicals or radiation)?	[ ]	[ ]	[ ]	[X]
b.	Possible interference with an emergency response plan or emergency evacuation plan?	[ ]	[ ]	[ ]	[X]
c.	The creation of any health hazard or potential health hazard?	[ ]	[ ]	[ ]	[X]
d.	Exposure of people to existing sources of potential health hazards?	[ ]	[ ]	[ ]	[X]
e.	Increased fire hazard in areas with flammable brush, grass, or trees?	[ ]	[ ]	[ ]	[X]
X.	NOISE				
	Would the proposal result in:				
a.	Increases in existing noise levels?	[ ]	[ ]	[ ]	[X]
b.	Exposure of people to severe noise levels?	[ ]	[ ]	[ ]	[X]
XI.	PUBLIC SERVICES				
	Would the proposal have an effect upon or result in a need for new or altered government services in any of the following areas:				
a.	Fire protection?	[ ]	[ ]	[ ]	[X]
b.	Police protection?	[ ]	[ ]	[ ]	[X]
c.	Schools?	[ ]	[ ]	[ ]	[X]
d.	Maintenance of public facilities, including roads?	[ ]	[ ]	[ ]	[X]
e.	Other governmental services?	[ ]	[ ]	[ ]	[X]
XII.	UTILITIES AND SERVICE SYSTEMS				
	Would the proposal result in a need for new systems or supplies or substantial alterations to the following utilities:				
a.	Power or natural gas?	[ ]	[ ]	[ ]	[X]
b.	Communications systems?	[ ]	[ ]	[ ]	[X]

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	Potentially Significant Impact	Potentially Significant Unless Mitigation Incorporated	Less Than Significant Impact	No Impact
c. Local or regional water treatment or distribution facilities?	[ ]	[ ]	[ ]	[X]
d. Sewer or septic tanks?	[ ]	[ ]	[ ]	[X]
e. Storm water drainage?	[ ]	[ ]	[ ]	[X]
f. Solid waste disposal?	[ ]	[ ]	[ ]	[X]
g. Local or regional water supplies?	[ ]	[ ]	[ ]	[X]
XIII. AESTHETICS				
Would the proposal:				
a. Affect a scenic vista or scenic highway?	[ ]	[ ]	[ ]	[X]
b. Have a demonstrable negative aesthetic effect?	[ ]	[ ]	[ ]	[X]
c. Create light or glare?	[ ]	[ ]	[ ]	[X]
XIV. CULTURAL RESOURCES				
Would the proposal:				
a. Disturb paleontological resources?	[ ]	[ ]	[ ]	[X]
b. Disturb archaeological resources?	[ ]	[ ]	[ ]	[X]
c. Affect historical resources?	[ ]	[ ]	[ ]	[X]
d. Have the potential to cause a physical change which would affect unique ethnic cultural values?	[ ]	[ ]	[ ]	[X]
e. Restrict existing religious or sacred uses within the potential impact area?	[ ]	[ ]	[ ]	[X]
XV. RECREATION				
Would the proposal:				
a. Increase the demand for neighborhood or regional parks or other recreational facilities?	[ ]	[ ]	[ ]	[X]
b. Affect existing recreational opportunities?	[ ]	[ ]	[ ]	[X]
XVI. MANDATORY FINDINGS OF SIGNIFICANCE				
a. Does the project have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community. Reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory?	[ ]	[ ]	[ ]	[X]

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		Potentially Significant Impact	Potentially Significant Unless Mitigation Incorporated	Less Than Significant Impact	No Impact
b.	Does the project have the potential to achieve short-term, to the disadvantage or long-term, environmental goals?	[ ]	[ ]	[ ]	[X]
c.	Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulatively considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects).	[ ]	[ ]	[ ]	[X]
d.	Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly?	[ ]	[ ]	[ ]	[X]

C. Determination

Based on the evaluation in FED (Environmental Effects section), I find that the proposed NPS Implementation and Enforcement Policy will not have a significant adverse effect on the environment.

_____ _____

Date

Stan Martinson, Chief
Division of Water Quality
State Water Resources Control Board

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Appendix A

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

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State Water Resources Control Board

California Environmental Protection Agency

~~December 8, 2003~~
April 16, 2004

Version Date: ~~December 8, 2003~~ April 16, 2004

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

Guidance for Developing An Integrated Program for Implementing and Enforcing the "Plan for California's Nonpoint Source Pollution Control Program"

I. INTRODUCTION

In December 1999, the State Water Resources Control Board (SWRCB), in its continuing efforts to control nonpoint source (NPS) pollution in California, adopted the *Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan) (SWRCB, 1999). The NPS Program Plan upgraded the State's first *Nonpoint Source Management Plan* adopted by the SWRCB in 1988 (1988 Plan) (SWRCB, 1988). Upgrading the 1988 Plan with the NPS Program Plan brought the State into compliance with the requirements of section 319 of the Clean Water Act (CWA) and section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). This document, the SWRCB *Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Implementation and Enforcement Policy), explains how the NPS Program Plan will be implemented and enforced and, in so doing, fulfills the requirements of California Water Code (CWC) section 13369 (a)(2)(B).

To continue receiving federal funds to implement the State's NPS pollution control program, the State was required to obtain approval of the NPS Program Plan from the U. S. Environmental Protection Agency ~~(U.S. EPA)~~ and the National Oceanic and Atmospheric Administration ~~(NOAA)~~. Federal approval required the SWRCB to provide assurances that it has the legal authority to implement and enforce the NPS Program Plan. In providing these assurances, the SWRCB cited the mandates and authorities granted it and the Regional Water Quality Control Boards (RWQCBs) by the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). The Porter-Cologne Act designates the SWRCB and RWQCBs as the State agencies with primary responsibility for water quality control in California and obligates them to address all discharges of waste that could affect the quality of the waters of the State, including potential nonpoint sources of pollution. To carry out this mandate, the Porter-Cologne Act has provided the SWRCB and RWQCBs with:

- Planning authority to designate beneficial uses of the waters of the State, establish water quality objectives to protect those uses, and develop implementation programs to meet water quality objectives and maintain and/or restore designated beneficial uses;

- Administrative permitting authority in the form of waste discharge requirements (WDRs), waivers of WDRs, and basin plan prohibitions; and

- Enforcement options to ensure that dischargers comply with permitting requirements.

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This NPS Implementation and Enforcement Policy explains how these Porter-Cologne Act mandates and authorities, delegated to the SWRCB and RWQCBs by the California Legislature, will be used to implement and enforce the NPS Program Plan. The policy also provides a bridge between the NPS Program Plan and the *SWRCB Water Quality Enforcement Policy* (Enforcement Policy) (SWRCB, 2002).

The information provided in this policy is designed to assist all responsible and/or interested parties in understanding how the State's NPS water quality control requirements will be implemented and enforced. The parties involved include the SWRCB and the RWQCBs, federal, state and local agencies, individual dischargers, designated third-party participants and any other interested public and private parties.

In addition to using the Porter-Cologne Act's planning, permitting, and enforcement authorities to prevent and control nonpoint sources of pollution, the SWRCB and RWQCBs have implemented a broad program of outreach, education, technical assistance and financial incentives. This program is supplemented by collaborative efforts with other agencies and non-governmental organizations (NGOs) to help implement and coordinate the use of their programs that contribute to NPS control. The goal is to provide an integrated statewide approach to controlling nonpoint sources of pollution. In structuring this document, a review of the Porter-Cologne Act is provided in Section II, including an overview of the Act related to planning requirements, and administrative permitting authorities; Section III provides history and background on development of the State's NPS pollution control program; Section IV discusses the structure of the NPS implementation program including statewide implementation, and the mandatory five key elements of an NPS implementation program~~,~~; and ~~integration of the management options into NPS pollution control; and~~ Sections V and VI discuss RWQCB compliance assurance, implementation success, and future considerations.

D R A F T

II. STATUTORY AND REGULATORY BACKGROUND

A. Overview of the Porter–Cologne Water Quality Control Act

The Porter-Cologne Act is the principal law governing water quality control in California. It establishes a comprehensive program to protect water quality and the beneficial uses of waters of the State. The Porter-Cologne Act applies broadly to all State waters, including surface waters, wetlands, and ground water; it covers waste discharges to land as well as to surface and groundwater, and applies to both point and nonpoint sources of pollution.[1]

The Legislature has declared that it is the policy of the State that:

1. The quality of all the waters of the State shall be protected;
2. All activities and factors that could affect the quality of ~~s~~State waters shall be regulated to attain the highest water quality that is reasonable; and
3. The State must be prepared to exercise its full power and jurisdiction to protect the quality of water in the ~~s~~State from degradation.[2]

The Porter-Cologne Act is administered regionally, within a framework of statewide coordination and policy involving both the SWRCB and RWQCBs.[3] The SWRCB adopts State policy for water quality control and statewide water quality control plans, in addition to regulations that are binding on the RWQCBs. The RWQCBs each govern one of the nine hydrologic regions into which California is divided, adopting regional water quality control plans (basin plans) for their respective regions.[4] Basin plans are reviewed and updated on a triennial basis. The SWRCB must approve basin plans, or any amendments thereto, before they become effective.[5] Statewide plans adopted by the SWRCB supersede any RWQCB-adopted plans to the extent of any conflict. The RWQCBs also issue permits and waivers to implement basin plan water quality requirements and, when necessary, take enforcement actions.[6] The SWRCB adopts statewide general permits.[7] The SWRCB also reviews RWQCB decisions on petitions for review.[8] The primary point of contact for dischargers and other interested parties to receive information regarding the laws, regulations and programs related to NPS pollution control is at the regional level.

B. Porter-Cologne Act Water Quality Control Act Planning Requirements

Planning authority under the Porter-Cologne Act extends to any activity or factor which may affect water quality.[9] For example, factors which affect water quality include not only waste discharges, but also saline intrusion, reduction of waste assimilative capacity caused by reduction in water quantity, hydrogeologic modifications, watershed management projects, and land use.[10]

Water quality control plans designate beneficial uses of water, establish water quality objectives to protect those uses, and provide a program to implement the objectives.[11] The beneficial use designations and water quality objectives, together with the State's antidegradation policy,[12] constitute water quality standards for purposes of the CWA.[13] The water quality control plan implementation programs are required to describe the nature of actions that are necessary to meet water quality objectives, including recommendations for action by both private and public entities.[14] Implementation programs also must include a time schedule and describe proposed monitoring activities to assess compliance with water quality objectives.[15]

C. The Porter-Cologne Water Quality Control Act and Waste Discharge Regulation

The Porter-Cologne Act provides that "All discharges of waste into the waters of the ~~s~~State are privileges, not rights."[16] Furthermore, all dischargers are subject to regulation under the Porter-Cologne Act including both point and NPS dischargers.[17] In obligating the SWRCB and RWQCBs to address all discharges of waste that can affect water quality, including nonpoint sources, the legislature provided the SWRCB and RWQCBs with administrative permitting authority in the form of administrative tools (waste discharge requirements [WDRs], waivers of WDRs, and basin plan prohibitions) to address ongoing and proposed waste discharges. 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.

The SWRCB and RWQCBs use their permitting authorities to implement the requirements of applicable State policies and state and regional water quality control plans. Permits take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of CWC section 13241.[18]

With the exception of persons discharging into community sewer systems, any person discharging or proposing to discharge waste that could affect water quality must file a report of waste discharge (RoWD) with the appropriate RWQCB, unless the RWQCB waives the filing.[19] A RoWD also is required if a discharger proposes a material change in the character, volume, or location of a discharge.[20] The RWQCB must then determine the appropriate action to take, either issuing WDRs to the discharger, or conditionally waiving the requirements.[21] WDR~~aste discharge requirement~~s can prohibit the discharge of waste or certain types of waste, either under specific conditions or in specified areas. As an alternative, the RWQCB may prohibit the discharge of waste or certain types of waste in a water quality control plan.[22]

Because a RWQCB may choose to use the basin planning process to adopt some of these administrative approaches, there is some overlap between the planning and administrative processes. A categorical waiver of waste discharge requirements, for instance, could be adopted as a RWQCB basin plan amendment. The SWRCB and RWQCBs have broad discretion in how they use the administrative tools provided by the Porter-Cologne Act.

1. Waste Discharge Requirements

The RWQCBs have primary responsibility for issuing WDRs. The RWQCBs may issue individual WDRs to cover individual discharges or general WDRs to cover a category of discharges.[23] WDRs may include effluent limitations or other requirements that are designed to implement applicable water quality control plans, including designated beneficial uses and the water quality objectives established to protect those uses and prevent the creation of nuisance conditions. As in a basin plan prohibition, a WDR may specify certain conditions under which, or areas where, the discharge of waste or certain types of waste will not be permitted. Dischargers operating under a WDR must submit an annual fee to the appropriate RWQCB to cover administrative costs. The fee schedule is determined by the SWRCB, based upon factors such as total flow, volume, number of animals or area involved, etc. These fees help provide the SWRCB and the RWQCBs with resources to administer the ~~NPS~~WDR program.

The SWRCB also can issue general WDRs under specific conditions.[24] Violations of WDRs may be addressed, for example, by issuing Cleanup and Abatement Orders (CAOs) or Cease and Desist Orders (CDOs), assessing administrative civil liability or seeking imposition of judicial civil liability or judicial injunctive relief.

2. Waivers of Waste Discharge Requirements

The requirements for a discharger to submit a RoWD or for a RWQCB to issue WDRs may be waived by the RWQCB or SWRCB for a specific discharge or a specific type of discharge if the ~~state~~SWRCB or ~~regional board~~RWQCB determines, after a public meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest.[25] All waivers are conditional and may be terminated at any time. Except for waivers for discharges that the SWRCB or a RWQCB determines do not pose a significant threat to water quality, waiver conditions must include, but need not be limited to, individual, group or watershed-based monitoring.[26] Waivers may not exceed five years in duration, but may be renewed. Prior to renewing a waiver, the SWRCB or RWQCB must determine whether the discharge in question should be subject to general or individual WDRs.

CWC section 13269(e) provides that "the regional boards and the state board shall require compliance with the conditions pursuant to which waivers are granted…." Therefore, even where the RWQCBs decide to waive the requirement to submit a RoWD for general WDRs, the RWQCBs are encouraged to have an enrollment process for coverage under the waiver of WDRs so that the RWQCBs can identify the dischargers who are required to comply with the general waiver of WDRs. Although the RWQCBs retain their prosecutorial discretion to decide how to ensure compliance with their conditional waivers, the language of section 13269(e), makes it clear that the legislature intends that the RWQCBs allocate some of their resources to ensuring that dischargers are in compliance. ~~As of January 1, 2004~~ Following SWRCB adoption of a fee schedule, RWQCBs are authorized to collect annual administrative fees to establish and implement waivers of WDRs.[27]

There are many different ways for the RWQCBs to ensure compliance. In the event of noncompliance, the RWQCB could rescind the waiver, or terminate its applicability to individual dischargers, and issue WDRs in its place. If the waiver leaves significant discretion with the discharger to determine how to comply with the waiver's conditions, the RWQCB could adopt a new waiver that is more directive in terms of the actions that the dischargers must take in order to comply with the waiver. In order to be enforceable, waiver conditions should be clearly specified.

Potential enforcement actions include issuance of a notice of violation (NOV), an informal enforcement action which notifies the discharger of the violation of the waiver condition and the reasonably expeditious time within which compliance must be achieved to avoid proposed adoption of WDRs. Other formal enforcement actions that may be taken include CAOs, CDOs, notices to comply (NTC), and time schedule orders.

3. Prohibitions

Pursuant to CWC section 13243, RWQCBs may prohibit discharges of waste or types of waste either through WDRs or through waste discharge prohibitions specified in a basin plan. A RWQCB may amend a basin plan to prohibit a particular discharge or a particular type of discharge or to conditionally prohibit a discharge. A conditional prohibition may include specific conditions under which application or enforcement of the prohibition for a particular discharge or particular type of discharge may be waived. In some cases, RWQCBs may waive application of the prohibition for the planning and permitting period of projects or activities. RWQCBs may also use conditional basin plan prohibitions as the primary administrative tool for implementation programs - for example, in cases where a RWQCB desires to prohibit discharges unless certain procedural or substantive conditions are met. Basin plan prohibitions are extremely useful because, once adopted, they allow a RWQCB to take direct and immediate enforcement action by issuing CAOs or CDOs, or assessing civil liabilities, even in the absence of WDRs. Therefore, they allow RWQCBs to respond in a timely manner where NPS pollution generated by certain activities is creating an emergency or a problem that is not otherwise being remedied in an adequate or timely manner.

D. Porter-Cologne Act Enforcement Options

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 SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. These options range from informal NOVs to formal actions defined in the Porter Cologne Act. Formal actions range from NTCs to civil administrative remedies, and can include referrals for criminal penalties. Both the Enforcement Policy and common RWQCB practice recognize the merit of progressive enforcement---that is, initially taking whatever level of enforcement is appropriate, considering the RWQCB workload and the circumstances of the case, and applying increasingly severe remedies where necessary to correct a problem.

III. DEVELOPING THE STATE'S NPS POLLUTION CONTROL PROGRAM

The State's NPS Program has been developed in conformance with the CWA, CZARA, and the Porter-Cologne Act. The CWA requires the SWRCB to develop and implement an NPS pollution control program and provides funding for this purpose. The NPS Program Plan was the State's response to this requirement, as well as to additional federal requirements for the inclusion of management measures (MMs) consistent with the CZARA *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution to Coastal Waters* (USEPA, 1993). As described above, the Porter-Cologne Act provides the SWRCB and RWQCBs with the authority and administrative tools to implement the CWA and CZARA requirements.

The Porter-Cologne Act also provides the definition of "waste" that is integral to understanding the SWRCB's and RWQCBs' NPS pollution control authorities and responsibilities. "Waste" is broadly defined to include sewage and "any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation".[28] This definition includes all Attorney General interpretations of the terms "sewage", "industrial waste", and "other wastes" under the Porter-Cologne Act's predecessor legislation.[29] The Attorney General has interpreted the latter terms to include wastes from a wide variety of activities. As a result, it is clear that "discharges of waste" are not limited to discharges resulting from waste disposal activities, but also include releases of pollutants as part of other activities, including all nonpoint sources of waste.[30]

In the Porter Cologne Act, the term "discharge of waste" includes all discharges, point and nonpoint, including agricultural return flows and storm water discharges. The CWA distinguishes between point and nonpoint sources of pollution. Under the CWA, a point source is identified as a discernible, confined, and discrete conveyance, such as a pipe, ditch, or channel; however, irrigated agricultural return flows and agricultural storm water runoof are excluded. Nonpoint pollution sources generally are sources of water pollution that do not meet the definition of a point source as defined by the CWA. NPS pollution typically results from contact between pollutants and land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. Consequently, the most successful control of nonpoint sources is achieved by prevention or by minimizing the generation of NPS discharges.

~~Regulation of nonpoint sources of pollution is much less prescriptive than point sources and~~ ~~m~~Most NPS management programs typically depend, at least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution. As originally used in the CWA and its implementing regulations, the term "BMP" officially referred only to practices that had been formally adopted by the SWRCB through its continuing planning program. Informally, however, prior to adoption of the NPS Program Plan, the term became generally used to refer to any type of practice for NPS control, whether formally approved or not. In this policy, the term "MP" has replaced the formerly used term "BMP" when referencing practices that have not been formally adopted by the SWRCB.

MPs may include, but are not limited to, structural and non-structural (operational) controls. They may be applied before, during and after pollution producing activities to eliminate or reduce the generation of NPS discharges and the introduction of pollutants into receiving waters. Successful MP implementation typically requires: (1) adaptation to site-specific or regional-specific conditions; (2) monitoring to assure that practices are properly applied and are effective in attaining and maintaining water quality standards; (3) immediate mitigation of a problem where the practices are not effective; and (4) improvement of MP implementation or implementation of additional MPs when needed to resolve a deficiency**.** MP implementation, however, may not be substituted for actual compliance with water quality requirements. The U.S. Court of Appeals for the Ninth Circuit, in *Northwest Indian Cemetery Protective Ass'n v. Peterson*, held that BMPs [MPs] in a certified water quality

management plan were not "…standards in and of themselves. Adherence to the BMPs [MPs] does not automatically assure compliance …the federal statute [CWA] contemplates that any activity conducted pursuant to a BMP [MP] can be terminated or modified if the conducted activity resulted in a violation of water quality standards."[31]

There are many programs provided by state and federal agencies, as well as NGOs, to assist dischargers. These programs can help dischargers understand how their operations can cause NPS pollution and help them choose and implement MPs to prevent or control NPS pollution. In addition, many of the programs provide financial as well as technical assistance.

Since the early 1990s, using CWA § 319(h) funds, the SWRCB and RWQCBs have reached out to dischargers with technical and educational information and financial support to assist with MP implementation. Other informal RWQCB programs have encouraged development of watershed groups to facilitate NPS pollution control efforts. Additional technical expertise and/or financial assistance are provided through the grant and loan sources of other state and federal agencies. These include resource conservation districts (RCDs), University of California Cooperative Extension and the Natural Resources Conservation Service. In addition, there are State agencies, other than the SWRCB and RWQCBs, with programs and authorities related to NPS control, that help implement the NPS Program Plan by coordinating their programs and activities. Under the leadership of the SWRCB and the California Coastal Commission (CCC), an Interagency Coordinating Committee (IACC) meets regularly to actively promote and coordinate inter-agency NPS pollution control activities.[32]

IV. STRUCTURING ~~THIRD-PARTY~~ AN NPS CONTROL IMPLEMENTATION PROGRAM TO ACHIEVE ~~NPS IMPLEMENTATION PROGRAMS~~ WATER QUALITY OBJECTIVES

An NPS control implementation program is a program developed to comply with SWRCB or RWQCB WDRs, waivers of WDRs, or basin plan prohibitions. Implementation programs for NPS pollution control may be developed by a RWQCB, the SWRCB, an individual discharger or by or for a coalition of dischargers in cooperation with a third-party representative, organization, or government agency. The latter programs are collectively known as "third-party" programs and the third-party role is restricted to entities that are not actual dischargers under RWQCB/SWRCB permitting and enforcement jurisdiction. These may include NGOs, citizen groups, industry groups, including discharger groups, watershed coalitions, government agencies, or any mix of the above. Although a third-party program may be comprised solely of dischargers, the reason it is a third-party is because the entity that represents the dischargers is not an actual discharger.

A. ~~Definition of a Third-Party NPS~~ Challenges of Statewide NPS Pollution Control Implementation ~~Program~~

~~For the purposes of this policy, a Third-Party NPS implementation program is a program developed by one or more third parties to comply with WDRs, a waiver of WDRs, or a basin plan prohibition governing NPS pollution. In this policy, these programs are referred to as Third-Party Programs. Third-Party Programs are programs that neither the SWRCB nor a RWQCB has developed.~~The challenges to implementing statewide prevention and control of NPS pollution discharges are significant. The RWQCBs ~~are the agencies~~ have the primary responsibility for ensuring that ~~there are~~ appropriate NPS control implementation programs are in place throughout the State. ~~to meet water quality objectives and to protect the beneficial uses of the waters of the State. To fulfill these responsibilities, the RWQCBs may approve or endorse Third-Party Programs in many ways. These~~ RWQCB responsibilities include, but are not limited to, ~~adopting a program that includes~~ issuing WDRs or a waiver of WDRs for individual dischargers or a category of NPS dischargers, or adopting a basin plan amendment that addresses NPS dischargers.

~~There are many potential organizational approaches to developing an appropriate Third-Party Program.~~ Given the extent, ~~and~~ nature, and diversity of sources of NPS pollution discharges, ~~of the State's water~~ the RWQCBs need to be as creative and efficient as possible in devising approaches to prevent or control NPS pollution. A primary advantage of the development of third-party programs is their ability to reach multiple numbers of dischargers who individually may be unknown to the RWQCB. ~~if California's water quality protection and restoration goals are to be achieved. A Third-Party Program may be developed by or for an individual discharger or through a collective effort for a group of dischargers.~~

A RWQCB may use whatever mix of organizational approaches it deems appropriate. Coalitions~~. Group~~ of dischargers may differentiate themselves in many ways: regionally, sub-regionally, by watershed, discharge characteristics, discharger community type, or through participation in some other publicly or privately developed program. Though dichargers participate in third-party programs, organizationally, the programs must be managed by someone other than a discharger. For example, there are organizations or entities already involved in NPS management programs. ~~In addition to the agencies with which MAAs and MOUs have been executed, there are situations where other agencies or organizations are involved in NPS pollution control efforts with and without a formal agreement with the SWRCB or a RWQCB. Several~~ RWQCBs have had experience working with industry groups, both formally and informally, to develop education and self-regulation within a particular industry. Other organizations have become active in NPS pollution prevention and land restoration efforts through CWA §319(h) grants, State bond grants, or the State Revolving Fund loan program. Many of the partnerships formed to take advantage of these financial resources have developed into self-sustaining third-party organizations. Some are affiliated with RCDs or have developed as part of the

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Coordinated Resource Management Planning ~~(CRMP)~~ approach; others are watershed groups or have developed their own organizational structure based on other geographic or industry-specific factors. In some situations the organizations accomplish their goals through a mix of public and private partnership efforts. ~~The RWQCB staff has worked with these groups at various levels.~~

RWQCBs are not required to endorse or approve any specific program or type of program. Each program brought before a RWQCB or SWRCB must be individually judged on its merits. The scale against which it will be measured will assess its potential to result in the implementation of actions to successfully prevent or control discharges of nonpoint sources of pollution. The ultimate goal of any NPS control implementation program must be to protect the beneficial uses of the State's waters.

~~B. Statewide Implementation and the Use of Third-Party Programs~~

~~The RWQCBs are the agencies with primary responsibility for ensuring that there are appropriate NPS control implementation programs in place to meet water quality objectives and to protect the beneficial uses of the waters of the State.[33] To fulfill these responsibilities, the RWQCBs may approve or endorse Third-Party Programs in many ways. These include, but are not limited to, adopting a program that includes issuing WDRs or a waiver of WDRs for a category of NPS dischargers, or adopting a basin plan amendment that addresses NPS discharges throughout the region.~~

~~There are many potential organizational approaches to developing an appropriate Third-Party Program. Given the extent and nature of NPS pollution of the State's waters, the RWQCBs need to be as creative and efficient as possible if California's water quality protection and restoration goals are to be achieved. A Third-Party Program may be developed by or for an individual discharger or through a collective effort for a group of dischargers. Groups of dischargers may differentiate themselves in many ways: regionally, sub-regionally, by watershed, discharge characteristics, discharger community type, or through participation in some other publicly or privately developed program. Though dischargers participate in Third-Party Programs, organizationally, they may be managed by someone other than the dischargers. There are organizations or entities already involved in NPS management programs, for instance, RCDs, watershed groups, and some industry groups such as the dairy industry. A RWQCB may use whatever mix of organizational approaches it deems appropriate, as long as it can provide a rational explanation for why it is treating some dischargers differently than other dischargers (e.g., because one group of dischargers is actively participating in a watershed group's efforts, while another is not).~~

~~C~~B. Third-Party Programs Administered by State Agencies Other than the SWRCB or RWQCBs

There are agencies, in addition to the SWRCB and RWQCBs, with the authority to implement programs to meet water quality objectives and protect beneficial uses. Several of these agencies are formally linked to the RWQCBs and SWRCB through memoranda of understanding (MOUs) or management agency agreements (MAAs). MOUs and MAAs are important for NPS regulation because they delineate the roles and responsibilities of individual agencies ~~with respect~~ in the State's efforts to control~~ling~~ NPS pollution sources. In all cases, agencies with regulatory power act in accordance with their own authorities and processes.

There are two general types of MOUs: (1) cooperative agreements made with other agencies or organizations that are able to provide information or technical or financial assistance to further the State's goal of preventing or controlling nonpoint sources of pollution; and (2) cooperative agreements made with land management agencies with authority to control NPS discharges through inclusion of MPs in their land lease agreements.

With an MAA, the SWRCB may designate another agency as a management agency to take the lead in implementing NPS pollution control. The actions taken by these agencies are taken under their own authorities and using their own regulatory processes. The fundamental purpose of the SWRCB/RWQCBs when applying the management agency approach is to achieve, through the capabilities of a management agency, at least the same degree of control over NPS pollution as could be attained through direct regulation under SWRCB/RWQCB authority, but to do so more efficiently.

The SWRCB and RWQCBs may not delegate their NPS authorities and responsibilities to another agency, and may not indefinitely defer taking necessary action if another agency is not properly addressing a NPS problem. However, where another agency is constructively involved in NPS efforts, the SWRCB and RWQCB should seek to take those efforts into account and, where appropriate, take advantage of these third-party efforts. Not only does this avoid unnecessary duplication of effort, it can leverage the SWRCB's and RWQCBs' limited staffing and financial resources. While another agency's actions pursuant to an MOU or MAA do not fulfill the RWQCBs' obligation to use its administrative tools to address the relevant NPS discharges, another agency's actions can serve, for example, as the basis, in part or in whole, for a RWQCB waiver of WDRs for the activities covered in these agreements.

If water quality problems persist, the RWQCBs may not indefinitely defer enforcement action to other agencies. While the 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. In addition, a RWQCB can enforce the conditions or requirements contained in the waiver, WDR, or prohibition that addresses the underlying discharge of waste. Consistent with a particular MAA, the lead agency

under an MAA may be given an opportunity to achieve compliance before the RWQCBs take necessary action.

The RWQCBs also have developed partnerships with other agencies that are in a position to take quick and decisive enforcement action. The California Department of Fish and Game, for instance, may take action against a problem discharger under its own laws and regulations, working with either the local county district attorney's office or the attorney general's office.

The RWQCBs have broad flexibility and discretion in fashioning NPS management programs, and are encouraged to be as innovative and creative as possible, and, as appropriate, to build upon Third-Party Programs. The State Board, in turn, is encouraged to establish a program that recognizes and honors successful and outstanding third-party efforts.

~~D~~C. The Key Elements of an NPS Pollution Control Implementation Program

Before approving or endorsing a specific ~~Third-Party P~~ NPS pollution control implementation program, ~~the~~a RWQCB must determine that there is a high~~reasonable~~ likelihood ~~that~~ the ~~Third-Party P~~implementation program will attain the RWQCB's stated water quality objectives. This will include consideration of the MPs to be used, and the process for ensuring their proper implementation as well as assessment of MP effectiveness. Depending on the program, it also ~~will~~may include other factors such as the level of discharger participation. ~~and the effectiveness of the MPs implemented.~~ NPS dischargers have had and will continue to ~~receive~~have many opportunities to take advantage of the available technical and financial assistance programs administered through the SWRCB, ~~as well as~~ in addition to the assistance offered by other programs. A first step in the education process offered by these programs often consists of discharger assessment of their lands or operations to determine NPS problems, followed by the development of a plan to correct those problems. It is important to re~~member~~cognize that the development of a plan is only the first step in developing an implementation program that address~~es~~ ~~the~~a discharger's NPS ~~problems~~pollution discharges. Implementation of the plan, including any necessary iterative steps to adjust and improve the plan and/or implementation must follow the planning stage.

Prior to developing an NPS control implementation program or recognizing an ~~Third-Party P~~implementation program developed by dischargers or third-parties as sufficient to meet ~~their~~ RWQCB obligations to protect water quality, a RWQCB~~s~~ shall ensure that the program meets the requirements of the five key structural elements described below. While the RWQCBs are free to use the administrative tool(s) that they determine to be most appropriate for a particular ~~Third-Party P~~implementation program, all implementation programs will have the five structural elements in common. Development of Elements 1 and 2 are the primary responsibility of those who are developing the implementation program~~the Third-Party~~. Elements 3 and 4 may require ~~Third-Party~~ consultation with ~~a~~ the appropriate RWQCB. Element 5 shall be developed

by the RWQCB. ~~Ultimately, a Third-Party Program's adherence to a structure based on the five key elements also may serve other purposes, including determining whether NPS control projects qualify for grant funding.~~

For ~~Third-Party P~~implementation programs ~~that primarily are~~ developed by non-regulatory parties, factors such as availability of funding~~,~~; a demonstrated track record or commitment to NPS control implementation~~,~~; and a level of organization and group cohesion that facilitates NPS implementation ~~is~~are among the critical factors that must be taken into account. For regulatory programs, the availability of staff resources to administer the implementation may be a major concern.

~~Third-Party P~~NPS control implementation programs shall include the following five key elements:

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KEY ELEMENT 1: An NPS control implementation program's ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

Existing and potential beneficial uses of the waters of the State are identified through a public process. RWQCBs establish water quality objectives to protect those uses, and a program to implement the objectives. The State also is required to adopt and implement an antidegradation policy designed to protect water quality that is higher than that necessary to protect the designated beneficial uses. For purposes of this policy, the term "water quality requirements" will be used to include water quality objectives established to protect beneficial uses and any higher level of water quality needed to comply with the State's antidegradation policy.

An NPS control implementation program ~~Third-Party Program~~ must be specific as to the water quality requirements it is designed to meet. For example, if the program relies upon dischargers' use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements ~~in question~~. The program also should ~~identify which~~ provide other information as required by the RWQCB, including but not limited to the identification of participant dischargers. ~~are expected to participate, so that~~ T~~t~~he RWQCB ~~can~~must be able to ensure that all ~~of~~ the significant sources of the NPS discharges of concern are addressed.

KEY ELEMENT 2: An NPS control implementation program shall include a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program's stated purpose(s), the process to be used to select or develop MPs, and the process to be used to ensure and verify proper MP implementation.

~~The~~A RWQCB must be able to determine that there is a ~~reasonable~~high likelihood that the program will attain water quality requirements. This will include consideration of the MPs to be used and the process for ensuring their proper implementation. It also will include other factors such as the level of discharger participation and the effectiveness of the MPs implemented.

Although MPs must be tailored to a specific site and circumstances, 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. A schedule assuring MP implementation and assessment, as well as adaptive management provisions must be provided. 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. (See also Key Element 3.) Although MP implementation never may be substitute for meeting water quality requirements, MP implementation assessment may, in some cases, be used to measure nonpoint source control progress.

KEY ELEMENT 3: Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program shall include a specific time schedule and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.

The Porter-Cologne Act (CWC §13242[b] and § 13263[c]), the NPS Program Plan, and the NPS Implementation and Enforcement Policy recognize that there are instances where it will take time to achieve water quality requirements. The effort may involve all or some of various processes, including: identification of measurable long term and interim water quality goals and a timeline for achieving these goals; identification and implementation of pollution control MPs, as well as provision for maintenance of the implementation actions and provision for additional actions if initial actions are inadequate; and, in the case of third-party organizations, identification of a responsible third-party to lead the efforts.

In considering approval of specific interim goals and the time necessary to achieve those goals, a RWQCB may consider such factors as the necessity of providing for significant capital outlays for MP implementation, the presence of a severely degraded waterbody, and whether or not an NPS control implementation program ~~Third-Party Program~~ is a component of a larger TMDL implementation program. The time schedule may not be longer than that which is reasonably necessary to achieve an NPS implementation program's water quality ~~the Third-Party Program's~~ objectives. Preliminary development of the time schedule shall be undertaken by the ~~Third-P~~party responsible for developing the NPS control implementation program. The RWQCB may amend and must approve the time schedule. If the RWQCB later determines that additional time is necessary to complete the program, it may make further

amendments to the time schedule or issue an enforcement order that contains a compliance schedule.

KEY ELEMENT 4**:** An NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.

Verification measures to determine whether an ~~Third Party P~~NPS control implementation program is meeting its stated purpose is a key element of all NPS control implementation programs. If the ~~Third Party P~~program depends upon an iterative MP approach, in addition to verification of proper MP implementation (Key Element 2), feedback mechanisms are needed to clearly indicate whether and when additional or different MPs or MP implementation measures must be used, or other actions taken. Designing the appropriate types and frequency of verification and feedback measures (e.g. reporting, inspection, monitoring, etc.) is an integral part of implementation ~~Third-Party P~~program development and success.

In all cases the ~~Third-Party P~~NPS control implementation program should describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs are being properly implemented and are achieving the program's objectives and/or to provide feedback for use in adaptive management. These efforts are necessary to determine whether the program is on time and on track in achieving its goals.

Depending on the water quality problem, the cause, the beneficial uses at risk, and the purpose for which the monitoring will be used (e.g. adaptive management or regulatory purposes) the appropriate type(s) of monitoring should be used. Some monitoring approaches include photo monitoring; assessing residual dry matter on rangelands; various indicators of healthy instream habitat; riparian and wetland habitat structure, density and cover; and bioassessment. Some programs may involve collecting and reporting ambient water quality monitoring data. Those programs should be consistent with the SWRCB Surface Water Ambient Monitoring Program (SWAMP) Data Quality Management Plan (DQM), which provides for more than one level of data quality. The DQM approach to data quality recognizes that the rigor needed to monitor for regulatory purposes may not be necessary for other purposes. Consequently, the SWAMP DQM provides data quality and reporting objectives for both regulatory and screening studies. Regardless of which approach is used, all monitoring programs should be reproducible, provide a permanent/documented record and be available to the public.

KEY ELEMENT 5**:** Each RWQCB shall make clear, in advance, the potential consequences for failure to achieve an NPS control implementation program's stated purposes.

A RWQCB action to approve or endorse an NPS control implementation ~~Third-Party P~~program shall contain a general description of the course of action or actions to be taken if verification/feedback mechanisms indicate or demonstrate that the program is failing to achieve its stated objectives. ~~Depending on the particular program, some of the courses of action may be initiated by the RWQCB, a third-party agency or private entity, or both.~~ Although not binding on the RWQCB, this element should be written with the objective of creating clear expectations and reinforcing the obligations that dischargers, third parties, and other agencies, in addition to the RWQCBs, have accepted in agreeing to implement ~~the Third-Party Program~~an NPS control implementation program. This element also has the advantage of requiring the examination of proposed programs with respect to options for enforcement should the program not proceed as well as expected.

Clear expectations regarding potential RWQCB responses to inadequate or ineffective programs, including but not limited to adopting a revised program or the taking of an enforcement action, provides dischargers and the public with greater certainty regarding the process. RWQCB options will vary significantly, depending on the structure of the program. (e.g., which administrative tool or tools are being utilized, whether third-party regulatory or land use agencies, or private entities are coordinating the dischargers' efforts, etc.) While not all programs need be directly enforceable, any enforcement limitations that might be encountered should be well understood by the RWQCB prior to approving or endorsing an ~~Third-Party P~~NPS control implementation program.

In cases of individual noncompliance, selective enforcement actions may be taken. In cases of third-party noncompliance, an effort to revise the ~~T~~third-~~P~~party ~~P~~program is an alternative. Generally, prior to initiating major revisions to a program, informal contact with dischargers, group representatives, or other third parties, if any, will be attempted in order to redirect unsuccessful efforts. However, although the direction and efforts of a particular ~~T~~third-~~P~~party ~~P~~program are being undertaken as a group effort, with group designated or accepted leadership, if the group or third-party fails to follow through on their commitments, any RWQCB enforcement action taken will be against individual dischargers, not the third-party.

~~C. Integrating CWC §13369 Management Options Into NPS Pollution Control~~

~~California's first, statewide formal strategy for controlling NPS pollution was established in 1988 when the SWRCB adopted California's first nonpoint source management plan. The 1988 Plan provided a broad outline of management options described as "general management approaches" considered useful in addressing NPS problems. The~~

management options later were included in the NPS Program Plan and subsequently described in CWC §13369(a)(2)(A), as: (1) Non-regulatory implementation of management practices, (2) Regulatory-based incentives for management practices, and (3) The adoption and enforcement of waste discharge requirements that will require the implementation of management practices.

Although the terms used to express the management options have changed slightly over time, the underlying definitions have remained fairly consistent. The management option concept was never an attempt to establish rigid boundaries around NPS control actions, but was an attempt to recognize and acknowledge the many differing attitudes and potential responses to the State's efforts to control NPS pollution.

A RWQCB's approach regarding a NPS source discharge may have components of more than one management option, and the management options do not provide an exhaustive list of all of the ways to control NPS pollution. As described in the 1988 Plan, for example, WDRs could impose effluent limitations rather than, or in addition to, an obligation to conduct specified MPs. In addition, although there is not a direct correlation between the three administrative tools, which are available to the RWQCBs (see Section IIC above) and the three management options, dischargers are always under one of the administrative tools. For example, depending upon the specific contents of a particular administrative tool, waivers of WDRs could be characterized as Option 1 and/or Option 2, while some WDRs and conditional prohibitions could be characterized as Option 2 and/or Option 3. Consequently, the three management options provide only a general outline for categorizing many RWQCB NPS pollution control efforts. The actual contents of the administrative tool that implements a particular NPS implementation program are of greater import than the management option used to characterize the administrative tool. Additional information about "management options" is provided below.

Management Option 1: Non-Regulatory Implementation of MPs

The "non-regulatory implementation" option is characterized primarily by implementation actions or programs where a RWQCB does not directly impose obligations on dischargers to implement NPS control MPs. These actions or programs may rely upon discharger NPS pollution control actions implemented under the administration of Third-Party Programs, as described above, if those programs incorporate the five key elements as outlined above. Where existing Third-Party Programs do not contain all five of the elements, the parties responsible for managing these programs should generally be asked by the RWQCBs to voluntarily supplement their programs with additional measures designed to meet the five elements. If they do so, the entire program could be considered as "non-regulatory implementation". Where a third party does not choose to include these elements as part of its program, the RWQCBs will need to establish the supplemental elements. Another example of "non-regulatory implementation" is where dischargers determine that it is feasible to completely prevent all discharges of waste. If a RWQCB determines there is no remaining threat of discharges that could affect the quality of waters of the State, it loses jurisdiction to impose an obligation to conduct MPs.[34]

~~Management Option 2: Regulatory- Based Incentives for MPs~~

~~The "regulatory-based incentives" option includes those programs where the RWQCBs provide incentives to dischargers to implement specific MPs, but do not explicitly mandate their use. Relief from substantive or procedural requirements, such as reduced frequency of monitoring or reporting or elimination of a requirement to obtain RWQCB approval or licensed professional certification of discharger-specific NPS pollution management plans, if otherwise required, are among the types of incentives that are available to a RWQCB.~~

~~Management Option 3. Waste Discharge Requirements that Require MP Implementation~~

~~This management option is characterized as direct regulation and is more prescriptive than "non-regulatory implementation" and "regulatory-based incentives," in that the RWQCBs may use WDRs to mandate the use of specific MPs as further described below. The Porter-Cologne Act states that a RWQCB may not "specify the design, location or type of construction" required to achieve compliance with water quality standards. However, RWQCBs may prescribe the use of a specific MP as long as the RWQCBs also explicitly allow a discharger to substitute another MP of their own choosing that will achieve the same level of water quality protection. This provides dischargers with flexibility and managerial control over their operations. In addition to MPs, WDRs may also include effluent limitations, receiving water limitations, monitoring and reporting provisions, and other requirements.~~

V. RWQCB Compliance Assurance

Typically, the RWQCBs have regulated individual dischargers, rather than groups of dischargers who are represented or coordinated by third parties. Individual dischargers, including both landowners and operators, continue to bear ultimate responsibility for complying with a RWQCB's water quality requirements and orders. Generally, under the Porter-Cologne Act, the RWQCBs cannot take enforcement actions directly against non-discharger third parties. As part of the fifth element described above, the RWQCBs will need to explain how significant non-compliance can be addressed in Third-Party Programs. 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. Individual dischargers need to be informed as to what individual discharger actions or inactions will lead to individual enforcement. This explanation is necessary so that participating dischargers understand the ramifications of non-compliance, even if that non-compliance is by a third party they have selected as their representative. Options short of individual enforcement actions could include RWQCB actions such as changing a program to remove some autonomy, or developing sequential enforcement phases related to triggering events built into the program. Ultimately, the ineffectiveness of a group through which a discharger

participates in NPS control efforts cannot be used as an excuse for lack of individual discharger compliance.

The SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. Both the Enforcement Policy and common RWQCB practice also recognize the merit of progressive enforcement. With progressive enforcement, a RWQCB implements enforcement through an "...escalating series of actions that allows for the efficient and effective use of enforcement resources to: (1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance."

VI. IMPLEMENTATION SUCCESS AND FUTURE CONSIDERATIONS

This policy provides a template for NPS pollution control in California. However, the ability of the SWRCB and RWQCB to aggressively implement and enforce the State's NPS Program in a reasonable timeframe is directly linked to the resources available—both staff and budget—to carry out the program. The SWRCB recognizes that it needs to provide strong support for the RWQCBs' efforts through available technical and financial oversight and assistance. Statewide, a diverse array of parties participate in various ways to implement NPS pollution control measures. However, in most situations, the primary participants are the RWQCBs and NPS dischargers. The RWQCBs are expected to develop their own priorities and schedules for addressing the specific types of NPS pollution present within their regions.

Successful implementation of the NPS Program largely depends on two factors: the ability of the RWQCBs to use their administrative authorities and limited resources in creative and efficient ways, and the willingness of dischargers to implement MPs and other strategies that effectively prevent or control NPS discharges. To help accomplish this goal, dischargers are urged to take advantage of the many technical and financial assistance programs available to assist them and described earlier in this document.

Current land use management practices that have resulted in NPS pollution have a long and complicated physical, economic and political history. 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 ~~old habits~~ the use of practices that have resulted in current NPS pollution discharges and ~~cultural~~the barriers to change. Therefore, it is expected that it will take a significant amount of time for the RWQCBs to approve or endorse NPS control implementation p~~Third-Party P~~rograms throughout their regions, and even longer for those programs to achieve their objectives.

A rigorous dedication to periodic evaluation of all aspects of the program and an adaptive management approach will facilitate the road to success. Statewide implementation of the NPS program is predicated not only on individual NPS discharger actions to adopt and adapt alternative MPs, but upon the development and adaptation of self-determined management structures that encourage and support these changes. Much is known about the MPs that most effectively prevent and control polluted runoff. Less is understood about the alternative

alliances and management structures - the ~~T~~third ~~P~~party ~~P~~programs - that most efficiently and effectively will result in the watershed or industry-wide actions needed to control NPS pollution statewide. In addition to the public and private financial resources dedicated to this purpose, this effort will require a conscious willingness to experiment, evaluate and adapt management approaches that will support and bring us closer to our ultimate goal -- that of controlling NPS pollution to protect the quality of waters of the State in accordance with the mandates of the Porter-Cologne Act.

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REFERENCES

SWRCB, 1988. Nonpoint Source Management Plan. State Water Resources Control Board, Division of Water Quality, Sacramento, CA. November 1988.

SWRCB, 1999. Plan for California's Nonpoint Source Pollution Control Program. Division of Water Quality, Sacramento, CA. December 1999.

SWRCB, 2002. Water Quality Enforcement Policy. Office of Statewide Initiatives, Sacramento, CA. February 2002.

USEPA, 1993. Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters. January 1993.

END NOTES

1. CWC 13050[e],13260[a],13263[a],13376,13377. See also Lake Madrone Water District v. State Water Resources Control Board (1989) 209 Cal.App.3d 163, 171-175, 256 Cal.Rptr. 894 (Lake Madrone); Tahoe-Sierra Preservation Council v. State Water Resources Control Board (1989) 210 Cal.App.3d 1421, 1435, 259 Cal.Rptr. 132; 63 Ops.Cal.Atty.Gen. 51, 53-359 (1980) (Tahoe-Sierra).
2. See Water Code section 13000
3. See Water Code section 13000
4. (CWC sections 13200, 13201)
5. (CWC section 13245)
6. (CWC sections 13168, 186)
7. (CWC sections 13263(i), 13377; 40 Code of Federal Regulations [CFR] section 122.28; Cal. Code of Regulations [CCR] Title 23, section 2235.2)
8. (CWC section 13320; CCR, Title 23, sections 2050-2068)
9. (CWC sections 13000, 13050(i), 13140, 13142, 13241)
10. See discussion in Chief Counsel's Statement for the State Nonpoint Source Management Program Administered by the State Water Board and the Regional Water Boards (October 1988), pp. C-1 through C-2. See also Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program, pp. 3-4 (1969).
11. (CWC section 13050[j], 13241) The State Water Resources Control Board and the Regional Water Quality Control Board must consider the factors specified in CWC section 13241 when adopting or revising water quality objectives.
12 The federal antidegradation policy is contained in 40 C.F.R. sec. 131.12. The state is required to adopt and implement an antidegradation policy consistent with the federal policy. The federal policy establishes three tiers of water quality protection. The first tier establishes a minimum requirement that existing instream uses and the level of water quality necessary to protect those uses be maintained and protected. The second tier is designed to protect high quality waters by establishing prerequisites for allowing degradation of these waters. The third tier addresses outstanding national resource waters.
13. (See 33 U.S.C. sec. 1313(c); 40 CFR sections 131.3[i], 131.6)
14. (CWC section 13242)
15. (CWC section 13242)
16. CWC section 13263[g]
17. CWC section 13260
18. CWC section 13263[a]
19. (CWC sections 13260, 13269)
20. (CWC section 13264)
21. (CWC sections 13263, 13269)
22. (CWC section 13243)
23. (CWC section 13263[a] and [i]
24. (CWC section 13263[i])
25. CWC section 13269(a)(1)
26. CWC section 13269 (a)(2)
27. CWC section 13269(a)(4)(A)
28. (CWC section 13050[d])
29. Lake Madrone, supra, fn. 1, 209 Cal.App. 3d at 169, 256 Cal.Rptr. 894; see Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969) (Final Report), App. A, p. 23.
30. See e.g., Lake Madrone, supra, fn. 1 (release of accumulated sediment from a dam held a discharge of waste). See also discussion in Sawyer, State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow (1988) Pacific L.J. 1267, 1273-1275.
31. Northwest Indian Cemetery Protective Association vs. Peterson, (Ninth Circuit 1986) 795 F.2d688, 697, revised on other grounds (1988) Lung vs. Northwest Indian Cemetery Protective Association 485 U.S. 439 [108 S.Ct. 1319.99 L.Ed.2d.
32. Statewide information about IACC agencies and their activities is currently available at http://www.swrcb.ca.gov/nps/iacc.html.
33. CWC section 13001
34. CWC section 13260

D R A F T

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

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

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

Commenter: Patrick Porgans
Patrick Porgans and Associates, Inc.
P. O. Box 1713
West 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 third-party 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 must 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 nonpont 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 requirements. They include but are not limited to: (1) an explicit statement of the 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.

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

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 third-party 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 the 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-of-choice 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
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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.

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Comments on SWRCB January 9, 2004 Review of Irrigated Agriculture Waiver Water Quality Monitoring Requirements

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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 watershed-based 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 Monitored[1]

Constituents	Quantitation Limit	Reporting Unit
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 O_2/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 Kjeldahl Nitrogen	(b)	mg/L
Phosphorus	(b)	µg/L
Potassium	(b)	µg/L

a. In addition to Toxicity Investigation Evaluations (TIEs), sites identified as toxic in the initial screen shall be re-sampled 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 ten-year 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 constituents in sediments causing aquatic life toxicity and should be measured in all sediment 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/OClTMDLRpt12-11-02.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.

pH

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 CO_2 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).

01/30/04 17:06

CALIFORNIA FARM BUREAU FEDERATION

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 1/30 TIME: 4:45 PM FAX # CALLED: 341-5470

TO: Steve Fagundes
NPS Program Plan Implementation Unit

FROM: Tony Francois

PROCESSING INSTRUCTIONS

- [x] HIGH PRIORITY - DELIVER IMMEDIATELY
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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.

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 priorities, 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.

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

Very Truly Yours,

Anthony L. François, Esq.
Director, Water Resources

cc: George Gomes, Administrator, California Farm Bureau Federation

Heal the Bay

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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.

<u>The Draft NPS Policy Does Not Provide Enforceable, Regulatory Programs to Address NPS Pollution</u>

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

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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.

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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

PATRICK PORGANS & ASSOCIATES, INC.

February 3, 2004 Workshop
Item 8
Comments

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

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

FAX COVER LETTER

NUMBER OF PAGES 21
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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 **Confirmation**: 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 ☒ swrcbfailure toprotectwq/FAX2004

Attachments

PATRICK PORGANS & ASSOCIATES, INC.

GOVERNMENT REGULATORY RESOURCE CONVERGENCE

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

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.*

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

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

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

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

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

Respectfully,

Patrick Porgans

PP:sp 1 swrcbfailuretoprotectwq

Enclosures

[1] P&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.

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

---

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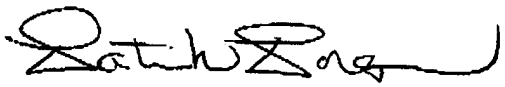
Respectfully,



Patrick Porgans

PP:sp 1 swrcbfailuretoprotectwq

Enclosures

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[1] P&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.

PATRICK PORGANS & ASSOCIATES, INC.

GOVERNMENT REGULATORY RESOURCE CONVERGENCE

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

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

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 Delievered**

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

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 and purveyor of water in California, exporting on average four-million acre-feet of water from the Sacramento-San Joaquin Delta, primarily to its CVP agricultural contractors in the San Joaquin Valley (SJV) service area. The historical record attests 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 regulatory, administrative and contractual and public trust mandates. Its "Catch-22" quandary is compounded by a fragmented regulatory and self-serving administrative process that attempts to maintain a status quo profile when confronted with one of 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 expense and to the demise of trust resources. This conflict of interest is illustrated by some of the following examples:

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

❷ The USBR's and contractors' respective actions are also a primary contributing factor to 120 miles of the San Joaquin River (SJR) classified as a water quality impaired body by the SWRCB.

❸ 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.***

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 12, 2002 2

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

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❹ 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.

❺ 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 appealed 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, the exception of the Cleanup and Abatement Order, there is no record of the SWRCB holding the USBR accountable 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.**

❺ 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.[1] SWRCB's Exhibits 19 and 20,(*Summary of Recent Decision 1485 Violations*), documented over 200 days of violations between Water-Year 1998 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, 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.**

❻ The CVRWQCB reports document the fact that the **USBR's** groundwater sumps discharges into the Delta Mendota Canal (DMC), have **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.**

❼ 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.

The USBR's ongoing contribution to the impairment of the public's waters, resulting from agricultural drainage return flows into

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[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.

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

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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

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

Supportive Documentation:

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

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

> *Selenium concentrations greater than 2ug/L occurred sporadically in the wetland water supply channels, with the majority of elevated concentrations during February, March, and April. Elevated concentration in the supply channel may he due to a number of factors including elevated selenium levels in supply water, inflows from agricultural subsurface drainage sources outside of the DPA, and local sources such as ground water seepage and surface return flows. The cause of the elevated concentrations in the wetland water supply channels are being investigated by Regional Board staff and local water agencies. Results of early investigation have been published separately (Chilcott, 2000b and Eppinger, et[2] al., 2002 draft).*

USBR water major factor in Selenium Exceedences: Supply water to the wetlands is predominately provided from the 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 to selenium loading is attributed to the practice of "blending" higher quality water with poorer quality drainage water. After nearly a decade of studies, attempting to quantify and qualify sources of selenium contributing to the exceedences in the wetland supply, there is no question source water provided by the USBR is a major factor. This finding was not a revelation to P&A, in fact, this was always a given. However, having had the opportunity to observe the USBR's "performance and 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-selenium contamination connection.

Notwithstanding, P&A has made it a point to keep apprized of the plethora of shortcomings, data inconsistencies, selenium load and/or water quality exceedences, and related incongruities attributable to the USBR's "handling" of the GBP, which the 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.

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Art Baggett, Chairman, State Water Resources Control Board
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From: Patrick Porgans & Associates **Hand Delivered**

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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.

In the Mid-1990s P&A Suggested that the USFWS File a Formal Complaint with the CVRWQCB and SWRCB for 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 the CVRWQCB and the SWRCB against the USBR et al for impairing the Service's water right permits in the wetland channels. At that time, the USFWS notified the CVRWQCB of its concern for the wetlands and selenium sources and/or exceedences; however, it did not make a formal regulatory request/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 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 5ppb selenium objective promulgated by the EPA for the SJR and conduct business as ususal.

GBP 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, USBR[4], CVRWQCB[5] and the SWRCB[6] 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:

[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.
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.

[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.

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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 development and the advent of irrigated agriculture, they were exacerbated with construction of the CVP. (R.T. pp. 3988, 4781; SDWA 39; SWRCB 1e, pp. II-15, VIII-2.) The CVP consist of 18 federally operated reservoirs and four reservoirs operated jointly with the DWR. (SWRCB 1e, p. III-5, SWRCB 167.) The Delta-Mendota Canal and pumping plant first were began operating in 1951. (SDWA 48, pp. 10-11.) The San Luis Drain and the California Aqueduct were completed in 1967. (SWRCB 167, Technical Appendix, pp. [II-11] - [II-13].) SDWA's witness testified that between 1930 and 1950 the average salt load at Vernalis was 750,000 tons per year. Between 1951 and 1997, the salt load has averaged more than 950,000 tons per year. Peak loads have exceeded 1,5 million tons per years following extended droughts. (SWDA 34A.) Central Valley RWQCB staff testified that from the 1960s onward there has been an increase in salt load and concentrations. (R.T. pp. 4835-4836.) The April through August salt load in the 1980s was 62 percent higher than the load in the 1960s and the corresponding annual load increase was 38 percent. (SWRCB 1e, p. VIIII-11; SWRCB 97.)

Central Valley RWQCB staff described geographic sources of salinity based on historical data from the 1977 through 1997. (R.T. p. 4891.) The Central Valley RWQCB staff concluded that high salinity at Vernalis is 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 percent of the salt load comes from the northwest side of the San Joaquin River, and approximately 37 percent of the salt load comes from the Grasslands area. (SEWD 7a.) These areas received approximately 70 percent of their water supply from the CVP, 20 percent from precipitation and 10 percent from groundwater. (SWRCB 8, p. V-11.) The TDS concentration of agricultural drainage water from the Grasslands area that discharges ti the river through Mud Slough is approximately 4,000 mg/l. (R.T. p. 4869; SWRCB 8, p. VIII-27.) In some cases, drainage water is more than ten times the concentration of the Vernalis salinity standard. (R.T. pp. 7850-7851.)

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

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

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

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

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-imposed drainage dilemma it created in conjunction with its federal Central Valley Project water contractors. It is a problem that had been well documented by more than 100 years of research, supported by real science and hard data/publications. It is a problem that was identified even before the construction of the initial CVP and San Luis Unit of the project. Ironically, as both the USBR and its contractors knew, in the case with the San Luis Unit, the San Luis Drain was suppose to be built in unison with the water deliveries, because of the known drainage problems within the San Luis Unit (Westland Water District) service area. But paraphrasing one of WWD's initial General Managers, Ralph Brody, there was no real concern about the San Luis Drain (SLD) being built early on, just deliver the water and 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.

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

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Unfortunately, the perquisite for the USBR's renewed interest in the drainage issues is not an agency-inspired 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 that USBR has not only failed miserably to reconcile, but, conversely the record proves its actions have and continue 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 engineers, "experts" in agricultural drainage, during the SWRCB's Bay-Delta "Water Rights" hearings, revealed drainage is doubling the salt loads every five years in the San Joaquin Valley serviced by a portion of the CVP.

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

Potential Solutions According to USBR "Fact Sheet

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

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.

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

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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.

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 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 opposition to the USBR's Grassland Bypass Project (GBP), which utilizes a portion of the San Luis Drain, for discharging drainage water into Mud Slough, a tributary to the San Joaquin River. For all of its "so-called achievements" the GBP has not done away with the toxic trace elements and/or salts contained within the SJV hydrological area: they are simply being banked and stored in the soil profile and in the affected groundwater basin. The data show that the dividends on the salt load within the SJV are doubling every five years. The most condemning commentary on the merits of the GBP were published by the USBR, in an addendum/correction, to Chapter 6 of the ***Grasslands Project 1998-99 Annual Report,*** and I quote: ***"Data for several more years will be necessary before the impact of the Grassland Bypass Project can be quantified with any confidence."*** As you know the aforementioned addendum/correction to that report was not a voluntary concession by the USBR; it was compelled to take this action as a means to assuage legitimate concerns regarding the report, raised by the U.S. Geological Survey (USGS).

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

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

> *"Understanding the biotransfer of Se is essential to evaluating the fate of proposed changes in Se 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 discharges via the SJR or a proposed SLD extension to the Bay-Delta should be at least as complete and could profitably build from the framework presented here. For the Bay-Delta, this new tool is used in site-specific forecasts to evaluate Se effects based upon the major processes leading from loads through consumer organisms to predators. We conclude that credible protective criteria needs to be applicable to vulnerable food webs and to be based on contaminant concentrations in sources such as particulate materials that most influence bioavailability. Bivalves appear to be the most sensitive indicator of Se contamination in the Bay-Delta.*

Constitutional Conflict - Unreasonable Use of Water:

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

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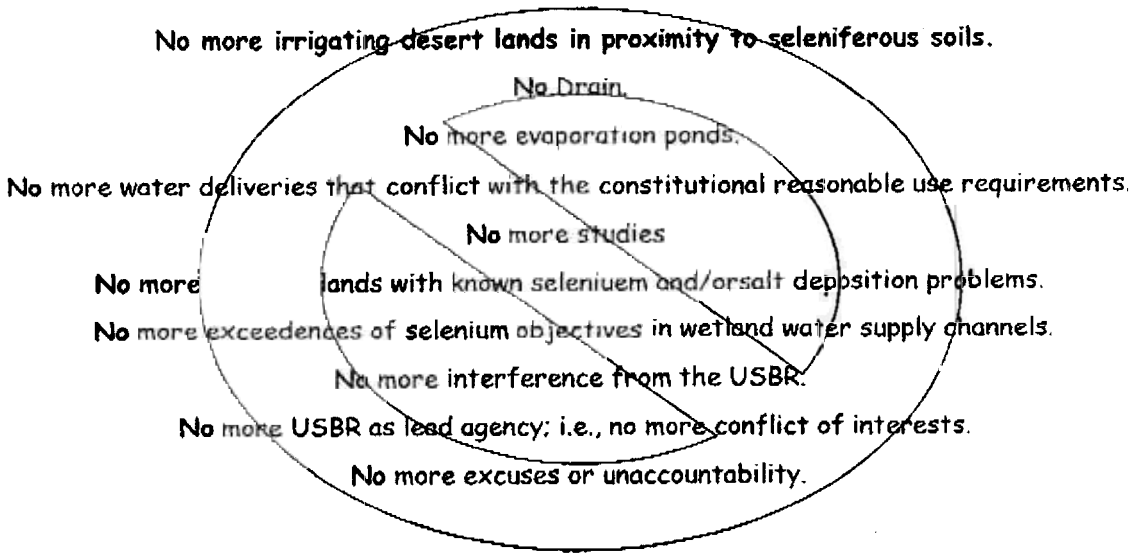
CVP Capital Costs Repayments During the Last 50 Years are Less than Total Drainage Related Costs:

According to a May 2001 USBR "Cost Allocation Study" 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 *Fiscal 2002 Water Rate Book*, 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.

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

The USBR has referred to the"re-evaluation" of the "drainage alternatives"[9] as an iterative process, which, according to the literal interpretation, means characterized by repetition. P&A concurs that this process has been both repetition and draining. In FACT, P&A is not amenable to "participating" in a reiterate process. Albeit, for the record, this is P&A's final position.



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

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

Nov. 14, 2002 **10**

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

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.

Respectfully,

Patrick Porgans
Defacto Public Servant
PP:sp 🖫3■fnlusbr./wetlandviolations

cc: List Attached

PATRICK PORGANS & ASSOCIATES, INC.

GOVERNMENT REGULATORY SOURCE CONVERGENCE

Tele: (916) 374-8197 Fax: 372--7679 P.O. Box 1713, W. Sacramento, CA 95691

February 27, 2003

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) Fax No: (916) 978-5114

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

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:

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

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.

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 behoove 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.[1]

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

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[1] U.S. Environmental Protection Agency, National Watershed Characterization," ***Index of Watershed Indicators*** (http://www.epa.gov/surf), 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.

~~transportation costs.) Please be advised that these numbers are on the conservative side. In light 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

[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.

appealed 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.**

C. 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.**

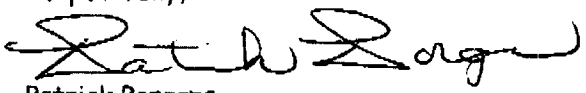
D. In 2002, an estimated 33,000 fish were killed on the Klamath/Trinity River system (some of which are state/federally listed as threatened species) resulting from a USBR water-related management issue. P&A contacted the USBR to ask if it had been cited for the fish kill. USBR's spokesperson said, no, 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,



Patrick Porgans
cc: Congressman George Miller
Attachments

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FAX COVER LETTER

NUMBER OF PAGES _16_
TOTAL PAGE COUNT INCLUDES COVER PAGE

1/20/04

SENT TO: LES GROBER, CHIEF, SJR TMDL UNIT

AFFILIATION: CVRWQCB

FAX NO: (916)464-4800

TELE. NO 916) 464-4851

SENT BY: PATRICK PORGANS

CONFIRMATION: YES _√_ NO __

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

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

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[1]CVRWQCB'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.*

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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.

For the record, I must reiterate that P&A takes strong exception to the board's decision to separate the water quality and water quality issues into two separate phase of the hearing process, such an action is incongruent. My concern relative to the separation of those two critical issues, was affirmed during my cross examination of the fisheries experts when they conceded that water quality and quantity are inextricably linked for fish survival and sustainability. Separating the two issues preempted the introduction of meaningful evidence, upon which the board could make an unbiased 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 Management Program (VAMP) was based upon limited data. More important, the record will attest 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 been raised regarding the procurement of all of the funds required for the experiment, and regarding certain risk associated with funding the VAMP/agreement. According to David Kennedy, director of the California Department of Water Resources, a portion of the funds for VAMP would come from the State's General Fund. State funding could amount to approximately $12 million.

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).

With current selenium loads averaging between 10,000 and 12,000 lbs., being discharged into the river annually, upstream from Vernalis, which exceeds the 5ppb water quality limit routinely, neither the DFG nor the USFWS quantified or qualified the bioaccumulation of selenium in the food chain, 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%."*]

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 that during the last "drought" both the DWR and the Bureau failed to provide water to meet the terms and condition of their respective water right permits as required by D-1422 and D-1485. At that particular time the Delta was on the verge of an ecological collapse, partially due to the water exports by these agencies. At one point, during that period, the Bureau notified the Board in writing that it had no intention of meeting the Vernalis standard. Based upon the record there are absolutely no assurances that the government or the group is going to be held accountable if either fail to meet the 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 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.

It is imperative that the board, the water users, and the agricultural drainers cease from fragmenting the issues. This fragmentation benefits the water users, at the expense of the general public and is 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.

In conclusion, I offer the following comment, which is not meant to be derogatory nor offensive to any of the participants. This agreement comes down to some dollars for water, with somebody else paying the bill.

NRDC
THE EARTH'S BEST DEFENSE

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-

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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

DRAFT

Advocates for Wild, Healthy Oceans

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Formerly the Center for
Marine Conservation

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. Porter-Cologne Mandates Administrative Controls on Polluted Runoff Equivalent 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

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. Third Party Programs Should Be Applied Cautiously and in Conformance with Porter-Cologne's Mandates.

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

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 RWQCBs 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."

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[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. The Draft Policy Should Clearly Address the Severe Limitations of Certain Management Options.

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 must adopt waste discharge requirements when required to do so by law (*e.g.*, when a waiver is not in the public interest).

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

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 obligation 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. The Board Should Seek Additional Resources to Administer a Proper and Timely Program.

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,

Linda Sheehan
Director, Pacific Regional Office

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

from Aaron Ferguson @ Workshop

Item 8
Feb 3 W/S

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 Coalition[1] 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.

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

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.

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

1) Explicit Purpose: 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) Timeline: 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) Feedback Mechanisms: 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) Consequences: 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,

David J. Guy
Executive Director
Northern California Water Association

Mark E. Biddlecomb
Director of Conservation Programs
Ducks Unlimited

California State Senate

COMMITTEE
ON
APPROPRIATIONS

STATE CAPITOL, ROOM 2206
SACRAMENTO, CALIFORNIA 95814
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DEDE ALPERT
CHAIR

February 10, 2004

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

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 the 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,

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 must 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

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

CALIFORNIA DEPARTMENT OF FISH AND GAME
CERTIFICATE OF FEE EXEMPTION
De Minimis Impact Finding

Project Title/Location Name and Address of Project Proponent (include county):

State Water Resources Control Board Resolution No. 2004 – XXX
Policy for the Implementation and Enforcement of the Nonpoint Pollution Control Program

Project Description:

The project is the adoption of a statewide policy for the implementation and enforcement of the California Nonpoint Source Pollution Control Program (NPS Program). The proposed *Policy for the Implementation and Enforcement of the Nonpoint Pollution Control Program* (NPS Implementation and Enforcement Policy) describes the statutory and regulatory authorities of the State Water Resources Control Board (SWRCB) and Regional Water Quality Control Boards (RWQCBs) to prevent and control NPS pollution. The NPS Implementation and Enforcement Policy also defines third-party NPS implementation programs (e.g., programs that neither the SWRCB nor a RWQCB has developed), provides five, key structural elements required for their development and RWQCB approval, and their application in the NPS Program.

Findings of Exemption

Name and address of project proponent:

State Water Resources Control Board
Division of Water Quality
1001 I Street, 15th Floor
Sacramento, CA 95814

2. In accordance with SWRCB policies regarding the implementation of the California Environmental Quality Act, the SWRCB has developed a Functional Equivalent Document (FED) to determine whether the proposed project may have a significant adverse effect on the environment.

3. When considering the record as a whole, there is no evidence before the SWRCB that the proposed project will have potential for an adverse effect on wildlife resources or the habitat upon which the wildlife depends.

Certification:

I hereby certify that the SWRCB has made the above findings of fact and that, based upon the FED, environmental checklist, and hearing record, the project will not individually or cumulatively have an adverse effect on wildlife resources, as defined in Section 711.2 of the California Fish and Game Code.

_____ Date: _____

Celeste Cantu, Executive Director
State Water Resources Control Board