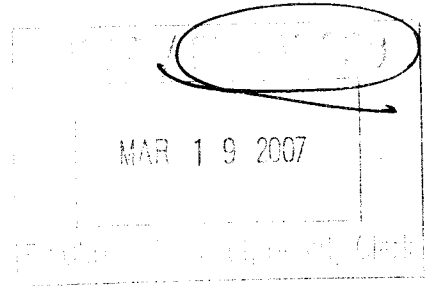


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and the Regional Water Quality Control Board



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

**SAN FRANCISCO BAYKEEPER, INC., BILL JENNINGS,**  
  
Petitioners,  
  
v.  
  
**STATE WATER RESOURCES CONTROL BOARD,**  
  
Respondent,  
  
**CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD (REGION 5),**  
  
Real Parties in Interest.

Case No. 99CS02722  
  
**SUPPLEMENTAL AGREEMENT AND ~~PROPOSED~~ STIPULATED FURTHER ORDER REGARDING COMPLIANCE SCHEDULE**  
  
Judge: Lloyd G. Connelly, Jr.

1 WHEREAS petitioners and plaintiffs Baykeeper (formerly WaterKeepers Northern  
2 California and San Francisco BayKeeper, Inc.) and Bill Jennings (collectively "Petitioners")  
3 brought this action against respondent and defendant State Water Resources Control Board  
4 ("State Water Board") and real party in interest Central Valley Regional Water Quality Control  
5 Board ("Regional Water Board") (collectively "Respondents"); and

6 WHEREAS the petition challenged the Regional Water Board's adoption of a regional  
7 cleanup plan and the State Water Board's adoption of a Consolidated Cleanup Plan  
8 ("Consolidated Plan") containing "site-specific variances" for three pesticide toxic hot spots  
9 (sites 5.3, 5.4 and 5.5); and

10 WHEREAS the petition also challenged the State Water Board's failure under Water  
11 Code section 13393 to adopt sediment quality objectives; and

12 WHEREAS on October 11, 2001, the Court entered judgment for Petitioners on both  
13 claims and issued a writ of mandate ("Writ") directing Respondents, inter alia, to amend the  
14 Consolidated Plan to include a cleanup plan for sites 5.3, 5.4 and 5.5, to adopt sediment quality  
15 objectives, and to submit a proposed compliance schedule; and

16 WHEREAS the parties entered into a Settlement Agreement to resolve the compliance  
17 schedule issue, which the Court approved and entered as an Order of the Court on April 15, 2002  
18 ("Order"); and

19 WHEREAS the Order required the Regional Water Board to amend its Regional Toxic  
20 Hot Spot Cleanup Plan by December 6, 2002, and the State Water Board to submit an amended  
21 Consolidated Plan to the Office of Administrative Law ("OAL") by September 1, 2003; and

22 WHEREAS the Regional Water Board adopted cleanup plans for sites 5.3, 5.4 and 5.5 on  
23 March 13, 2003, and the State Water Board amended the Consolidated Plan to include these  
24 plans on January 22, 2004; and

25 WHEREAS the State Water Board submitted the amended Consolidated Plan to OAL on  
26 October 3, 2005; and

1           WHEREAS, due to irregularities in the administrative record submitted to OAL, the State  
2 Water Board withdrew the amended Consolidated Plan; and

3           WHEREAS the Order required the State Water Board to circulate its draft proposal for  
4 sediment quality objectives and implementation policies by August 5, 2005, and to adopt and  
5 submit final objectives and policies to OAL by February 28, 2007; and

6           WHEREAS the State Water Board committed \$2.5 million to the adoption of sediment  
7 quality objectives in Resolution No. 2002-0006, adopted on January 23, 2002; and

8           WHEREAS the State Water Board asserts that it has made substantial progress in  
9 developing proposed scientifically-based sediment quality objectives and implementation tools  
10 for marine bays, utilizing data on sediment toxicity, benthic community response, and sediment  
11 chemistry, but that, due to the magnitude of work required to develop a sediment quality  
12 database, the State Water Board is behind schedule; and

13           WHEREAS the State Water Board further asserts that its effort has focused on  
14 developing draft sediment quality objectives for marine bays (as opposed to estuaries) in the first  
15 phase ("Phase I") of the program because sediment chemistry, toxicity, and benthic community  
16 data was available for these waters, and that very little data is available on sediment quality,  
17 sediment toxicity, and benthic community health for estuaries, and, in particular, for the San  
18 Francisco Bay Delta ("Delta"); and

19           WHEREAS, the State Water Board's Scientific Steering Committee determined on March  
20 1, 2006 that further work regarding methodologies to address the indirect effects of pollutants in  
21 sediments is essential to ensure that the final methods are scientifically supported; and

22           WHEREAS the State Water Board in Resolution No. 2005-0061, adopted on  
23 September 7, 2005, committed \$2.6 million to the second phase ("Phase II") of the State Water  
24 Board's program to develop sediment quality objectives; and

25           WHEREAS the State Water Board further asserts that it will need four years to  
26 complete Phase II, which will include implementation methodologies to address (a) direct effects  
27 in estuaries, and (b) indirect effects in both bays and estuaries; and

1           WHEREAS the parties have agreed that it is in the best interests of the people of the state  
2 to allow the State Water Board additional time to develop sediment quality objectives that  
3 incorporate additional data on sediment in the Delta and other estuaries, provided that, pending  
4 the complete development of the required data, fully enforceable narrative objectives are in place  
5 that can be implemented based on the best available existing data, and provided further that all  
6 objectives are adopted in accordance with the timeline set forth in this Supplemental Settlement  
7 Agreement ("Supplemental Agreement"); and

8           WHEREAS the parties understand and agree that Petitioners, by entering into this  
9 Supplemental Settlement Agreement, are in no way endorsing, or expressing an opinion  
10 regarding the legal adequacy of, any decisions made or actions taken heretofore by the State  
11 Water Board or its staff in connection with the adoption of sediment quality objectives, including  
12 but not limited to decisions or actions pertaining to the workplan, the stakeholder process, the  
13 CEQA scoping meeting informational document, and any proposed objectives or implementation  
14 measures; and the parties further agree that Petitioners have not waived, and by entering into this  
15 Agreement do not waive, any rights they may have to challenge the legal adequacy of any Phase  
16 I or Phase II objectives adopted by the State Water Board, or any decision made or action taken  
17 in connection therewith; and

18           WHEREAS Petitioners' agreement to the revised timeline and phased approach set forth  
19 in this Supplemental Settlement Agreement is based in part on its position that it is desirable for  
20 enforceable objectives to be adopted at the earliest possible date, even if those objectives may  
21 not meet all statutory requirements for sediment quality objectives, while more detailed  
22 objectives and implementation policies are being developed;

23           WHEREAS the parties agree that, in conjunction with the revised timeline provided  
24 herein, it is desirable to extend until after the adoption of Phase II sediment quality objectives  
25 Petitioners' time for challenging the legal adequacy of any objectives to be adopted in Phase I, so  
26 as to preserve Petitioners' legal rights to challenge objectives while at the same time facilitating  
27 the phased approach to adoption of objectives; and

1           WHEREAS, in light of the foregoing, the parties have agreed that it is in all parties'  
2 mutual interest to enter into this Supplemental Agreement to revise the compliance schedule in  
3 the Order without further proceedings; and

4           WHEREAS the parties have further agreed that, in order to avoid litigation on the issue,  
5 it is in all parties' mutual interest to settle Petitioners' claims for attorneys' fees and costs incurred  
6 in connection with enforcement of the stipulated compliance schedule in the Order.

7           NOW THEREFORE IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:

8       1.    Consolidated Plan.

9           a.    The date stated in Paragraph 1, subparagraph (b) of the Order is changed from  
10 September 1, 2003 to February 15, 2007. As amended, the provision reads as follows:

11                   "The State Board shall submit an adopted amendment to the Consolidated  
12 Cleanup Plan setting forth cleanup plans for sites 5.3, 5.4 and 5.5 to the Office of  
13 Administrative Law ("OAL") by February 15, 2007."

14           b.    Paragraph 1 of the Order is further amended to add the following new  
15 subparagraph (c):

16                   "c. Within two (2) weeks of OAL approval of the amended Consolidated Plan, the  
17 State Water Board shall submit the Consolidated Plan to the Legislature and file a  
18 return with the Court."

19           c.    The parties hereby acknowledge and agree that Petitioners have not waived, and  
20 by stipulating to this Supplemental Agreement do not waive, any arguments or claims they may  
21 otherwise have relating to (i) the Regional Water Board's or State Water Board's compliance  
22 with any of the deadlines established in the Order, as modified by this Supplemental Agreement,  
23 or (ii) the adequacy of the amended Consolidated Plan.

24       2.    Sediment Quality Objectives.

25           Paragraph 2 of the Order is amended by deleting subparagraphs b. and c. and inserting  
26 the following:

1 "b. The State Water Board shall consider a draft Phase I proposal for sediment  
2 quality objectives for bays and estuaries and related policies. The proposal shall  
3 include:

- 4 (1) A final objective for direct effects for all bays in the state.  
5 (2) An interim narrative objective for direct effects for all estuaries in  
6 the state. Until Phase II is completed, the objective will be implemented  
7 with a methodology using available sediment toxicity and chemistry data.  
8 (3) An interim narrative objective for indirect effects for all bays and  
9 estuaries in the state. Until Phase II is completed, the objective will be  
10 implemented using available data.  
11 (4) An implementation policy for all of the objectives that is consistent  
12 with the foregoing.  
13 (5) The objectives shall be applicable to the sediments of all bays and  
14 estuaries in the state, and shall be enforceable, immediately upon their  
15 approval by OAL and the United States Environmental Protection Agency  
16 (EPA), notwithstanding the absence of data for any particular bay or  
17 estuary.

18 c. The State Water Board shall adopt and submit to OAL all Phase I sediment  
19 quality objectives and related implementation policies by February 29, 2008.

20 d. The State Water Board shall complete and circulate for public review its draft  
21 Phase II proposal for sediment quality objectives and related implementation  
22 policies by June 30, 2008. The proposal shall include:

- 23 (1) A proposed final objective for direct effects for all estuaries in the  
24 state.  
25 (2) A proposed final objective for indirect effects for all bays and estuaries  
26 in the state.  
27 (3) An implementation policy for all of the objectives.  
28

1 (4) The objectives shall be applicable to the sediments of all bays and  
2 estuaries in the state, and shall be enforceable, immediately upon their  
3 approval by OAL and EPA, notwithstanding the absence of data for any  
4 particular bay or estuary.

5 e. The State Water Board shall adopt and submit to OAL all Phase II sediment  
6 quality objectives and related implementation policies by December 31, 2010.

7 3. No Waiver of Rights

8 Nothing in this Supplemental Settlement Agreement shall be construed as an admission  
9 by either party as to the adequacy, legality, inadequacy or illegality of any Phase I or Phase II  
10 sediment quality objectives hereafter adopted by the State Water Board, or any actions taken by  
11 the State Water Board in connection therewith, and the parties reserve all rights to make any  
12 claim, argument and/or defense with respect thereto, except as provided in Paragraphs 4 and 5  
13 herein. Nothing herein shall prohibit Petitioners from challenging in this action, or in a separate  
14 action, the legality of any Phase I or Phase II objectives adopted by the State Water Board, or  
15 any actions taken by the Board in connection therewith, or in any way limit the grounds for such  
16 a challenge, to the extent otherwise permitted by law, except as provided in Paragraph 5 herein.

17 4. Tolling Agreement

18 a. The Parties agree that the statute of limitations for any claim or cause of action of the  
19 Petitioners challenging the State Water Board's adoption of Phase I sediment quality objectives,  
20 or any amendments thereto that may be approved by the State Water Board prior to the adoption  
21 of the Phase II objectives, including but not limited to any statute of limitations for filing a  
22 challenge to the adequacy of Respondents' return to the writ, shall be tolled and shall not begin  
23 to run until the approval by OAL of all Phase II objectives adopted by the State Water Board  
24 pursuant to this Supplemental Settlement Agreement

25 b. Respondents hereby waive any defense that they may have to any claim or cause of  
26 action described in Paragraph 4.a of this Supplemental Settlement Agreement where such  
27 defense asserts the expiration of the statute of limitations, laches, estoppel or waiver regarding  
28

1 the passage of time, action or inaction between the effective date of this Supplemental Settlement  
2 Agreement and the commencement of the statute of limitations period upon approval by OAL of  
3 all Phase II objectives adopted by the State Water Board, including but not limited to any  
4 defense challenging the legality of this tolling agreement.

5 c. Nothing herein shall be construed as limiting Petitioners' ability to file a challenge to  
6 any Phase I objectives, or any actions of the State Water Board in connection therewith, prior to  
7 the expiration of the tolling period, except as provided herein.

8 5. Attorneys' Fees and Costs.

9 a. Respondents shall pay Petitioners the amount of \$18,000.00 in settlement of  
10 Petitioners' claim of entitlement to attorneys' fees and costs incurred up to the date of entry of  
11 this Supplemental Agreement. Respondents shall make this payment within 22 days after  
12 obtaining approval from the Department of Finance ("DOF") by providing to the undersigned  
13 counsel for Petitioners a check in the amount of \$18,000.00 made payable to the Shute, Mihaly  
14 & Weinberger LLP Trust Account. The taxpayer identification number for Shute, Mihaly &  
15 Weinberger is 942647744.

16 b. Notwithstanding Paragraph 6 of the Order, this payment shall constitute  
17 satisfaction in full of any claim Petitioners may have for attorneys' fees, costs, or other expenses  
18 incurred in this litigation up to the date of entry of this Supplemental Agreement. Each of  
19 Petitioners further agrees that in consideration for the payment of \$18,000.00 to Petitioners, each  
20 Petitioner shall fully and forever release and waive any and all claims that each of them may  
21 have against the Respondents for attorneys' fees, costs, or other expenses incurred in this  
22 litigation up to the date of entry of this Supplemental Agreement. Nothing in this Supplemental  
23 Agreement shall preclude Petitioners from seeking any fees, costs or other expenses incurred  
24 after the date of entry of the Supplemental Agreement pursuant to Section 6 of the Order.

25 c. In the event that DOF has not approved the payment described in subparagraph  
26 (a) above within 90 days of the entry of the Supplemental Agreement, the Supplemental  
27 Agreement shall terminate and the parties' rights and obligations as set forth in the Order shall  
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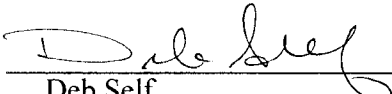
1 remain in effect as if the Supplemental Agreement were never entered, unless the parties agree  
2 and stipulate otherwise.

3 6. Future Extensions.

4 Paragraph 8 of the Order is amended by replacing the existing text with the following: "8.  
5 Notwithstanding any prior order of the Court, Respondents may apply to the Court for extension  
6 of the due dates set forth herein only upon a showing of extraordinary circumstances  
7 necessitating the extension."

8 WHEREFORE, the parties enter into this Supplemental Agreement and submit it to the  
9 Court for its approval and entry as an Order of the Court.

10 Dated: 1-30-07 BAYKEEPER

11  
12 By:   
13 Deb Self  
14 Executive Director

15 Dated: \_\_\_\_\_ BILL JENNINGS

16 By: \_\_\_\_\_  
17 Bill Jennings

18 Dated: \_\_\_\_\_ STATE WATER RESOURCES CONTROL BOARD

19 By: \_\_\_\_\_

20 Dated: \_\_\_\_\_ CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD (REGION 5)

21 By: \_\_\_\_\_

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10 Dated: \_\_\_\_\_ BAYKEEPER

11  
12 By: \_\_\_\_\_  
13 Deb Self  
14 Executive Director

14 Dated: 29 January 07 BILL JENNINGS

15  
16 By: Bill Jennings  
17 Bill Jennings

17 Dated: February 8 07 STATE WATER RESOURCES CONTROL  
18 BOARD

19  
20 By: Thomas Howard

21 Dated: February 21, 2007 CENTRAL VALLEY REGIONAL WATER  
22 QUALITY CONTROL BOARD (REGION 5)

23  
24 By: Pamela Crean

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Approved as to form:

Dated: 26 Feb 2007

EDMUND G. BROWN JR.  
Attorney General of the State of California

By: 

BRUCE REEVES  
Deputy Attorney General  
Attorney for Respondent State Water Resources  
Control Board and Real Party in Interest Central  
Valley Regional Water Quality Control Board

Dated: 2/23/07

SHUTE, MIHALY & WEINBERGER

By: 

William J. White  
Attorneys for Petitioners

**APPROVED AND SO ORDERED.**

Dated: MAR 19 2007

**LLOYD G. CONNELLY**

HONORABLE LLOYD G. CONNELLY, JR.  
Judge of the Superior Court