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SUPERIOR COURT  
OF CALIFORNIA  
SACRAMENTO COUNTY**

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15 **SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

16 MONTEREY COASTKEEPER, a program of THE  
OTTER PROJECT, a non-profit organization;  
17 ANTONIA MANZO, an individual;  
ENVIRONMENTAL JUSTICE COALITION FOR  
18 WATER, a non-profit organization; CALIFORNIA  
SPORTFISHING PROTECTION ALLIANCE, a  
19 non-profit organization; PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
20 ASSOCIATIONS, a non-profit trade association;  
and SANTA BARBARA CHANNELKEEPER, a  
21 non-profit organization,

22 Petitioners,

23 v.

24 CALIFORNIA STATE WATER RESOURCES  
CONTROL BOARD, a public agency,

25 Respondent,

26 OCEAN MIST FARMS, et al.,

27 Respondent-Intervenors.  
28

Case No. 34-2012-80001324

**PETITIONERS' OPENING BRIEF  
IN SUPPORT OF PETITION FOR  
WRIT OF MANDATE AND  
[PROPOSED] ORDER**

**Date:** May 15, 2015  
**Time:** 10:00 a.m.  
**Dept.:** 29  
**Judge:** Hon. Timothy M. Frawley

**Action Filed:** Nov. 29, 2012

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EPA, Approval and Promulgation of Implementation Plans; California; San Joaquin  
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State Water Resources Control Board, *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (May 20, 2004) (reprinted at RB 9405-24) ..... 4, 31, 35

State Water Resources Control Board, *Guidance Memorandum* (Feb. 16, 1995)..... 37 n.18, 41

State Water Resources Control Board, *Admin. Procedures Update 90-004: Antidegradation Policy Implementation for NPDES Permitting* (July 2, 1990) ..... passim

State Water Resources Control Board, *Resolution No. 68-16: Statement of Policy with Respect to Maintaining High Quality Waters in California* (1968) (reprinted at RB 9377-78) ..... passim

State Water Resources Board Report to the Legislature, *Recommendations Addressing Nitrate in Groundwater 5* (2013), available at [http://www.waterboards.ca.gov/water\\_issues/programs/nitrate\\_project/docs/nitrate\\_rpt.pdf](http://www.waterboards.ca.gov/water_issues/programs/nitrate_project/docs/nitrate_rpt.pdf)..... 44 n.25

Michael A.M. Lauffer, *Summary of Regulations Governing Adjudicative Proceedings Before the California Water Boards* (2006), available at [http://www.swrcb.ca.gov/laws\\_regulations/docs/adjudicative\\_hearing\\_process.pdf](http://www.swrcb.ca.gov/laws_regulations/docs/adjudicative_hearing_process.pdf)..... 45 n.26

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1 **INTRODUCTION**

2 The quality of surface and groundwater in the Central Coast Region of California is at a critical  
3 juncture. The Central Coast Regional Water Quality Control Board (“Regional Board”) has identified  
4 agricultural runoff—laden with nutrients from fertilizers, pesticides, and other wastes—as a “major  
5 cause of water pollution in the Central Coast region.” RB 4849. Ninety percent of the millions of  
6 people who live in the Region get their drinking water from groundwater. If degradation continues  
7 unchecked, the groundwater for 80 percent of people in the Salinas Valley and other areas will be  
8 undrinkable by 2050. Treating the region’s nitrate-contaminated drinking water could cost billions of  
9 dollars and raise water bills for low-income households throughout the Region. At the same time,  
10 pesticides are rendering more and more surface waters toxic to fish, insects, and other aquatic life.  
11 Worsening contamination threatens the Region’s exceptional biodiversity and indeed the agricultural  
12 industry itself, which depends on clean water for irrigation.

13 This case raises two questions: how did we get here, and where must we go? After decades of  
14 leaving discharges from irrigated agriculture virtually unregulated, in 2004 the Regional Board issued a  
15 “conditional waiver” for irrigated agriculture. Under California law, a “waiver” is a general permit for  
16 a class of permittees who discharge similar wastes to State waters—in this case the “growers” (or  
17 “dischargers”) who engage in irrigated agriculture in the Central Coast Region. A waiver must contain  
18 all necessary standards, prohibitions, and other requirements needed to meet applicable water quality  
19 objectives, as well as monitoring adequate to ensure the waiver is working.

20 Between 2008 and 2010, the Regional Board came to realize that the 2004 Waiver was, in fact,  
21 not working. “[M]any of the same areas that showed serious contamination from agricultural pollutants  
22 five years ago, particularly nitrate and toxic pesticides, are still seriously contaminated.” RB 4051.  
23 Toxicity “remains common,” there is “reduced [biological] diversity and few sensitive species,” and  
24 “we are not seeing widespread improvements in nitrate concentrations” in the worst areas. RB 4051;  
25 *see also* RB 3758-64. Acknowledging that agricultural discharges are the sole or a primary contributor  
26 to each of these conditions, RB 3764, 4849, the Regional Board implored that “[s]ignificant measures  
27 need to be implemented now,” RB 4088. “Changes in farming practices,” shifts in “who bears the costs  
28 and benefits of water quality protection,” RB 4860, and a new suite of aggressive measures were

1 necessary to stop growers' continued pollution of water quality:

2       The agricultural industry must implement the *most effective management practices*  
3       (related to irrigation, nutrient, pesticide and sediment management) *that will most likely*  
4       *yield the greatest amount of water quality protection*, and verify their effectiveness with  
5       on-farm data. The [Regional] Board must establish a known and reasonable *time*  
6       *schedule*, with *clear and direct methods of verifying compliance* and monitoring  
7       progress over time. . . . To prevent further water quality impairment and impact to  
8       beneficial uses, we must take action now.

9 RB 1129 (emphasis added); *see also* RB 606, 1130. Consistent with these statements and the law, in its  
10 initial drafts of a new waiver the Regional Board proposed stringent, enforceable standards and  
11 prohibitions along with individual, on-farm monitoring programs. Dischargers had to meet nitrogen  
12 reduction targets and decrease toxicity; they had to monitor their individual discharges from their  
13 farms; and they faced specific consequences if they failed to comply.

14       However, between 2010 and 2012, the Regional Board's resolve—and the waiver itself—  
15 weakened under growers' constant pressure for less and less regulation. Each time the Regional Board  
16 issued a new draft, it took another step back. Then, in reviewing the Regional Board's final waiver, the  
17 State Water Quality Control Board ("State Board") made things much worse. In 2013, the State Board  
18 ultimately issued a Modified Waiver that replaced many specific, substantive, enforceable water quality  
19 standards with vague, weak, unenforceable goals. The State Board also deleted monitoring provisions  
20 critical to identifying and eliminating the worst pollution sources. What few real standards and  
21 monitoring requirements left in the Modified Waiver were limited to an ever-shrinking group of  
22 growers. Agriculture won while everyone else lost.

23       The new, Modified Waiver for irrigated agricultural discharges is not the one the Regional  
24 Board had envisioned or said was required to comply with the California Water Code and the State's  
25 policy prohibiting the degradation of its waters. These laws require the State and Regional Boards to  
26 issue a waiver that effectively controls the pollution of surface waters and groundwater by growers and  
27 restores those waters' high quality and public beneficial uses. The Modified Waiver also fails to  
28 comply with the California Environmental Quality Act, which requires meaningful analysis and  
mitigation of the significant environmental effects that will flow from the State Board's action.

1 **BACKGROUND**

2 **I. Legal background**

3 **A. Porter-Cologne Act**

4 The regulation of water quality in California involves a federal-state partnership, with the State  
5 implementing the permitting provisions of the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and  
6 its own more stringent Porter-Cologne Water Quality Control Act (“Porter-Cologne Act”), Cal. Water  
7 Code (“Water Code”) § 13000 *et seq.*; *see generally Bldg. Indus. Ass’n of San Diego Cnty. v. State Water*  
8 *Res. Control Bd.*, 124 Cal. App. 4th 866, 872-75 (2004). To comply with federal law, the States must set  
9 water quality standards that protect the beneficial uses of waters, including public drinking supply,  
10 propagation of wildlife, and recreational purposes. 33 U.S.C. § 1313(c). These federal standards set the  
11 national floor, with the States free to impose more stringent standards to protect local water quality. 33  
12 U.S.C. § 1370; *Bldg. Indus. Ass’n*, 124 Cal. App. 4th at 881. The Porter-Cologne Act is broader in scope  
13 than federal law, regulating both surface water and groundwater and both point and nonpoint sources of  
14 pollutants, including runoff from agricultural irrigation. *Compare* Water Code §§ 13050(e), 13369 *with*  
15 33 U.S.C. § 1342(l)(1) (exempting irrigated agriculture from permitting).

16 Under the Porter-Cologne Act, California is divided into nine regions. Each region is overseen  
17 by a Regional Board, which regulates water quality for all basins within its jurisdiction, subject to  
18 oversight by the State Board. Water Code § 13200. The Central Coast Regional Board has jurisdiction  
19 over a 300-mile long, 40-mile wide segment of the Central Coast, which includes urban and rural areas  
20 and the heavily agricultural regions of the Salinas, Santa Maria, and Lompoc Valleys. To protect water  
21 resources, the Regional Board has adopted a water quality control plan, called the Central Coast Basin  
22 Plan (“Basin Plan”), which establishes water quality objectives to “ensure the reasonable protection of  
23 beneficial uses and the prevention of nuisances.” Water Code §§ 13240, 13241; 23 Cal. Code Regs. §  
24 3920 *et seq.*; *see also Bldg. Indus. Ass’n*, 124 Cal. App. 4th at 875. Any discharger whose waste “could  
25 affect” water quality must obtain a discharge permit—called “waste discharge requirements”—from the  
26 Regional Board. Water Code § 13260. Such permits must “prescribe requirements” that both  
27 implement Basin Plan standards and protect beneficial uses. *Id.* § 13263.  
28

1 In lieu of individual permits, the Regional Board may develop discharge requirements for an  
2 entire class of similar pollution sources using a “waiver.” *Id.* § 13269(a)(1). However misleading its  
3 name may be, a “waiver” is simply a general permit; it does not lessen the Board’s duty to prescribe  
4 whatever requirements are needed to achieve the Basin Plan’s water quality objectives. Thus, the  
5 Regional Board may issue a waiver only if it is (1) “consistent with” the Basin Plan and (2) “in the  
6 public interest.” *Id.* Waivers must also include monitoring requirements “designed to support the  
7 development and implementation of the waiver program, including, but not limited to, verifying the  
8 adequacy and effectiveness of the waiver’s conditions.” *Id.* § 13269(a)(2). The results of that  
9 monitoring must be publicly available. *Id.* These requirements parallel the monitoring and reporting  
10 requirements that apply to individual permits, *see* 23 Cal. Code Regs. § 2230, and are intended to ensure  
11 that waivers set forth real obligations, not just aspirational goals. As a form of waste discharge  
12 requirements, waivers last for five years and “may be terminated at any time.” Water Code  
13 § 13269(a)(2).

#### 14 **B. Nonpoint Source Policy**

15 The Basin Plan incorporates the State Board’s 2004 *Policy for Implementation and Enforcement of*  
16 *the Nonpoint Source Pollution Control Program* (“Nonpoint Source Policy”). RB 9405-24. The Nonpoint  
17 Source Policy requires that nonpoint source programs meet specific “key elements,” RB 9417-21, and  
18 include “sufficient feedback mechanisms” to enable regulators, dischargers, and the public to “determine  
19 whether the program is achieving its stated purpose(s),” RB 9419.

#### 20 **C. Antidegradation Policy**

21 Beyond the requirements of the Porter-Cologne Act, California has adopted a State  
22 Antidegradation Policy modeled after (but more protective than) the similar federal policy. *See* State  
23 Water Res. Control Bd., *Resolution No. 68-16: Statement of Policy with Respect to Maintaining High*  
24 *Quality Waters in California* (1968) (“State Antidegradation Policy”), RB 9377-78; 40 C.F.R. §  
25 131.12. Under the State Antidegradation Policy, waters that meet or are below water quality objectives  
26 must be maintained or improved, and waters that are cleaner cannot be degraded at all. Thus, the State  
27 Policy requires the State to achieve “the highest water quality consistent with maximum benefit to the  
28 people of the state.” *Asociacion de Gente Unida por El Agua v. Central Valley Regional Water*

1 *Quality Control Board*, 210 Cal. App. 4th 1255, 1259 (2012) (“AGUA”) (quoting State Antidegradation  
2 Policy) (invalidating conditional waiver for dairy farms for noncompliance with Policy); *see also* State  
3 Water Res. Control. Bd., *Admin. Procedures Update 90-004: Antidegradation Policy Implementation*  
4 *for NPDES Permitting*, 1-4 (July 2, 1990) (“APU 90-004”);<sup>1</sup> *Cal. Sportfishing Prot. Alliance v. Cal.*  
5 *Reg’l Water Quality Control Bd., Central Valley Region*, Cal. Sup. Ct. No. 34-2012-80001186  
6 (Consolidated No. RG12632180) (May 21, 2013) (invalidating conditional waiver for irrigated  
7 agriculture for noncompliance with State Policy).

## 8 **II. Factual background**

9 The Salinas Valley is a long swale between the Gabilan and Santa Lucia Mountain ranges. Its  
10 hundreds of miles of rivers and streams once twisted through a mosaic of salt ponds, grasslands, and  
11 wetlands—now mostly irrigated agriculture—before percolating into underground aquifers or spilling  
12 into Monterey Bay. Water is the lifeblood of the Valley and of the entire Central Coast Region: deep  
13 municipal supply wells and shallow domestic wells supply 90 percent of the drinking water for the  
14 Region’s millions of residents. RB 8506; SB 3180. River and streamside habitats support some of the  
15 most significant biodiversity of any temperate region in the world, including some of the last remaining  
16 populations of the California sea otter, endangered steelhead, endangered coho salmon, and other  
17 imperiled species. RB 8506.

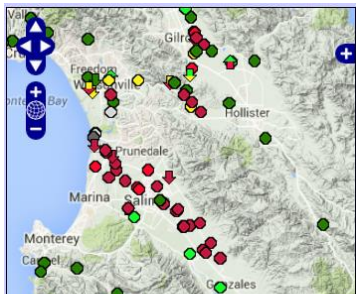
18 The Valley’s extensive drainage and irrigation systems also sustain a multi-billion dollar  
19 agricultural industry. *Id.* The industry’s intensive use of fertilizers and pesticides increasingly  
20 threatens the Salinas Valley’s water resources, and the industry’s landscape alterations exacerbate that  
21 threat. In 2011, the Regional Board reported that “many of the same areas that showed serious  
22 contamination from agricultural pollutants five years ago, particularly nitrate and toxic pesticides, are  
23 still seriously contaminated,” and a number of sites “appear to be getting worse.” RB 5464.<sup>2</sup> Over a  
24 third of groundwater wells are now contaminated with dangerously high nitrate concentrations, in some

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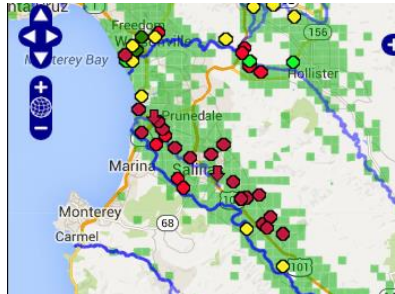
25 <sup>1</sup> Available at [http://www.swrcb.ca.gov/water\\_issues/programs/npdes/docs/apu\\_90\\_004.pdf](http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf). All websites were  
26 last visited December 18, 2014.

27 <sup>2</sup> Petitioners urge the Court to read the Regional Board’s candid assessments of water quality in the Central Coast  
28 Region, and of agricultural dischargers’ impacts on water quality, in two documents accompanying the Board’s  
early proposed waivers: Staff Report (RB 4843-4900) and Appendix G (RB 5444-5512). Earlier versions of these  
reports are at RB 3725-65 and RB 4032-97.

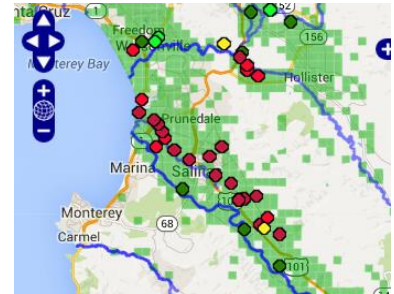
1 cases exceeding federal drinking water standards by an order of magnitude. RB 2879. If degradation  
2 continues at the present rate, the groundwater for 80 percent of people in the Salinas Valley (and other  
3 areas) will be undrinkable by 2050. SB 3173. In addition, nearly every water body in the lower Valley  
4 is listed by the State and the U.S. Environmental Protection Agency (“EPA”) as “impaired” for harmful  
5 pollutants associated with agriculture like nutrients, pesticides, and sediment. RB 5448-49.



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12 **Figure 1. Surface water nitrate**  
13 **pollution.** Colored dots indicate  
14 degree of degradation below  
15 beneficial use thresholds (green  
16 best, dark red worst).



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22 **Figure 2. Invertebrate survival**  
23 **in water.** Colored dots indicate  
24 degree of degradation;  
25 green layer indicates agricultural  
26 pesticide use.



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32 **Figure 3. Invertebrate survival in**  
33 **sediment.** Colored dots  
34 indicate degree of degradation;  
35 green layer indicates  
36 agricultural pesticide use.

15 **Nitrates in groundwater.** Nitrates are chemical byproducts of nitrogen-based fertilizers that  
16 dissolve easily in water, where they pose “arguably the most serious and widespread of all pollution  
17 problems in the Central Coast Region.” RB 5449. According to one study, “up to approximately 50  
18 percent of the wells surveyed [in portions of the Salinas Valley] had concentrations above the nitrate  
19 drinking water standard, with average concentrations nearly double the standard.” RB 8512-13; *see*  
20 *also* SB 3173 (57 percent of population uses a water system with nitrate concentrations that have  
21 exceeded the drinking water standard at least once between 2006 and 2010). EPA has set the drinking  
22 water standard at 45 mg/L nitrates as nitrates (10 mg/L nitrates as nitrogen)<sup>3</sup> to protect people—  
23 particularly infants, pregnant women, and the elderly—from diseases like “blue baby syndrome,”  
24 cancer, Parkinson’s disease, and diabetes. RB 5495-96, 8513, 9199.

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26  
27 <sup>3</sup> There are two equivalent ways to express nitrate concentrations in water: nitrates as nitrates and nitrates as  
28 nitrogen. The first measures the weight of the nitrogen and oxygen in a nitrate molecule, while the latter only  
measures the weight of the nitrogen. For the sake of consistency, we have converted all nitrate concentrations to  
the nitrates as nitrates standard.

Over the last 30 to 40 years, nitrate data show a clear pattern of degradation, from nitrate levels better than the relevant standard to worse than the relevant standard. *See* RB 8467 (“pollution gets substantially worse each year”); SB 3173 (“Nitrate contamination is widespread and increasing.”). Specifically, the mean concentration in nearly every aquifer and sub-basin studied now exceeds the drinking standard. In the Valley generally, the mean concentration has increased from 36 mg/L in 1993 to 56 mg/L in 2007:<sup>4</sup>

Aquifer or Sub-Basin	1978 Mean (Median)	1987 Mean (Median)	1993 Mean	2007 Mean (Median)
Pressure 180'	19.9 (6.9)	29.4 (9.0)	19.5	<b>49</b> (20)
Pressure 400'	N/A	N/A	10.8	12 (3)
Pressure Deep	N/A	N/A	N/A	1 (1)
East Side	40.2 (28.0)	<b>80.3 (55.9)</b>	<b>85.1</b>	<b>106 (63)</b>
Forebay	38.1 (33.8)	<b>54.4 (42.7)</b>	42.5	<b>79 (54)</b>
Upper Valley	28.3 (26.0)	<b>51.7 (47.5)</b>	<b>67.5</b>	<b>90 (78)</b>
Total	N/A	N/A	36.1	<b>56</b> (20)

**Table 1:** Mean and median nitrate concentrations in aquifer and aquifer sub-basins throughout the Salinas Valley. Values are expressed in mg/L; those in **bold** are above the 45 mg/L drinking water standard.

The people most affected by nitrate contamination are residents of rural communities who drink from shallow domestic wells in the Salinas Valley. *See* RB 8506 (as of 1990, there were 40,000 permitted private wells in entire Central Coast Region, and this number is increasing). Many households may not be aware that their tap water is contaminated. RB 5502. Those who are aware may not be able to afford water treatment; at least 23,215 people who get their drinking water from small water systems in the Salinas Valley alone face higher per capita costs for treatment. SB 3215. Treating the region’s nitrate-contaminated drinking water could cost “billions of dollars” and raise water bills for low-income households throughout the Region. RB 5502, 8514; SB 3215-19, 6139.

There is no question as to the source of the contamination: cropland fertilizers account for 78 to 96 percent of the estimated nitrate loading to groundwater in the Salinas Valley. RB 8466-67; SB 3185-86. Tens of millions of pounds of nitrate—37.5 percent of the nitrogen fertilizer applied

<sup>4</sup> Data compiled from RB 2879, 17719, 17836; *see also* SB 3157-3248, 3329-4802 (providing detailed assessment of increasing groundwater nitrate contamination in the Salinas Valley).

1 annually and roughly equal to 2,000 dump truck loads—leach into the water supply each year.  
2 RB 8466, 5484.

3 **Nitrates in surface waters.** Nitrate contamination is also widespread aboveground. Fifteen  
4 water bodies in the lower Salinas Valley (47 in the Central Coast Region generally) are impaired by  
5 nitrate pollution. RB 1154. Of 250 surface water sites evaluated for the Central Coast Ambient  
6 Monitoring Program<sup>5</sup> and Cooperative Monitoring Program,<sup>6</sup> 30 percent exceed the 45 mg/L drinking  
7 water standard, in some cases by fivefold or more. RB 5451; *see also* Figure 1, *supra* p. 6. In addition,  
8 approximately 60 percent have concentrations above 4.43 mg/L, the Basin Plan’s aquatic life standard.  
9 RB 5450, 11471. Concentrations above this level are directly toxic to salmon and trout and can  
10 stimulate algal blooms that consume oxygen and kill aquatic organisms. RB 5450, 10139-40, 11471.

11 Many of the nitrate-laden rivers and creeks in the Salinas Valley are deteriorating. The  
12 Regional Board has singled out the rivers and creeks in the Tembladero Slough and lower Salinas River  
13 as “some of the most seriously polluted.” RB 4894. Of the 26 monitoring sites in these systems, only  
14 two have never had concentrations exceeding the human health standard, and most sites with  
15 concentrations higher than the standard are either not improving or getting worse. *See supra* n.5 (data  
16 showing that mean nitrate concentrations at Gabilan Creek and the Salinas Reclamation Canal have  
17 increased above 45 mg/L).

18 About 60 percent of the water bodies on the Central Coast Region’s 2010 list of impaired waters  
19 identify agriculture as a potential source of impairment. RB 8517. Most of the worst water quality  
20 sites for nitrates are in areas dominated by or downstream from row crop agriculture. RB 16867. In  
21 contrast, nitrate levels rarely exceed 4.43 mg/L in areas where significant agricultural activity is absent,  
22 even in heavily urbanized creeks. RB 8518, 16864.

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24  
25 <sup>5</sup> The Central Coast Ambient Monitoring Program is “the Central Coast Regional Water Quality Control Board’s  
26 regionally scaled water quality monitoring and assessment program.” The information on the Central Coast  
27 Ambient Monitoring Program website, <http://www.ccamp.org>, is part of the record in this case. *See* Regional  
28 Board Record Index Files 197, 479-80.

<sup>6</sup> The Cooperative Monitoring Program is composed of farmers who have opted not to conduct their own  
individual monitoring. Preservation, Inc., monitors the 50 receiving water sites in the Cooperative Monitoring  
Program and makes the data from those sites available on the Central Coast Ambient Monitoring Program website.



1           **Pesticides and toxicity.** In addition to fertilizer, farmers in the Central Coast agricultural areas  
2 apply pesticides to kill insects that could damage their crops. *See, e.g.*, RB 16924. Pesticide residues  
3 combine with each other and other chemicals to poison organisms that ingest or otherwise come into  
4 contact with them. *See generally* RB 10092-118. Toxicity measures the harm that water laced with  
5 such mixtures causes to the environment and human health. RB 9196. The Central Coast has both the  
6 highest percentage of “toxic sites” and the highest percentage of “highly toxic sites” (22 percent of all  
7 sites tested) in California. RB 5455, 7746. Twenty-nine water bodies are on the 2010 List of Impaired  
8 Waters because they are so toxic that fish and other organisms cannot survive in them. RB 5452-53.  
9 The majority of these listings are in the lower Salinas Valley. RB 1157.

10           The water quality objective for toxicity is narrative: “all waters shall be maintained free of toxic  
11 substances in concentrations which are toxic to . . . life.” RB 9196. The Central Coast Ambient  
12 Monitoring Program uses an 80 percent survival rate to quantify this objective. Most Salinas Valley  
13 sites in the program are “severely impacted” (dark red) or “impacted” (red) because the mean survival  
14 rate at these sites is less than 80 percent. *See* Figures 2-3, *supra* p. 6. Alarming, at some sites,  
15 including Chualar Creek at Chualar River Road and Quail Creek at Highway 101, the majority of  
16 samples showed a zero percent invertebrate survival rate (that is, 100 percent mortality) in water.  
17 There are also some sites, including the Blanco Drain, where very few or none of the samples were  
18 toxic until sometime in the last few years. *See supra* n.5; RB 5452 (“The levels of toxicity found in  
19 ambient waters of the Central Coast far exceed anything allowed in permitted point source[ ]  
20 discharges. . . . We have drainages in agricultural areas of the Region that are toxic virtually every time  
21 they are measured.”).

22           The toxicity problem in the Salinas Valley is directly related to the region’s high pesticide use  
23 rates and in-stream pesticide concentrations. Two of the most toxic pesticides, diazinon and  
24 chlorpyrifos, have a long history of use in the Salinas Valley, and a 2006 study found that pyrethroid  
25 use in the Valley was higher than in any other region studied. RB 8521-22, 11698, 16874-75, 16929.  
26 Rigorous monitoring is essential to ensure that pesticide concentrations do not continue to build up, as a  
27 growing body of evidence indicates that pesticides can attack developing brains and lead to  
28 neurological diseases later in life. RB 5500. One 2009 study, for example, reported that residents who

1 drink from wells near fields sprayed with the insecticides propargite or chlorpyrifos were 90 percent  
2 more likely to develop Parkinson’s disease than those drinking from uncontaminated wells. *Id.*  
3 Toxicity has been “documented in some areas of intensive agricultural operations [and] traced to  
4 currently applied pesticides.” RB 10.

5 **Habitat degradation and erosion.** Many waterways are also damaged by intentional  
6 landscape alterations. Over the last several decades, the pace of riparian and wetland area alteration has  
7 accelerated as operators remove vegetation to plant cultivated crops and keep out deer and other  
8 wildlife. RB 4897, 5511. These changes make existing pollution problems even worse. Landscape  
9 loss destroys the watershed functions that maintain high water quality and critical habitat—by filtering  
10 pollutants, providing shade for wildlife, preventing soil erosion, recharging aquifers, and providing  
11 flood storage capacity. RB 5507-11.

12 Consider the problem of increased water temperature. When riparian habitat is destroyed,  
13 critical shade disappears and water temperatures increase. RB 5510, 8527. The result is lower oxygen  
14 levels, less protection for insects and fish, and poorer watershed health. RB 3763, 4896, 5570.  
15 Temperatures in some denuded water bodies of the Central Coast exceed 68 degrees Fahrenheit,  
16 rendering some of the only rearing and migration habitat for endangered salmonids uninhabitable. RB  
17 4894, 8506, 8528.

18 Soil erosion and the resulting sediment loading are also longstanding problems. Sediment  
19 loading can lead to sustained levels of high turbidity. Turbidity measures material suspended in water,  
20 and all turbidity levels above 25 “nephelometric turbidity units” further increase water temperatures,  
21 decrease the amount of sunlight available for aquatic plants, and make it difficult for fish to feed,  
22 breathe, and reproduce. RB 8524, 21039-40. Many sites in the Salinas watershed exceed 100 units,  
23 which is 20 times the median turbidity of most other sites on the Central Coast. RB 2236. As for  
24 erosion, high levels of runoff not only impact aquatic organisms directly, they also carry nutrients  
25 downstream and mobilize pesticides. Nutrient loading to the Monterey Bay has led to large algal  
26 blooms that kill aquatic life and sea birds. RB 8526.

27 In short, the water quality situation in the Salinas Valley is abysmal. Nitrate and pesticide  
28 pollution continues at an alarming rate, and unchecked landscape alterations exacerbate longstanding

1 problems. The 2004 Waiver did not move the region into compliance with water quality objectives,  
2 and the full extent and speed of degradation is still unknown due to widespread data monitoring and  
3 reporting gaps. Nonetheless, “[t]he water quality impairments [in the Central Coast] are well  
4 documented, severe, and widespread . . . and many (not all) agricultural waste discharges continue  
5 to . . . impose certain risks and significant costs to public health, drinking water supplies, aquatic life,  
6 and valued water resources.” RB 4849.

### 7 **III. The Modified Waiver Administrative Process**

8 After decades of minimally regulating one of the worst water pollution sources in the Central  
9 Coast, the Regional Board issued a conditional waiver for agricultural dischargers in 2004 (“2004  
10 Waiver”).<sup>7</sup> This waiver, however, failed to stop the continuing degradation of water quality. Thus,  
11 from 2008 to 2012, the Regional Board developed a new waiver aimed at actually complying with  
12 water quality standards, but, as it developed, the waiver became weaker and weaker under intense  
13 pressure from agricultural growers. In 2013, the State Board modified the already-weakened Regional  
14 Board’s waiver, further diminishing its effectiveness. The final Modified Waiver will not abate the  
15 continued pollution of Central Coast waters by agricultural dischargers.

16 **2004 Waiver.** The 2004 Waiver aimed to “achieve and maintain” beneficial uses through  
17 education; voluntary, unspecified management practices; and limited, general water quality data gained  
18 through cooperative monitoring. RB 71-72, 1128-29, 1184-92. The 2004 Waiver did not require  
19 dischargers to meet specific targets, timelines, or monitoring requirements. RB 1128-29. The Regional  
20 Board conducted limited review under the California Environmental Quality Act (“CEQA”), Cal. Pub.  
21 Res. Code § 21000 *et seq.* RB 22-57.

22 **2012 Waiver: 2008-2011 drafts.** The Regional Board determined that water pollution  
23 continued unabated under the 2004 Waiver. RB 1000, 1130, 3767; *see generally* RB 3725-65, 4032-  
24 97. Thus, “immediate and effective action” was “necessary to improve water quality protection and  
25 resolve the widespread and serious impacts on people and aquatic life.” RB 1126.

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27 <sup>7</sup> Original agricultural waste discharge waivers were adopted in 1983, under which “water quality . . . has been  
28 shown to be impaired by such constituents as pesticides and nutrients, lending further urgency to the need to adopt  
additional requirements for irrigated operations.” RB 9.

1           Accordingly, the Regional Board intended that the new waiver would establish “specific  
2 requirements, time schedules, milestones, and verification monitoring” to ensure that dischargers:

- 3           • Eliminate toxic discharges of agricultural pesticides to surface waters and groundwater;
- 4           • Reduce nutrient discharges to surface waters to meet nutrient standards;
- 5           • Reduce nutrient discharges to groundwater to meet groundwater standards;
- 6           • Minimize sediment discharges from agriculture lands; and
- 7           • Protect aquatic habitat (riparian areas and wetlands) and their buffer zones.

8 RB 606. Agricultural representatives opposed the Board’s “regulatory” focus, favoring instead  
9 reprising the 2004 Waiver’s educational focus. *See, e.g.*, RB 965-66, 969 (opposing the Board’s  
10 “major philosophical shift” from an educational to a regulatory focus; expressing concern about the  
11 “policy shift from collaboration to regulation”; and asserting that the Board “urgently needed to move  
12 the agency’s approach . . . away from regulation”).

13           In February 2010, the Regional Board issued a new draft waiver. Unlike the 2004 Waiver, the  
14 February 2010 draft: imposed explicit discharge prohibitions to reduce nutrient, sediment, and pesticide  
15 pollution (including a prohibition on “excessive use or over-application of fertilizer”); updated  
16 management practices under Farm Plans<sup>8</sup> with scheduling, reporting, and implementation requirements;  
17 protected aquatic habitats; and enhanced surface water, groundwater, and compliance monitoring. RB  
18 1143-44, 1182-89, 1191-92, 1251. The Board declared that “individual on-farm water quality  
19 monitoring is critical to . . . protect water quality.”<sup>9</sup> RB 1219. Growers responded by proposing the  
20 2004 scheme again, including reducing Farm Plan requirements and eliminating public reporting  
21 requirements. RB 2143, 2261-67, 2492. Regional Board staff determined that the proposals failed to  
22 include the targets, schedules, and monitoring requirements necessary to achieve water quality  
23 objectives. RB 2143-44.

24           In November 2010, the Regional Board issued a revised draft (“2010 Draft”) that retained much  
25 of the earlier draft but introduced categorizing dischargers into three tiers, corresponding roughly to the  
26 size of farm operation, proximity to an impaired watercourse, use of chemicals, and type of crops.

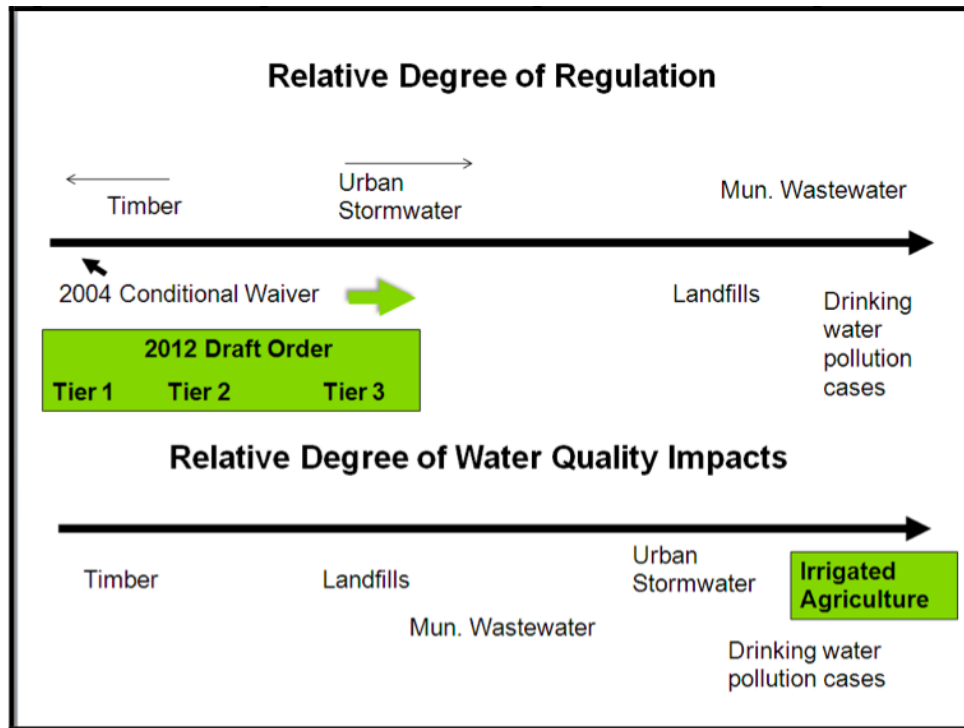
27 <sup>8</sup> Farm Plans are “tool[s] to identify the management practices that have been or will be implemented to protect  
28 and improve water quality,” and “contain a schedule for implementation of practices and an evaluation of progress  
in achieving water quality improvement.” RB 8532.

<sup>9</sup> This draft included requirements for Individual Discharge Characterization Monitoring, Individual Discharge  
Monitoring, Watershed (receiving water) Monitoring, and “Additional Monitoring.” RB 1192-93.

1 RB 3733. Tier 3 dischargers were subject to the most stringent regulation, one of which would have  
2 required reducing excess nitrogen. RB 3733, 3789-93. The Board remained adamant that the new  
3 waiver “must” include individual monitoring to “enable the regulated community and stakeholders to  
4 understand when Dischargers are in compliance.” RB 3736, 3748; *see also* RB 4850, 5480.

5 The California Farm Bureau Federation and other growers again opposed the Regional Board’s  
6 proposed standards and individual monitoring. *See, e.g.*, RB 4737, 4740, 4745. In response, the Board  
7 issued a weakened draft in March 2011. That draft narrowed Tier 3 to those dischargers using two  
8 specific pesticides: diazinon and chlorpyrifos. RB 4871. As a result, over 100 high-risk pesticides  
9 were excluded, including malathion, a pesticide that growers can substitute for diazinon to evade Tier  
10 3’s requirements. RB 1230-32. Growers then advanced another proposal to eliminate the waiver’s few  
11 remaining standards and prohibitions, and the Board issued yet another weakened draft that, among  
12 other things, lessened restrictions on excess nitrogen. *See* RB 6408-17, 6571-79, 6620-44, 6755-66.

13 **2012 Waiver.** In March 2012, the Regional Board issued a final waiver (“2012 Waiver”) that  
14 further weakened the improvements which the Board previously determined were necessary. RB 8465-  
15 8558. For example, despite the Board’s emphasis on the need for individual monitoring, the 2012  
16 Waiver allowed groups of dischargers to use self-formulated group monitoring. RB 8468-69; *see also*  
17 RB 8259-60, 8301-02. This change eliminated the Board’s ability to identify the worst pollution at the  
18 specific source. The Board also added a provision allowing dischargers to move to a lower tier through  
19 group monitoring. RB 8478-79; *see also* RB 8260. Finally, the Board significantly weakened nitrate  
20 management; instead of requiring dischargers to actually reduce excess nitrogen, the Waiver required  
21 them only to “report progress towards” reductions or “implement an alternative,” unspecified  
22 management practice. RB 8493-94; *see also* RB 8327. By the Board’s own admission, RB 7744, the  
23 2012 Waiver advanced the regulation of agricultural pollution by a relatively small degree. Such  
24 regulation fell far short of what was required of other industries, even though agricultural pollution  
25 poses the highest degree of water quality impacts in the region. RB 7744 (Figure 1, reproduced as  
26 Figure 4 below).



**Figure 4.** Relative Degree of Water Quality Regulation for Different Activities. RB 7744.

The Regional Board made these final changes a day after researchers at the University of California-Davis published a study on groundwater nitrate contamination in the Central Coast (“U.C. Davis Report”). SB 3157-4802. In the Report, 26 scientists analyzed nitrate data from nearly one hundred thousand well samples, traced pollution sources, and evaluated and recommended various management techniques. See SB 3157-76, 3197-3201. Though the Regional Board declined to consider the U.C. Davis Report while preparing the 2012 Waiver, the Regional Board asked the State Board to consider it in their review of the 2012 Waiver. RB 8131; SB 7163 n.2.

Finally, to comply with CEQA, the Regional Board issued a Subsequent Environmental Impact Report along with the 2012 Waiver. RB 8977.

**2013 Modified Waiver.** Intervenors, Petitioners, and other parties challenged the 2012 Waiver in petitions to the State Board. See Water Code § 13320; SB 1-1646. In June 2013, the State Board issued a draft waiver that gutted what was left of the 2012 Waiver’s monitoring and nitrate pollution reduction requirements. In particular, the draft deleted the requirement to simply *calculate* excess nitrogen; limited Tier 3 individual surface water monitoring to “outfalls” (pipes and ditches); and relaxed group monitoring requirements. SB 5657, 5675, 5685-86.

1 The State Board issued further drafts in August and September 2013, each of which further  
2 weakened the 2012 Waiver. These drafts added Provision 87.5, which allowed dischargers to  
3 implement vague “modified” management practices when their first efforts failed; all dischargers had to  
4 do was make a “conscientious effort” to stop polluting. SB 6204-05, 6414-15, 7186. On September  
5 24, 2013, the State Board incorporated all of these changes into its final Water Quality Order No. WQ  
6 2013-0101 (“Modified Waiver”). SB 7162-7234.<sup>10</sup> As weak as the Regional Board’s 2012 Waiver  
7 was, the Modified Waiver was far worse. It weakened management practice implementation and  
8 evaluation processes, eliminated requirements for nitrate reduction and monitoring at the source and  
9 reporting, and relaxed group monitoring requirements. In issuing the waiver, the State Board refused to  
10 consider the U.C. Davis Report, SB 7163 n.2, and failed to conduct any additional CEQA review.

### 11 **STANDARD OF REVIEW AND BURDEN OF PROOF**

12 The Court must determine whether the agency prejudicially abused its discretion. Cal. Code  
13 Civ. Proc. § 1094.5(b). An agency abuses its discretion when it (1) proceeds contrary to the law, (2)  
14 issues an order or decision unsupported by its findings, or (3) makes findings unsupported by the  
15 evidence. *Id.* In reviewing the record evidence for the conditional waiver, the Court must exercise its  
16 independent judgment. Water Code § 13330(e). Under this independent judgment standard, a  
17 prejudicial abuse of discretion exists where the “weight of the evidence” does not support the agency’s  
18 findings. Cal. Code Civ. Proc. § 1094.5(c); *see also Silva v. Superior Court*, 14 Cal. App. 4th 562, 582  
19 (1993) (“weight of the evidence” is “synonymous with” preponderance of the evidence).<sup>11</sup> Independent  
20 judgment review is “a kind of limited trial de novo, using the existing administrative record.” *Int’l*  
21 *Bhd. of Elec. Workers v. Aubry*, 42 Cal. App. 4th 861, 868 (1996). Thus, “in order to uphold the [State]  
22 Board, the court would have had to be convinced *by the weight* of the evidence that the Board’s  
23 decision was correct. Simply put, the superior court would have had to agree with the Board, on the  
24

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25 <sup>10</sup> The State Board’s modifications to the 2012 Waiver—and thus the 2013 Modified Waiver itself—are more  
26 clearly reflected in clean and redline versions of the 2012 Waiver found at SB 7235-7531. For the sake of  
27 consistency and convenience, Petitioners cite to the redline version of the 2012 Waiver (SB 7329-69) where  
28 possible.

<sup>11</sup> With respect to the CEQA claim only, an agency abuses its discretion when substantial evidence reveals  
significant unanalyzed environmental effects that will result from project changes. *Am. Canyon Cmty. United for*  
*Responsible Growth v. City of Am. Canyon*, 145 Cal. App. 4th 1062, 1072 (2006).

1 basis of the record,” not “merely . . . determine whether there was substantial evidence in the  
2 record . . . to support the Board’s determination.” *Marina Cnty. Water Dist. v. State Water Res.*  
3 *Control Bd.*, 163 Cal. App. 3d 132, 138 (1984). Likewise, “[i]t is the court, rather than the agency, that  
4 has ‘final responsibility for the interpretation of the law.’” *AGUA*, 210 Cal. App. 4th at 1267-68.

5 Moreover, the State Board, through its administrative record, must “bridge the analytic gap  
6 between the raw evidence and ultimate decision or order.” *Topanga Ass’n for a Scenic Cmty. v. Cnty.*  
7 *of Los Angeles*, 11 Cal. 3d 506, 515 (1974); *see also id.* at 516 (explaining that the findings requirement  
8 “minimize[s] the likelihood that the agency will randomly leap from evidence to conclusions”).  
9 Boilerplate findings are insufficient to satisfy this requirement. *Glendale Memorial Hosp. v. Dep’t of*  
10 *Mental Health*, 91 Cal. App. 4th 129, 140 (2001). In this case, the State Board must “bridge the  
11 analytic gap” between the evidence in the record and the Board’s conclusions that: (1) the Modified  
12 Waiver is consistent with the Basin Plan and is in the public interest (under Water Code section  
13 13269(a)(1)); (2) the Waiver’s monitoring program is sufficient to verify the adequacy and  
14 effectiveness of the Waiver’s conditions to meet water quality standards (under Water Code section  
15 13269(a)(2)); and (3) the Waiver complies with the State Antidegradation Policy. As we explain in  
16 Sections I, II, and III below, the State Board has not met its burden.

## 17 ARGUMENT

### 18 **I. The Modified Waiver Violates Water Code Section 13269(a)(1) Because It Is Not** 19 **Consistent with the Basin Plan or In the Public Interest.**

20 The Porter-Cologne Act requires that all conditional waivers be “consistent with any applicable  
21 state or regional water quality control plan and . . . in the public interest.” Water Code § 13269(a)(1).  
22 The weight of the evidence shows that the 2013 Modified Waiver is not consistent with the Basin Plan  
23 because it: (1) lacks the specific, enforceable standards and prohibitions needed to meet the Basin  
24 Plan’s water quality objectives and protect beneficial uses; (2) does not require adequate monitoring of  
25 water quality or management practices; and (3) fails to comply with the Nonpoint Source Policy or the  
26 State Antidegradation Policy.

27 Similarly, the State Board cannot demonstrate that the Modified Waiver is in the public interest  
28 because the Board made no findings to that effect. In particular, the Board fails to find or show that the



1 Modified Waiver will in fact lead to significant, quantifiable improvements in the quality of waters  
2 upon which the people of the Central Coast Region rely. Even if it had made the necessary findings,  
3 the Waiver is not in the public interest because it: (1) does not comply with the Basin Plan’s objectives;  
4 (2) does not comply with California’s Human Right to Water Law, and (3) does not satisfy the  
5 Regional and State Boards’ obligations under the public trust doctrine.

6 **A. The Modified Waiver Is Not Consistent with the Basin Plan.**

7 **1. The Central Coast Basin Plan Sets Forth Mandatory Water Quality**  
8 **Objectives to Protect Beneficial Uses.**

9 The Central Coast Basin Plan “show[s] how the quality of the surface and ground waters in the  
10 Central Coast Region should be managed to provide the highest water quality reasonably possible.”  
11 RB 9165. To that end, the Basin Plan establishes “water quality objectives,” or those “limits or levels of  
12 water quality constituents or characteristics” that will protect present and future beneficial uses and  
13 prevent nuisance. Water Code §§ 13241, 13050(h); RB 9194. “Beneficial uses” “include, but are not  
14 limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation;  
15 aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic  
16 resources or preserves.” Water Code § 13050(f). As relevant here, the Central Coast Basin Plan sets  
17 forth the following objectives:

- 18 • Nitrates: “Waters shall not contain biostimulatory substances in concentrations that  
19 promote aquatic growths to the extent that such growths cause nuisance or adversely  
20 affect beneficial uses.” RB 9195. For municipal and domestic water supplies, the  
21 Regional Board has converted this narrative standard into a numeric one: 45 mg/L  
22 nitrates as nitrates. RB 5450, 9199, 11477. For aquatic life, the Board “designate[s]  
23 water bodies as impaired for aquatic life use when nitrate concentrations exceed”  
24 4.43 mg/L. RB 11471; *see also* RB 5450.
- 25 • Toxicity: “All waters shall be maintained free of toxic substances in concentrations  
26 which are toxic to, or which produce detrimental physiological responses in, human,  
27 plant, animal, or aquatic life.” RB 9196.
- 28 • Pesticides: Toxicity is related to pesticides, which shall not “reach concentrations  
that adversely affect beneficial uses.” RB 9196.
- 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.” RB 9195.

- 1 • Temperature: “Natural receiving water temperature of intrastate waters shall not be  
2 altered unless it can be demonstrated to the satisfaction of the Regional Board that  
3 such alteration in temperature does not adversely affect beneficial uses.” RB 9196.
- 4 • Habitat: The Basin Plan contains requirements to protect aquatic habitat, and the  
5 Regional Board has interpreted the Plan to “require[ ] the protection of riparian  
6 habitat and the maintenance of adequate buffer zones . . . . [R]emoving riparian  
7 habitat and buffer zones on and around irrigated agricultural fields . . . is a direct  
8 violation of the Basin Plan.” RB 608; *see also* RB 9262-64.

9 The Basin Plan includes a “program of implementation” to meet these objectives. RB 9209-  
10 347; Water Code § 13242. The program consists of “a description of the nature of actions which are  
11 necessary to achieve the objectives,” a “time schedule for the actions to be taken,” and enforcement  
12 mechanisms “to determine compliance with objectives.” RB 9209. “Control measures implemented by  
13 the Regional Board must provide for the attainment of this Basin Plan’s beneficial uses and water  
14 quality objectives.” RB 9211. Further, actions to achieve the Total Maximum Daily Loads in certain  
15 areas to protect drinking water supplies specifically rely on the irrigated agricultural conditional waiver.  
16 RB 9310.

17 **2. The Modified Waiver Does Not Contain the Specific, Enforceable  
18 Standards or Prohibitions Needed to Comply with the Basin Plan.**

19 The Modified Waiver does not meet the Basin Plan’s objectives or constitute the comprehensive  
20 and urgent action that the Regional Board initially determined was necessary to address declining water  
21 quality on any meaningful timeframe. Chief among the Modified Waiver’s deficiencies is its lack of  
22 enforceable standards, which the Regional Board found were essential to filling the gaps left by the  
23 2004 Waiver, and which the Board included in its original drafts. The Board originally resisted deleting  
24 such provisions, but eventually caved under the pressure of the interests the Board was trying to regulate.  
25 The State Board further weakened the waiver, with no articulation of how and when it would achieve the  
26 Basin Plan’s objectives.

27 **a. The Modified Waiver Deletes Key Provisions for Reducing  
28 Nitrate Pollution.**

The Regional Board has identified nitrate pollution as a critical problem in the Central Coast  
Region. RB 1126-27, 1136-37, 1156, 3731, 3760, 4052-53, 4859-60; 4874; 5450-51, 11471; *see also* SB  
7236, 7330. The Modified Waiver is key to addressing that problem because “fertilizer from irrigated

1 agriculture is the largest primary source of nitrate pollution in drinking water wells,” SB 7236, 7330,  
2 and because the Regional and State Boards are the principal regulators of such pollution, RB 4858.  
3 Since 90 percent of the Region’s people rely on shallow wells for drinking water, the Basin Plan sets a  
4 low nitrate standard (45 mg/L) and accords certain areas special protection because of threats to drinking  
5 water supplies. SB 3180; RB 8506, 9199, 9309.

6 Accordingly, the Regional Board’s 2010 Draft Waiver proposed requiring Tier 3 dischargers to  
7 meet nitrogen balance ratio targets. RB 8327 (Provision 47). Nitrogen ratios allow agricultural  
8 dischargers to balance fertilizer application with how much fertilizer crops actually need, and the use of  
9 targets would bring those ratios progressively closer to 1:1. *See* RB 3789-90; *see also* RB 3928-29. At  
10 growers’ insistence, however, the Regional Board replaced “meet” with “report progress towards,” and  
11 “targets” with “milestones,” in its 2012 Waiver. RB 8327 (Provision 78). Then, in the Modified  
12 Waiver, the State Board deleted even the requirement just to *calculate* nitrogen ratios, SB 7359-60,  
13 claiming that they are “speculative and overly simplistic,” SB 7216. Not only did the Board cite no  
14 evidence for this assertion, but all the available evidence indicated otherwise. The Regional Board  
15 recognizes such ratios as a common measure of cropland nitrogen use efficiency, and the U.C. Davis  
16 Report commissioned for the State Board used ratios extensively in its analysis. RB 3789-90, 4071; SB  
17 7210-11, 3197-3202, 6303. Even the State Board admitted the “necessity of providing targets to  
18 encourage and measure progress in reducing pollutant discharges.” SB 7215-16.

19 The State Board deleted other important nitrate requirements. The 2012 Waiver would have  
20 required Tier 3 dischargers with high nitrate loading risk to annually report the nitrogen needs of crops,  
21 the balance of nitrogen applied compared to those needs, and estimates of nitrate loading to water and  
22 reductions under the Waiver. RB 8493-94; SB 7209-10, 7212-15. The Modified Waiver deletes all this  
23 accounting and requires dischargers to report only how much nitrogen they apply and existing soil and  
24 water conditions.<sup>12</sup> SB 7210-14, 7359-60, 7510-12, 7516-20. The State Board reasoned that a “more  
25 nuanced calculation” was necessary and that total nitrogen applied would allow the regulator to “easily  
26 identify outliers in nitrogen application.” SB 7210-11. Even if those assertions were true, the State  
27

28 <sup>12</sup> The Modified Waiver also eliminated individual monitoring on the grounds that it would be too “ambitious and costly.” SB 7206, 7211.

1 Board eliminated any requirement for even a rough calculation of how much fertilizer is used versus  
2 how much crops need—information essential to understanding and minimizing excess use.

3 The State Board’s skepticism about the reliability of nitrogen balancing and reporting might pass  
4 muster had the Board adopted other enforceable standards or prohibitions for nitrates. The State and  
5 Regional Boards are the agencies with authority to regulate nitrate discharges to groundwater, RB  
6 1128, 3735, and a conditional waiver, thus far, is the only means by which the Boards have chosen to  
7 exercise their authority. But as a result of the Boards’ actions, there is not a single enforceable standard  
8 or prohibition in the Modified Waiver that requires agricultural dischargers to apply measurably less  
9 nitrogen. The waiver therefore will not achieve the Basin Plan’s objectives on a meaningful timeframe,  
10 and nitrate contamination will continue to worsen. *See* RB 607 (Regional Board in 2008 calling for  
11 “aggressively address[ing] these problems”); *supra* pp. 6-8 (discussing worsening contamination).  
12 Adopting a waiver that has no reasonable chance of complying with the law is an abuse of discretion.  
13 *Cf. Hall v. EPA*, 273 F.3d 1146, 1159 (9<sup>th</sup> Cir. 2001) (under the Clean Air Act, agency “must determine  
14 the extent of pollution reductions that are required and determine whether the emissions reductions  
15 effected by the proposed revisions will be adequate to the task”).

16 **b. The Waiver’s Farm Plan, Pesticide Controls, and Other**  
17 **Compliance Provisions Are Too Weak to Satisfy the Basin Plan.**

18 Apart from nitrogen balancing and reporting, the Regional and State Boards also deleted several  
19 provisions that were critical to ensuring that dischargers take measures to actually reduce pollution. In  
20 this section we discuss four of many examples.

21 The first such provision concerns dischargers’ Farm Plans. The Regional Board initially  
22 required Farm Plans to “[d]emonstrate that discharges do not cause or contribute to exceedances of  
23 water quality standards . . . by including methods and results to evaluate progress and effectiveness of  
24 water quality management practices, treatment or control measures, or changes in farming practices  
25 implemented to achieve compliance with this Order.” RB 3786; *see also* RB 1184 (“must focus on  
26 resolving priority water quality issues related to individual operations”). The Regional Board later  
27 weakened these provisions, requiring only a “[d]escription and results of methods used to verify  
28 practice effectiveness and compliance with this Order,” such as “water quality sampling, discharge

1 characterization, reductions in pollutant loading.” RB 8486; *see also* RB 8532. The State Board then  
2 replaced this already-weakened provision with one that requires only a “description of the method and  
3 schedule for assessing the effectiveness of each management practice, treatment, and control measure.”  
4 SB 7190.

5 In other words, the requirement went from (1) dischargers having to show that their discharges  
6 do not impair water quality to (2) dischargers having only to describe their effectiveness verification  
7 methods and resulting outcomes and, finally, to (3) dischargers having merely to provide a description  
8 of the methods for evaluating whether their discharges impair water quality—with no need to  
9 demonstrate compliance or even provide results of verification efforts. Concomitantly, the “methods”  
10 that dischargers were expected to describe shifted from action-forcing techniques like discharge  
11 sampling and calculated pollutant reductions to “visual inspections, photographs, soil nutrient testing,  
12 soil moisture measurements, and recordkeeping.” SB 7190 (“use of advanced methods” such as  
13 sampling “is not required”). As a result of these changes, a substantive standard the Regional Board  
14 said was necessary became one purely about disclosures of “standard farming practices.” *Compare* RB  
15 1129 *with* SB 7188.

16 Pesticide controls and vegetation buffers met a similar fate. In its initial draft waiver, the  
17 Regional Board would have required all dischargers to (1) “eliminate or minimize the discharge of  
18 pesticides to meet water quality standards using best practicable treatment or control,” (2) avoid  
19 applying any of over 100 pesticides with “high potential to degrade/pollute surface water” near any  
20 water body, and, ultimately, (3) “eliminate toxicity in irrigation runoff or eliminate the discharge of  
21 irrigation runoff” within two years. RB 1258-59; *see also* RB 1230-32. The Board deleted these  
22 requirements, however, in favor of regulating pesticides and toxicity only indirectly, by imposing  
23 minimal requirements on Tier 2 and Tier 3 growers.<sup>13</sup> As a result, under the Modified Waiver: no  
24 pesticide targets or significant prohibitions exist; all growers, regardless of tier, now must monitor for  
25 only 27 pesticides of the hundreds available, SB 7404-05, 7455-56, 7525-26; and only two pesticides  
26 will force a grower into Tier 2 or 3: diazinon and chlorpyrifos, RB 8481; SB 7345-46. These

27  
28 <sup>13</sup> Not even the requirement for Tier 3 growers to prepare vegetative buffer plans requires controlling pesticides.  
*See infra* p. 21.

1 provisions run counter to the Regional Board’s acknowledgment that “[c]ontrol measures . . . must  
2 provide for the attainment of this Basin Plan’s beneficial uses and water quality objectives.” RB 9211.

3 As for vegetation buffers, which serve critical ecological functions, RB 607-08, 5510-11, 8525,  
4 8527, growers are increasingly destroying such buffers, leading to a cascading collapse of ecosystems  
5 and of the beneficial uses they support, RB 608, 3763, 5511-12, 8520-31, 21039-40. For these reasons,  
6 the Regional Board has interpreted the Basin Plan to prohibit growers from destroying riparian habitat  
7 and to require the maintenance of adequate buffer zones. RB 608. The Board initially included  
8 provisions mirroring the Basin Plan’s requirements for all growers, requiring them to protect 50-, 75-,  
9 or 100-foot buffers (depending on stream flow) or otherwise prepare a robust Riparian Function and  
10 Restoration Plan. RB 1265-67; *see also* RB 5511 (“Staff expects that growers will continue to alter  
11 riparian and wetland areas due to food safety pressures, unless regulatory agencies successfully apply  
12 sufficient pressure in the opposite direction.”). However, in the 2012 Waiver, the Board required only  
13 a small group of growers—a subset in Tier 3—to submit a 30-foot buffer plan, or simply prepare a plan  
14 with no specific requirements. RB 8494-95 (Provision 80); RB 8618-19 (Tier 3 MRP, Part 7). The  
15 State Board upheld this provision despite recognizing that protecting natural vegetation “is one of the  
16 most effective practices for protecting the[ ] most vulnerable waterways.” SB 7218.

17 The 2013 Modified Waiver also fails to regulate some of the most heavily polluted discharges  
18 such as tile drains, which are subsurface pipes or tubes that collect irrigation water and discharge it to  
19 surface waters. RB 8556. The Regional Board reports that “tile drain water with elevated nitrate levels  
20 has been found draining into surface water bodies,” leading to significant pollution. RB 3764; *see also*  
21 SB 7189 n.71 (“Discharges from tile drains carry pollutants to surface waters and are appropriate for  
22 management practice implementation.”). The Modified Waiver makes a general claim to regulate tile  
23 drains, SB 7241, but admits that it “focus[es]” on “non-tile drain discharges,” SB 7275; RB 8505, and  
24 merely “encourages dischargers to coordinate implementation of management practices with other  
25 dischargers discharging to common tile drains” (without requiring dischargers to actually adopt any  
26 such practices), RB 8469; SB 7333; *see also* SB 7351 (requiring only *reporting* of practices adopted);  
27 *cf. Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d 692, 698 (9<sup>th</sup> Cir.  
28 2004) (in the context of air pollution reduction plans, distinguishing between establishing general goals

1 and actual requirements to meet them). Instead, the Regional Board punted to a “subsequent” waiver  
2 any additional efforts “to address tile-drain discharges.” RB 8556; *see also* SB 7189 n.71. Once again,  
3 the Modified Waiver will not achieve compliance with the Basin Plan’s water quality objectives on a  
4 meaningful timeframe.

5 Underlying many of the Modified Waiver’s inadequacies is the State Board’s decision to defer  
6 many necessary enforceable standards and timelines to a future waiver, and to ask an “Expert Panel” to  
7 conduct more analysis in the meantime. *See* SB 7165 & n.8 (describing Expert Panel and issues posed  
8 to it). This deferral was unnecessary: the administrative record and the U.C. Davis Report provided  
9 ample direction for how to craft an effective waiver, and the Regional or State Board could have  
10 convened any necessary panel in 2004, or 2008, or 2010. Worse, this deferral was unlawful: an outside  
11 panel’s recommendations for some future agency action cannot satisfy the State and Regional Boards’  
12 legal obligation to adopt, *at this point in time*, a conditional waiver that will achieve compliance with  
13 the Basin Plan. The State Board’s pleas that it was faced with “a water quality issue that has few  
14 immediate and easy solutions,” SB 7216 n.112, and that the Modified Waiver is “only an interim  
15 determination,” SB 7165, ring hollow.

16 **c. Provision 87.5—Regarding “Improved Practices”—Fails to**  
17 **Ensure That Dischargers Will Comply with the Basin Plan.**

18 The heart of the 2013 Modified Waiver’s “iterative” approach to Basin Plan compliance is  
19 Provision 87.5 (83.5 in the edited version), which reads in full:

20 To comply with Provisions 22, 23, 33, and 84-87 of this Order, Dischargers must (1) implement  
21 management practices that prevent or reduce discharges of waste that are causing or  
22 contributing to exceedances of water quality standards; and (2) to the extent practice  
23 effectiveness evaluation or reporting, monitoring data, or inspections indicate that the  
24 implemented management practices have not been effective in preventing the discharges from  
25 causing or contributing to exceedances of water quality standards, the Discharger must  
26 implement improved management practices.

27 SB 7187. According to the State Board, this provision “make[s] explicit the [Regional Board’s] intent  
28 that implementation of increasingly more effective management practices in an iterative manner as  
29 necessary constitutes compliance with” the Waiver’s general prohibition against exceedances of water  
30 quality standards and with the Waiver’s milestones. SB 7186.

1 Provision 87.5 weakens what few substantive provisions the Modified Waiver contains. First,  
2 the Regional Board will not be able to determine whether “management practices have not been  
3 effective in preventing the discharges from causing or contributing to exceedances of water quality  
4 standards” because the Modified Waiver’s monitoring program is inadequate to that task. *See infra* pp.  
5 26-27, 31-36. The Regional Board cannot require improved practices if it does not know whether  
6 existing practices are failing. Second, even presuming the Regional Board had the monitoring  
7 information it needed, Provision 87.5 provides no standards against which to measure existing  
8 practices—“have not been effective” is not a useful measure. *Cf. AGUA*, 210 Cal. App. 4th at 1277  
9 (absence of “mandatory standards” guiding exercise of discretion rendered provision for additional  
10 monitoring deficient). Third, dischargers need only adopt “improved” practices where existing ones are  
11 failing. According to the State Board, “improved” means that “[d]ischargers must make a  
12 conscientious effort to identify and implement management practices that effectively address the  
13 relevant water quality issue.” SB 7186. But a “conscientious effort” to do better next time will not  
14 achieve the Basin Plan’s water quality objectives. Finally, the Waiver’s weak monitoring program will  
15 not allow the Regional Board (let alone the public) to determine whether “improved” practices are  
16 actually working.

17 In short, by inserting Provision 87.5, the State Board gave dischargers a free pass. If  
18 dischargers’ initial management practices are not “effective” in “reduc[ing]” pollution (a low and vague  
19 measure of progress the Regional Board will not be able to assess), they suffer no penalty. Instead,  
20 dischargers just have to adopt unspecified new practices they believe will work better (which neither  
21 the Regional Board nor the public will be able to review). “Try something, and if it doesn’t work, try  
22 something else” is not a prescription for improving water quality or satisfying Basin Plan standards.  
23 *Cf. EPA, Approval and Promulgation of Implementation Plans; California; San Joaquin Valley;*  
24 *Contingency Measures for the 1997 PM<sub>2.5</sub> Standards*, 79 Fed. Reg. 29,327, 29,346 (May 22, 2014) (in  
25 the federal Clean Air Act context, emission reductions to be achieved are “practically enforceable” if  
26 the requirement “contains a clear statement as to applicability; specifies the standard that must be met;  
27 states compliance timeframes sufficient to meet the standard; and specifies sufficient methods to  
28 determine compliance, including appropriate monitoring, record keeping and reporting provisions”).





1                                   **3.     The Modified Waiver Does Not Provide for Adequate Monitoring**  
2                                   **of Discharges, Water Quality, or Management Practices.**

3                   Robust monitoring is a cornerstone of an effective waiver. With it, the Regional Board can  
4 ensure that dischargers are complying with the waiver’s conditions, implement enforcement measures  
5 when they are not, and modify the waiver where it is not working. Without it, the Regional Board and  
6 the public cannot determine water quality or ensure that pollution is being abated. Accordingly, the  
7 Porter-Cologne mandates that every waiver contain monitoring requirements “designed to support the  
8 development and implementation of the waiver program, including . . . verifying the adequacy and  
9 effectiveness of the waiver’s conditions.” Water Code § 13269(a)(2). The Board may waive  
10 monitoring requirements only “for discharges that it determines do not pose a significant threat to water  
11 quality.” *Id.* § 13269(a)(3).

12                   The 2013 Modified Waiver’s monitoring requirements fall far short of these requirements. As we  
13 explain more fully in Section II below, the Modified Waiver does not require most dischargers to monitor  
14 surface water discharges, which the Regional Board insisted was “the necessary next step” to resolve the  
15 water quality crisis. RB 4850; *see also* RB 1219 (“[i]ndividual on-farm water quality monitoring is  
16 critical”). Instead, the Waiver tracks water quality only by testing receiving waters downstream of  
17 multiple discharge points for most dischargers. SB 7390-91, 7435-36, 7496-97; SB 7513-15 (requiring  
18 monitoring only for Tier 3 outfalls and containment structures instead of all discharge points). To make  
19 matters worse, the Modified Waiver allows dischargers to join cooperative monitoring groups in lieu of  
20 conducting individual monitoring. These groups can then establish “alternative[s]” to the Waiver’s  
21 receiving water monitoring requirements, so long as the alternatives just “track progress in small sub-  
22 basins.” SB 7174-76 & n.37, 7342-43 (Provision 11). The combined effect of these provisions is to  
23 anonymize pollution—to shield discharge points, and therefore dischargers, from Board oversight. The  
24 Regional Board will be unable to determine which discharges are problematic, which practices are  
25 working, and which individual waters are improving or worsening.

1 The Modified Waiver’s groundwater monitoring program is equally meager. The Waiver requires  
2 individual monitoring of “primary irrigation well[s] and all wells that are used or may be used for  
3 drinking water.” SB 7396, 7441, 7502. But Tier 1 and 2 growers can just submit “existing groundwater  
4 quality data” or rely on studies instead of submitting new sampling data. SB 7396-97, 7442.  
5 Alternatively, any and all growers may join cooperative groups and rely on “existing data” or even just  
6 “statistically valid projection[s].” SB 7194, 7399, 7444, 7505. Finally, growers can simply avoid  
7 identifying their wells as “drinking water” sources to avoid having to do anything besides “characterize”  
8 groundwater aquifers. SB 7397, 7442, 7503. Even if dischargers choose to monitor individually, they  
9 need do so only infrequently, if at all. SB 7396-97, 7441-42, 7502. Finally, monitoring supply wells  
10 alone is inadequate because nitrate contamination can take some time to manifest in the wells. *AGUA*,  
11 210 Cal. App. 4th at 1275.

12 Infecting both surface water and groundwater monitoring in the Modified Waiver is the State  
13 Board’s decision to delete nitrogen balance reporting, which is the best available tool for dischargers to  
14 balance how much fertilizer they apply with how much fertilizer their crops actually need. *See* RB 3789-  
15 90; SB 3197-202. And compounding all of these problems is the Modified Waiver’s lack of any  
16 meaningful public disclosure of monitoring compliance. *See* SB 7190 (Farm Plan effectiveness reporting  
17 deleted); SB 7187 (Provision 87.5 requiring unspecified management practices); SB 7362 (Provision 83.5  
18 in redline); RB 1128-29, 3736, 3738 (Regional Board’s insistence on greater public transparency).

19 **4. The Modified Waiver Does Not Comply with California’s**  
20 **Nonpoint Source Policy or Antidegradation Policy.**

21 The Basin Plan incorporates the State Board’s Nonpoint Source Policy. RB 9405-24. The Policy  
22 requires that any program to control nonpoint sources (such as diffuse agricultural runoff) include  
23 “sufficient feedback mechanisms” for determining the program’s efficacy. RB 9419. The Regional  
24 Board acknowledges that it has “primary responsibility” for ensuring that the Policy be implemented,  
25 RB 4176, and that such responsibility entails achieving water quality objectives and “antidegradation  
26 requirements.” RB 8508. Nonpoint programs must include “management practices” that permit the  
27 Regional Board to “determine that there is a high likelihood the implementation program will attain the  
28 [Regional Board’s] stated water quality objectives,” quantifiable requirements and a specified time

1 schedule, and “sufficient feedback mechanisms” to show that requirements are in fact being met. RB  
2 9417-21.

3 The State Board did not meet any of these requirements. As discussed, the Board fails to  
4 demonstrate how the Modified Waiver will achieve the water quality objectives, let alone create a “high  
5 likelihood” of doing so. Moreover, its monitoring program lacks “sufficient feedback mechanisms” to  
6 evaluate the Waiver’s efficacy. The State Board’s only response is to claim that the Waiver does  
7 everything it needs to do for the time being, without any findings of fact connecting the evidence to the  
8 Nonpoint Source Policy’s requirements. SB 7186 n.64, 7216 n.112.

9 Nor does the State Board demonstrate compliance with the State Antidegradation Policy, which  
10 is incorporated by reference in the Nonpoint Source Policy and the Basin Plan. RB 9409, 9418. The  
11 Antidegradation Policy prohibits the degradation of “high quality” waters absent specific findings and  
12 requires the maintenance or restoration of waters that have been degraded. RB 9377; *AGUA*, 210 Cal.  
13 App. 4th at 1260-62. As discussed in Section III below, the State Board has not demonstrated that the  
14 Modified Waiver will prevent continued degradation of high quality waters, and the Boards have not  
15 made the findings required to allow such degradation.

16 **5. Ultimately, the Modified Waiver is Only Marginally Stronger Than the**  
17 **2004 Waiver, and Not Strong Enough to Comply with the Basin Plan.**

18 The 2012 Waiver and 2013 Modified Waiver are premised on a candid admission: the 2004  
19 Waiver was woefully inadequate at stopping agricultural pollution, as evidenced by ever-declining  
20 water quality in the Central Coast Region. *See* RB 1128-30, 3767. The Regional Board knew  
21 significant changes were required to comply with the Porter-Cologne Act and restore water quality. RB  
22 1129 (“The agricultural industry must implement the most effective management practices . . . that will  
23 most likely yield the greatest amount of water quality protection, and verify their effectiveness with on-  
24 farm data.”); *see also* RB 606, 1130 (“Protecting water quality and the environment while protecting  
25 agricultural benefits and interests will require change and may shift who bears the costs and who reaps  
26 the benefits.”).

1           Unfortunately, the Regional Board and the State Board ended up issuing a final waiver that  
2 ignored their own directives. The Court need not take Petitioners’ word for it: the Regional Board itself  
3 has admitted that the March 2011 draft of the 2012 Waiver—which would have been more stringent  
4 than *both* the 2012 Waiver and the final, 2013 Modified Waiver—imposed “fewer” requirements than  
5 the 2004 Waiver for Tier 1 dischargers (55 percent of dischargers and 39 percent of the irrigated  
6 acreage in the as Valley) and “comparable” requirements for Tier 2 dischargers (42 percent of  
7 dischargers and 47 percent of irrigated acreage). RB 4854, 7779-80. The only group with arguably  
8 more stringent requirements—dischargers in Tier 3—include at best just three percent of dischargers  
9 and 14 percent of irrigated acreage.

10           **B.       The Modified Waiver Is Not in the Public Interest.**

11           The Porter-Cologne Act precludes the Regional and State Boards from issuing waivers unless  
12 they are “in the public interest.”<sup>14</sup> Water Code § 13269(a)(1). The Regional Board opined that it  
13 satisfied this requirement because the 2012 Waiver (1) requires compliance with water quality  
14 standards, (2) includes conditions that are intended to eliminate, reduce and prevent pollution and  
15 nuisance and protect beneficial uses, (3) is better than the 2004 Waiver, mirrors municipal stormwater  
16 permits, efficiently allocates Board resources, and focuses on high-priority waters, and (4) provides  
17 “reasonable flexibility” and “a reasonable time schedule” for dischargers. RB 8511. Regarding the  
18 substantially weaker 2013 Modified Waiver, the State Board added only that an iterative approach to  
19 Basin Plan compliance “consistent with the public interest in addressing a water quality issue that has  
20 few immediate and easy solutions.” SB 7186, 7216 & nn.64, 112.

21           Such “conclusory findings without reference to the record” are not enough. *AGUA*, 210 Cal.  
22 App. 4th at 1280-81. First, they are not *evidence* that the Modified Waiver will serve the public  
23 interest, which the State Board might show through quantifiable improvements in water quality. But

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24  
25 <sup>14</sup> This language reflects a deliberate shift by the California legislature to make waivers meaningful tools of  
26 regulation. The Legislature specifically voted for a shift from “not against the public interest” to “in the public  
27 interest,” on the ground that “the conditions under which waivers of [waste discharge requirements] are granted”  
28 should “actually protect water quality.” S.B. 923, 2003-2004 Assemb. (Cal. 2003). Notably, the Legislature was  
specifically concerned about agriculture when it amended section 13269. *See id.* (legislators pinpointing  
“polluted runoff” from “Irrigated Agriculture” as “the major source of contamination of the state’s waters” and  
“the main reason that hundreds of California water bodies are not fit for drinking, fishing, swimming, or other  
uses”).

1 even if the State Board’s findings qualified as such evidence, the weight of the evidence contradicts  
2 them. As shown, the Modified Waiver fails to set out a program for complying with the Basin Plan  
3 objectives on any meaningful timeframe. The Regional and State Boards deleted or weakened nearly  
4 every substantive standard, pollution prohibition, and monitoring provision needed to protect water  
5 quality in favor of “flexibility” for growers. True, the Modified Waiver “contains more specific and  
6 more stringent conditions . . . compared to the 2004 [Waiver],” SB 7281, but that is an exceptionally  
7 low bar and, in any event, is true only for the very small and shrinking subset of Tier 3 growers. By the  
8 Regional Board’s own admission, the 2012 Waiver advanced the regulation of agricultural pollution by  
9 a relatively small degree. *See* RB 7744 (Figure 1); *supra* pp. 13-14, 29. The 2013 Modified Waiver  
10 undermined even that small gain. And, as discussed fully in Section III, the Modified Waiver allows  
11 the continued degradation of waters in violation of the State Antidegradation Policy, which requires  
12 “the highest water quality consistent with maximum benefit to the people of the state.” *AGUA*, 210  
13 Cal. App. 4th at 1258.

14 Ultimately, of course, the public interest is about *people*—in this case, the millions of people  
15 who rely on the Region’s wells for drinking water and use the Region’s waters for fishing, recreation  
16 and ecological services. The Regional Board, at least initially, recognized these interests as the driving  
17 force behind a new waiver. *See* RB 1128-29. Supporting that view, in 2012 the California Legislature  
18 enacted the Human Right to Water Law, which declares that “every human being has the right to safe,  
19 clean, affordable, and accessible water adequate for human consumption.” Water Code § 106.3(a); *see*  
20 *also* RB 3736 (“Among the highest priorities [of the Board] is to ensure that agricultural dischargers do  
21 not continue to impair Central Coast communities’ and residents’ access to safe and reliable drinking  
22 water.”).

23 The 2013 Modified Waiver will not serve the public’s right to clean drinking water. Despite the  
24 State Board’s claims, *see* SB 7228-29, the Modified Waiver’s weak provisions will only allow  
25 conditions to worsen (or at least not materially improve), leaving future generations to bear the heaviest  
26 costs. *See* RB 5502-04, 8514 *and* SB 3215, 6139 (all discussing the inordinate costs of groundwater  
27 treatment and unfair burden imposed on low-income communities); SB 5814 (without adequate action  
28 now, 80 percent of the Salinas Valley and other areas will be compromised by nitrate contamination).

1 Nor will the Modified Waiver adequately protect the other beneficial uses set out in the Basin Plan,  
2 which will further “limit the future of the Central Coast Region’s water resources.” RB 3736.

3 Petitioners recognize that the Central Coast Region is “one of the most productive and  
4 profitable agricultural regions in the nation” and that agriculture drives much of the Region’s economy.  
5 RB 1126-27, 8506. But as the Regional Board admonished in 2010, “[n]o industry or individual has a  
6 legal right to pollute and degrade water quality, while everyone has a legal right to clean water.” RB  
7 3737. “Resolving agricultural water quality issues,” the Board conceded, “will also require changes in  
8 farming practices, will impose increasing costs to individual farmers and the agricultural industry . . . ,  
9 and may impact the local economy.” *Id.*; *see also* RB 8505 (“Dischargers are responsible for the  
10 quality of surface waters and ground waters that have received discharges of waste from their irrigated  
11 lands.”). Those changes must come from the Regional and State Boards, who have primary authority to  
12 regulate discharges of pollutants to waters of the State. RB 1128, 3735. Unfortunately, in preparing  
13 the Modified Waiver, the Regional and State Boards lost sight of their words, their role, and the public  
14 interest.<sup>15</sup>

15 **II. The Modified Waiver Violates Water Code Section 13269(a)(2) Because Its Monitoring**  
16 **Provisions Are Inadequate.**

17 **A. The Modified Waiver Fails to Include Monitoring Adequate to Verify**  
18 **Its Effectiveness.**

19 A waiver’s monitoring provisions must “be designed to support the development and  
20 implementation of the waiver program, including, but not limited to, verifying the adequacy and  
21 effectiveness of the waiver’s conditions.” Water Code § 13269(a)(2).<sup>16</sup> The provisions “shall include  
22 sufficient feedback mechanisms” to ascertain “whether the program is achieving its stated purpose(s).”

23 <sup>15</sup> The public interest also required the Boards to consider and satisfy their duties under the public trust doctrine.  
24 That doctrine imposes an affirmative duty on all public agencies “to protect the people’s common heritage of  
25 streams, lakes, marshlands and tidelands.” *National Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 441  
26 (1983); *see also Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971) (public trust protects environmental uses). The  
27 Central Coast Region has significant navigable waterways, including 2,360 miles of streams, 25,040 acres of  
28 lakes, 8,387 acres of wetlands and estuaries, and 3,559 square miles of groundwater basins. RB 9166. The  
public interest in protecting trust resources requires a waiver with enforceable standards and timelines and  
adequate monitoring.

<sup>16</sup> The California Legislature specifically added this requirement in 2003 to address the inefficacy of previous  
agricultural waivers. S.B. 923, 2003-2004 Assemb. (Cal. 2003) (finding that “farm runoff [had] contaminate[d]  
drinking water supplies for millions of Californians”). Section 13269(a)(2) was designed to ensure that  
subsequent waivers would “actually protect water quality.” *Id.*

1 RB 9419. Additionally, “monitoring results shall be made available to the public.” Water Code  
2 § 13269(a)(2). The Regional Board may waive monitoring requirements *only* “for discharges that it  
3 determines do not pose a significant threat to water quality.” *Id.* § 13269(a)(3).

4 In *AGUA*, the most recent case addressing monitoring provisions in conditional waivers, the  
5 Court struck down a monitoring program that was limited in size, frequency, and constituents tested,  
6 and that was unable to identify pollution sources in a timely fashion. *AGUA*, 210 Cal. App. 4th at  
7 1275. The monitoring program failed to pinpoint actual sources of pollution, making it impossible to  
8 determine whether the Waiver is improving water quality. *Id.* at 1275-78. The Modified Waiver  
9 suffers from these and other problems.

10 **Surface water monitoring.** The Modified Waiver’s surface water monitoring program has two  
11 fatal flaws. First, the Modified Waiver does not require most growers to monitor their discharges.  
12 Rather, the Waiver simply requires Tier 1, Tier 2, and many Tier 3 dischargers to gather samples of  
13 receiving waters downstream from discharge points. Surface waters that must be monitored include  
14 listed major waterbodies and sites most directly affected by “agricultural discharge (including areas  
15 receiving drain discharges).” SB 7393, 7438, 7499 (Part 1, Section A.9, of Tiers 1, 2 & 3 MRPs)  
16 (requiring monitoring of listed major waterbodies and sites most directly affected by agricultural  
17 dischargers); *see also* RB 8571. Receiving water monitoring is no substitute for discharge monitoring  
18 because it: (1) does not indicate whether specific discharges are worsening and (2) describes pollution  
19 concentrations only in areas downstream (sometimes far downstream) from the actual sources. Without  
20 that information, the Board cannot identify where pollution is coming from or how to mitigate  
21 problems. *See* RB 4850 (evaluating “the relative contribution of pollution from individual dischargers  
22 is the necessary next step to resolve the severe water quality problems”); *see also* RB 1128-29, 3749-  
23 50, 3762.

24 Second, dischargers may join cooperative monitoring groups in lieu of conducting individual  
25 monitoring. SB 7353 (Provision 52). That is, dischargers can collect and report aggregated, rather than  
26 individual, receiving water data. SB 7342-44 (Provision 11). Groups can also create their own  
27 alternative monitoring programs that need only “provide indicators of water quality improvement  
28 and/or pollutant load reduction” and “be on a scale sufficient to track progress in small sub-basins and



1 be sufficiently representative of conditions in small sub-basins.” SB 7343; *see also* SB 7175-77.  
2 Characterizing surface water quality on an aggregated, regional level fails to identify localized  
3 pollution problems and precludes holding individual dischargers accountable. *See, e.g.*, RB 4850  
4 (Regional Board insisting that new waiver “provide[ ] [for] complete identification of individual  
5 operations responsible for discharge” and “allow[ ] for immediate management of known discharges”);  
6 RB 5480 (“Without an appropriate level of fertilizer application reporting and tracking on an individual  
7 grower or crop basis, determining local and regional reductions in fertilizer use and increased efficiency  
8 is virtually impossible.”); *see also* RB 7740 (“[a]ggregation of data cannot be used to cover up or  
9 obscure the sources and amounts of pollution being discharged”); SB 7198 (State Board lionizing self-  
10 enforced group monitoring); SB 2052 (noting that, without adequate enforcement and consequences,  
11 self-reported monitoring is not effective).

12 True, the Modified Waiver requires *some* Tier 3 dischargers to individually monitor *some*  
13 discharges. *See* SB 7513-16 (Part 5 of Tier 3 MRP). However, Tier 3 includes at most three percent of  
14 dischargers, who can escape Tier 3 by switching pesticides or joining cooperative monitoring groups.  
15 *See supra* p. 25. For those who remain in Tier 3, the Modified Waiver requires individual monitoring  
16 only of dischargers with “outfalls”—locations where water leaves control of a discharger “after being  
17 conveyed by pipes, ditches, constructed swales, tile drains, containment structures, or other discrete  
18 structures or features that transport the water.” SB 7513-14 (Part 5 of Tier 3 MRP). Moreover, the  
19 Modified Waiver does not require individual monitoring of irrigation runoff from fields, drainage  
20 water, or tailwater, or of leakage from “containment structures” (water retention ponds) with water that  
21 will be re-used for irrigation. SB 7335, 7515 (Part 5, Section A.7, of Tier 3 MRP).

22 **Groundwater monitoring.** The Modified Waiver’s groundwater monitoring program is also  
23 insufficient to verify the Waiver’s effectiveness, for three reasons. First, the Waiver requires  
24 dischargers to individually monitor only “the primary irrigation well and all wells that are used or may  
25 be used for drinking water purposes.” SB 7396, 7441, 7502 (Part 2, Section A.2, of Tier 1, 2, & 3  
26 MRPs). Thus, dischargers without “drinking water wells”—or those who choose not to identify their  
27 wells as “drinking water” wells—must monitor only one well on their property, which may be far  
28 removed from the area where most of the percolation and groundwater contamination is occurring.

1 Moreover, individual wells may not indicate contamination until several years after discharges of  
2 nitrates or pesticides occur. *See AGUA*, 210 Cal. App. 4th at 1275.<sup>17</sup>

3 Second, dischargers can conduct group instead of individual monitoring. SB 7343 (Provision  
4 11), 7352 (Provision 51), SB 7397-7400, 7442-45, 7503-06 (Part 2, Section A.6, of Tier 1, 2, & 3 MRPs).  
5 Group monitoring programs need only “include sufficient monitoring to adequately characterize the  
6 groundwater aquifer(s) in the local area . . . , characterize the groundwater quality of the uppermost  
7 aquifer, and identify and evaluate groundwater used for domestic drinking water purposes.” SB 7397,  
8 7442, 7502. Group monitoring can be based on existing data or “a statistically valid projection of  
9 groundwater quality at the location of the well” instead of direct sampling of *actual drinking water*  
10 *sources*. SB 7399, 7444, 7505.

11 Third, the frequency of groundwater monitoring is inadequate. Tier 1 and 2 dischargers must  
12 conduct only two rounds of groundwater monitoring within the first year and once every five years  
13 after that. SB 7396-97, 7441-42 (Part 2, Section A.3, of Tiers 1 & 2 MRPs). Only Tier 3 dischargers  
14 must conduct annual testing. SB 7502 (Part 2, Section A.3, of Tier 3 MRP). Even annual sampling is  
15 too infrequent to detect trends in groundwater quality or tie them to changing management practices.  
16 (The frequency differences between Tiers 1 and 2 and Tier 3 also do not make sense; similar practices  
17 could similarly affect drinking water sources, no matter the size of an agricultural operation.) Even  
18 wells that are severely contaminated are subject to inadequate monitoring. Although the State Board  
19 requires additional individual monitoring of drinking water wells with nitrate levels between 50 and 80  
20 percent of the human health standard, these wells need be tested only once per year. SB 7399-7400,  
21 7444-45, 7505-06 (Part 2, Section A.6(h), of Tier 1, 2 & 3 MRPs); SB 7193 (admitting that such wells  
22 have potential to exceed the human health standard “in a short time frame”). The Board assures us that  
23 “in most cases, the Executive Officer would require repeat sampling,” SB 7193, but provides “no  
24 mandatory standards governing the exercise of the Executive Officer’s discretion.” *AGUA*, 210 Cal.  
25 App. 4th at 1277.

26 \_\_\_\_\_  
27 <sup>17</sup> The *AGUA* court cited a report explaining that, “unlike monitoring wells[,] . . . agricultural supply wells are  
28 typically screened well below the water table and across substantial vertical distances . . . . In many cases, it will be  
difficult to determine[ ] whether elevated nitrate levels are due to on-site or off-site activities.” *AGUA*, 210 Cal.  
App. 4th at 1275.

1           **Nitrate monitoring of all waters.** As discussed above, because nitrogen uptake varies widely  
2 based on crop type and local circumstances, it is necessary to measure both the total nitrogen applied  
3 and the amount that will be absorbed to identify which dischargers are over-applying nitrogen.  
4 RB 3789-90, 3928-29; SB 3197-201, 6303, 7210-11. Nonetheless, the State Board struck the  
5 requirement to calculate nitrogen balance ratios, even though the Regional Board has found that more  
6 and more growers are over-applying nitrogen and polluting the Central Coast Region’s waters. SB  
7 7211; *see also* RB 4071-72 (in 2009, lettuce growers in Monterey County over-applying fertilizer lost  
8 an estimated 2,670 to 3,544 tons of nitrogen to groundwater leaching, at a cost of \$3.2 to \$4.3 million).

9           **Compliance monitoring.** For any waiver to be “effective[ ],” Water Code § 13269(a)(2), it  
10 must do more than monitor discharges; it must also track whether management practices are achieving  
11 compliance with water quality standards. *See* RB 9413 (Nonpoint Source Policy stating that  
12 “successful [monitoring program] implementation typically requires . . . monitoring to assure that  
13 practices . . . are effective in attaining and maintaining water quality standards.”).

14           Despite these requirements, the State Board deleted the 2012 Waiver’s Provision 44(g), which  
15 would have required dischargers to report the “results of methods used to verify practice effectiveness”  
16 when implementing management practices. RB 8486; SB 7190. The State Board also deleted the  
17 requirement to report the results of implementing nutrient management practices, instead substituting  
18 only a request for a “qualitative assessment of the discharger’s experience.” SB 7212-14. Worst of all,  
19 the Board introduced Provision 87.5, which requires dischargers to implement “improved”  
20 management practices when existing practices are not working. SB 7187. There are no requirements  
21 for dischargers to specify, get approval of, or monitor results of these “improved” practices; instead,  
22 dischargers simply must make a “conscientious effort” to do better. SB 7186. The resulting lack of  
23 compliance targets and source-level monitoring data make it impossible for the Regional Board or the  
24 public to verify whether management practices are improving water quality. *Cf.* S. Rep. No. 92-414  
25 (Oct. 28, 1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, at 3728, 3748 (monitoring requirements are  
26 “necessary” under the federal Clean Water Act and “should reveal violations” with little factual  
27 complexity).

1           **B.       The Waiver Fails to Disclose Adequate Monitoring Data to the Public.**

2           The Porter-Cologne Act provides that “monitoring results shall be made available to the  
3 public.” Cal. Water Code § 13269(a)(2). The State Legislature specifically added this requirement in  
4 light of widespread agricultural pollution. S.B. 923, 2003-2004 Assemb. (Cal. 2003).

5           Monitoring data collected under the Modified Waiver are so minimal that they do not  
6 meaningfully disclose water quality information to the public. The Modified Waiver measures  
7 receiving water pollution concentrations rather than actual individual discharges, monitors aquifers in  
8 place of individual wells, allows dischargers to engage in aggregated group monitoring, and lacks  
9 meaningful management practice monitoring. Neither the Board nor the public can know which  
10 dischargers, or practices, are causing pollution or curbing it. This outcome is precisely what the  
11 Regional Board had criticized at the beginning of the waiver revision process:

12                     Currently, information that provides evidence of on-farm improvements and reductions  
13 in pollution loading from farms is not required, and therefore probably does not exist for  
14 most farms. The public, including those who are directly impacted by farm discharges,  
15 and the Water Board, do not have the necessary evidence of compliance or  
improvements. This is unacceptable given the magnitude and scale of the documented  
water quality impacts and the number of people directly affected.

16 RB 1129; *see also* RB 3736, 3738.

17           **III.       The Modified Waiver Violates the State Antidegradation Policy.**

18           In addition to violating section 13269 of the Water Code, the 2013 Modified Waiver and  
19 underlying 2012 Waiver fail to comply with the State Antidegradation Policy. Under that Policy,  
20 which is incorporated into the Basin Plan, any Board issuing a waste discharge requirement or waiver  
21 must prevent pollution of high quality waters and improve waters whose quality has fallen below  
22 applicable water quality objectives.

23           The Regional and State Boards gave the State Antidegradation Policy only brief mention before  
24 adopting the 2012 Waiver and 2013 Modified Waiver. In the 2012 Waiver, the Regional Board said  
25 only that the waiver was “consistent” with State Antidegradation Policy. RB 8509, 8527. During the  
26 2013 Modified Waiver process, the State Board asserted that the 2013 Modified Waiver was  
27 “consistent” with State Antidegradation Policy, and would not “lead to any . . . lowering of water  
28 quality.” SB 7230; *see also* SB 7234. The State Board further said it was “cognizant of the important

1 mandate to carry out an appropriate antidegradation analysis prior to water boards’ regulatory actions,”  
2 and yet declined to fulfill its duty to assist the Regional Board in conducting an “appropriate analysis.”  
3 SB 7230-31. Instead, the State Board elected to delay any analysis until the next iteration of the  
4 Waiver is developed. SB 7231.

5 This record does not elucidate “the analytic route the administrative agency traveled from  
6 evidence to action.” *Topanga*, 11 Cal. 3d at 515. Rather, the record shows that Modified Waiver will  
7 not prevent agricultural dischargers from continuing to degrade surface waters and groundwater in the  
8 Central Coast Region, in violation of the State Antidegradation Policy.

9 **A. The State Antidegradation Policy Sets Strict Requirements that the State**  
10 **and Regional Boards Must Follow In Issuing a Conditional Waiver.**

11 The federal antidegradation policy was first established to help achieve the Clean Water Act’s  
12 mandate to “restore and maintain the chemical, physical and biological integrity of the Nation’s  
13 waters.” 33 U.S.C. § 1251. The federal policy divides waters into “tiers,” and tasks each State with  
14 developing an antidegradation policy that is consistent with the federal policy. 40 C.F.R. § 131.12(a).  
15 California has chosen to adopt a policy with higher protections than federal policy: The State Policy  
16 applies to surface *and* ground waters, protects existing *and* anticipated beneficial uses, and considers  
17 water quality levels since 1968 rather than 1975. APU-90-004 at 37, 9, 4. In addition, for “high  
18 quality” waters (discussed further below), the State Policy imposes significant obstacles to allowing  
19 any degradation. *See* RB 9377.

20 The Regional Board must classify waters into Tier 1 or Tier 2 based on (1) their “baseline”  
21 quality and (2) whether that baseline is above, at, or below the Basin Plan’s water quality objectives.  
22 *See* APU-90-004 at 4; Water Code § 13241.<sup>18</sup> If baseline water quality is *equal to* or *less than*

23 <sup>18</sup> Baseline quality is “the best water quality of the receiving water that has existed since 1968 [under the State  
24 Policy] . . . , or since 1975 under the federal policy.” APU-90-004 at 4. Baseline determinations are made on a  
25 water body-by-water body basis and, in the case of groundwater aquifers, on a sub-section basis. *AGUA*, 210 Cal.  
26 App. 4th at 1271 n.10 (citing St. Water Res. Control Bd., Guidance Memorandum, 4 (Feb. 16, 1995)). One section  
27 of an aquifer may be high quality while another is not. In addition, the Regional Board must determine the  
28 baseline quality “for each constituent in the discharge which is likely to degrade water quality,” as waters can be of  
high quality for one constituent but not another. APU-90-004 at 4.

Note that there is a third tier—Tier 3—which includes waters of such exceptional quality that they “constitute an  
outstanding National resource.” 40 C.F.R. § 131.12(a)(3). California has only two Tier 3 waters (Lake Tahoe and  
Mono Lake), which are not at issue in this case.

1 applicable water quality objectives, the water is Tier 1, the federal policy applies, and water quality  
2 must be maintained or improved, respectively. 40 C.F.R. § 131.12(a)(1); APU-90-004 at 4. If the  
3 baseline water quality is *better* than the water quality objectives, the water is Tier 2, or “high quality,”  
4 and the State Policy’s higher protections kick in. Such water’s high baseline water quality must be  
5 maintained, and there is a presumption that any activity that allows a discharge of waste will unlawfully  
6 degrade water quality. *AGUA*, 210 Cal. App. 4th at 1272.

7 California courts have interpreted the State Antidegradation Policy strictly. In *AGUA*, the Court  
8 of Appeal held that a dairy farm waiver violated the Policy by unlawfully allowing degradation of high  
9 quality waters by means of a waiver that lacked enforceable standards and adequate monitoring. *Id.* at  
10 1261, 1272-78. And in *California Sportfishing Protection Alliance, supra*, this Court applied *AGUA* to  
11 invalidate an interim conditional waiver for irrigated agricultural discharges for similar reasons. May  
12 21, 2013, Order at 19-20.

13 **B. The 2013 Modified Waiver Will Allow Continued Degradation of High**  
14 **Quality and Tier 1 Waters.**

15 **Degradation of high quality waters.** The first step in an antidegradation analysis is to  
16 determine whether there are high quality waters that may be affected by discharges authorized under  
17 the waiver. *See AGUA*, 210 Cal. App. 4th at 1270-71. In this case, the Regional and State Boards  
18 failed to explicitly make this determination or include any information in the waiver about the baseline  
19 water quality levels throughout the Central Coast Region, and thus abused their discretion. Despite this  
20 failure, and despite the widespread pollution caused by irrigated agriculture over the past decades, the  
21 record shows that there are still a number of high quality waters in the Region, including in the Salinas  
22 Valley. These waters are “high quality” because their quality is currently better than water quality  
23 objectives, or was better than water quality objectives at some point after 1968.

24 For example, groundwater samples collected throughout the Salinas Valley in 1978 had mean  
25 nitrate concentrations far below the 45 mg/L drinking water standard. As displayed in Table 1, *supra*  
26 p. 7, the mean nitrate concentration in 1978 was 19.9 mg/L at Pressure 180’, 40.2 mg/L at East Side,  
27 38.1 mg/L at Forebay, and 28.3 mg/L at Upper Valley. There are also several surface water bodies that  
28 are high quality for nitrates, toxicity, and pesticides. At least eight sites have water quality that is

1 currently better than the nitrate drinking water standard,<sup>19</sup> and both the Blanco Drain and Alisal Slough  
2 had toxicity levels low enough between 2005 and 2007 that invertebrate survival rates ranged from 80  
3 to 100 percent, indicating that the waters met the narrative water quality objective requiring that they be  
4 “maintained free of toxic substances.” *See supra* n.5; RB 9196. Many other sites are also probably  
5 high quality for surface water constituents but samples were not collected before the late 1990s, making  
6 it is impossible to know the water quality between 1968 and the first sampling dates.

7         Once high quality waters are known to exist, the State Antidegradation Policy applies so long as  
8 there is an activity that will discharge waste into the receiving water. The Policy “presumes . . . that the  
9 quality of the receiving water will be degraded by the discharge of waste” unless the Board shows  
10 otherwise. *AGUA*, 210 Cal. App. 4th at 1272. The Boards declare in Finding 22 of the 2012 Waiver  
11 that discharges will not lead to degradation because dischargers must implement management practices  
12 or control measures when they are “causing or contributing to exceedances of applicable water quality  
13 standards.” RB 8509; SB 7279. However, it is not enough to make “circular” assertions or issue  
14 “conclusory findings without reference to the record.” *AGUA*, 210 Cal. App. 4th at 1280-81. No  
15 provisions effectuate the boilerplate promises of Finding 22, and neither the Regional nor the State  
16 Board affirmatively shows how discharges will not degrade receiving water quality. *See Topanga*, 11  
17 Cal. 3d at 515 (agency must draw a rational connection between the facts found and decision made);  
18 *Glendale Memorial Hosp.*, 91 Cal. App. 4th at 140 (boilerplate findings cannot satisfy *Topanga*’s  
19 requirement).

20         For example, the 2012 Waiver and 2013 Modified Waiver identify regulated agricultural entities  
21 as waste “dischargers” throughout, and impose no actual prohibition on such discharges to high quality  
22 waters. Provision 44, which outlines the minimum Farm Plan requirements for all regulated farms,  
23 asks dischargers to describe only the management practices they plan to implement and the methods  
24 they plan to use to assess practice effectiveness. RB 8485-86; SB 7350-51. The provision does not  
25 provide sufficient criteria or standards to ensure that adopted practices will actually prevent discharge  
26 or that assessment methods will actually verify practice effectiveness. In fact, the only real discharge  
27 prohibition—nitrogen balancing—was excised. All of the other provisions in the Waivers are simply

28 <sup>19</sup> Those sites are 309SSP, 309SAC, 309LOK, 309SAG, 309GRN, 309SAS, 309RTA, and 309GAB.

1 aspirational or “standard farming practices,” SB 7188; they are not mandatory, enforceable standards or  
2 prohibitions. Finally, the Modified Waiver’s most stringent requirements, such as they are, apply to at  
3 most three percent of dischargers; the Waiver regulates few pesticides; and some of the most polluting  
4 discharges (*e.g.*, from tile drains) are not covered by the Waiver at all. *See supra* pp. 21-22, 25; *AGUA*,  
5 210 Cal. App. 4th at 1273-74.

6 Equally problematic are the Modified Waiver’s monitoring and enforcement provisions. In  
7 order to declare that the waste discharges will not lead to degradation, the Waiver’s monitoring  
8 program must be sufficient to alert the Boards if an agricultural discharger is degrading water quality,  
9 and the enforcement program must be sufficient to stop degradation once detected. *AGUA*, 210 Cal.  
10 App. 4th at 1273-78. Yet the Waiver’s programs are insufficient to do either of these things.  
11 Regarding monitoring, the State Board eliminated Provision 44(g), which would have required  
12 dischargers to report “results of methods used to verify practice effectiveness and compliance,” making  
13 it impossible to determine whether a particular practice is actually maintaining high quality waters.  
14 SB 7189-90. The State Board also eliminated the requirement that dischargers complete nitrogen  
15 reporting plan effectiveness forms with oversight by a qualified professional. SB 7209-15. The  
16 Modified Waiver has a host of other monitoring problems that preclude the Regional Board from  
17 ascertaining whether or why degradation is occurring. *See supra* pp. 26-27, 31-36.

18 As for enforcement, the Regional Board Executive Officer has discretionary authority to impose  
19 “additional management practices” on cooperative groups if a project is “not effective in achieving  
20 water quality standards.” SB 7344 (Provision 11). But it is entirely unclear when that authority kicks  
21 in or how the Executive Officer will exercise it. *See AGUA*, 210 Cal. App. 4th at 1277 (enforcement  
22 provisions deficient because there were “no mandatory standards governing the exercise of the  
23 Executive Officer’s discretion”). Similarly, Provision 19 allows the Executive Officer to elevate a  
24 discharger to a higher tier if the discharger poses a “higher threat to water quality” based on monitoring  
25 and reporting that, as discussed, will not actually indicate whether a discharger’s practices are working  
26 to meet water quality objectives. SB 7346-47. Finally, even if the Regional Board could determine  
27 that a discharger is not complying with its obligations, Provision 87.5 ensures that all the Board can do  
28 is ask dischargers to make a “conscientious effort” to implement “improved” practices. SB 7186-87.



1 Under *AGUA*, there is a presumption that any activity that allows a discharge of waste will  
2 unlawfully degrade water quality. *AGUA*, 210 Cal. App. 4th at 1272. The absence of any actual  
3 prohibitions or standards, the use of monitoring insufficient to show whether or how water quality is  
4 changing, and the vague hope that dischargers will try better next time do nothing to rebut this  
5 presumption.

6 **Findings required to allow degradation of high-quality waters.** The only way the Regional  
7 and State Boards can permit discharges of waste into high quality waters is to find that further  
8 degradation (1) is “consistent with maximum benefit to the people of the State,” (2) will not  
9 unreasonably affect beneficial uses, (3) will not violate water quality standards, and (4) will “meet  
10 waste discharge requirements which will result in the best practicable treatment or control” of the  
11 discharge. RB 9377-78.<sup>20</sup>

12 Just as in *AGUA*, the State and Regional Boards did not make these findings, and instead relied  
13 on the “circular,” boilerplate claim that no findings were needed because the Waiver prohibits further  
14 water quality degradation. *AGUA*, 210 Cal. App. 4th at 1260, 1280. For instance, although the Boards  
15 said that, under the Modified Waiver, “[d]ischargers must . . . maintain the highest water quality  
16 consistent with the maximum benefit to the people of the State,” RB 8509; SB 7279, the Boards  
17 conducted no “socioeconomic impact[ ]” analysis to support that statement, APU-90-004 at 5; *AGUA*,  
18 210 Cal. App. 4th at 1279 (discussing St. Water Res. Control Bd., Guidance Memorandum, 4-5 (Feb.  
19 16, 1995)). Similarly, the Boards failed to find that further degradation would not violate water quality  
20 standards. Given the vague enforcement mechanisms of the 2013 Modified Waiver, it is likely that  
21 sufficient water quality control measures will be imposed on agricultural polluters only *after* water  
22 quality has fallen below relevant standards (or perhaps not even until there is a new waiver). *AGUA*,  
23 210 Cal. App. 4th at 1277. As a final example, the Boards failed to find that agricultural dischargers  
24 degrading water quality would be subject to “best practicable treatment and control” to ensure that no  
25 pollution or nuisance will occur, and that the highest water quality consistent with the “maximum  
26 benefit to the people” of the state will be maintained. RB 9377; *AGUA*, 210 Cal. App. 4th at 1282.

27  
28 <sup>20</sup> The federal policy also requires a finding that degradation is “necessary to accommodate important economic  
or social development in the area in which the waters are located.” 40 C.F.R. § 131.12(a)(2).

1           **Maintaining and improving Tier 1 waters.** The State Antidegradation Policy also requires  
2 the Regional and State Boards to protect Tier 1 waters—those with a baseline quality equal to or less  
3 than applicable water quality objectives. If current water quality meets water quality objectives, the  
4 Boards must adopt measures sufficient to maintain that quality; if current quality is below levels needed  
5 to meet water quality objectives, the Boards must adopt measures to improve it. APU-90-004, at 4.

6           The Regional Board has not chronicled the baseline quality of the waters in the Salinas Valley.  
7 Despite that failure, information available on the Ambient Monitoring website shows that there are  
8 many Tier 1 waters in the Valley. Several municipal supply sites, including Alisal Creek, Alisal  
9 Slough, Quail Creek, and Merritt Ditch, continue to have nitrate concentrations more than twice the  
10 human health standard. *See supra* n.5. In addition, over 70 percent of the Salinas Valley sites  
11 monitored for toxicity levels within the last two years had at least one sample with an invertebrate  
12 survival rate worse than 80 percent, in violation of the Basin Plan objective that “all waters be  
13 maintained free of toxic substances.” *Id.*; RB 9196. Some of these sites barely exceed the objectives,  
14 with only a few samples that have survival rates indicating that the water and sediment is toxic.<sup>21</sup> *See*  
15 *supra* n.5. Other sites, including Chualar Creek at Chualar River Road and Quail Creek at Highway  
16 101, have survival rates so low they appear uninhabitable. *Id.*

17           As explained above, the Modified Waiver does not prohibit waste discharges to these or other  
18 Tier 1 waters. These discharges are presumed to degrade water quality unless the Boards demonstrate  
19 otherwise. *Cf. AGUA*, 210 Cal. App. 4th at 1272 (making this presumption for Tier 2 waters). The  
20 Boards fail to do so, and there is no reason to believe that degradation that continued under the 2004  
21 Waiver will reverse course under the Modified Waiver.<sup>22</sup>

22           The Modified Waiver also fails to *improve* low quality Tier 1 waters to levels that achieve water  
23 quality objectives. The Regional Board claims that the 2012 Waiver would “restore waters that have  
24 already experienced some degradation,” and the State Board all but agreed. RB 8509; SB 7230. But

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25 <sup>21</sup> For example, sites 309SAG, 309GRN, 309BLA, 309 SAC, 309BLA, 309ASB.

26 <sup>22</sup> For example, at Natividad Creek the average nitrate concentration has increased from about 124 mg/L in 2005  
27 to 168 mg/L in 2011, and the number of samples exceeding the human health standard increased from 67 to 86  
28 percent over the same period. At Merritt Ditch the average concentration increased from about 75 mg/L in 2005  
to 133 mg/L in 2011, and the number of samples exceeding the standard increased from 83 to 100 percent. *See*  
*supra* n.5.

1 this assertion is unwarranted given the absence of real prohibitions and adequate monitoring in the 2012  
2 Waiver and 2013 Modified Waiver. For example, the U.C. Davis Report advises that site-specific  
3 remediation projects are necessary to reduce nitrate pollution, SB 3198, yet the Modified Waiver does  
4 not provide adequate verification, monitoring or enforcement to ensure that individual Farm  
5 Management Plans are implemented. Likewise, restoring streamside plant buffers would help reduce  
6 pesticide and sediment loading, yet the Modified Waiver requires no more than three percent of the  
7 Salinas Valley farms to submit a Water Quality Buffer Plan. RB 7779; SB 7360. There is, in sum, no  
8 rational connection between the facts found and the conclusion that the Modified Waiver will improve  
9 water quality.

10 **IV. The State Board Unreasonably Excluded the U.C. Davis Report Under Water Code**  
11 **Section 13320 and Government Code Section 11513.**

12 The California Legislature has recognized a pressing need “to protect public health by  
13 preventing or reducing the contamination of groundwater.” SBX2-1, 2007-2008 Cal. Stat., 2d Ex. Sess.  
14 § 6 (codified at Water Code § 83002(b)(2)). To that end, the Legislature appropriated two million  
15 dollars to study causes of and solutions for nitrate contamination in the Salinas and Central Valleys.  
16 Water Code § 83002(b)(2)(D). In June 2010, the State Board selected nitrate experts at the University  
17 of California, Davis, to conduct the study. SB 2257-58.

18 Under the direction of Professors Harter and Lund, 26 scientists assembled and analyzed nitrate  
19 data from “nearly two dozen agencies,” with data points comprised of “100,000 samples from nearly  
20 20,000 wells.” SB 3173. The scientists traced nitrates from Salinas Valley aquifers back to their  
21 sources, connecting the well sampling data to hydrology, land use, fertilizers, nitrogen uptake, and a  
22 host of other variables. SB 3183-97. This analysis showed not only a marked upward trend in nitrate  
23 pollution over time, but also a distinct source: 96 percent of nitrate contamination in the region is  
24 traceable to fertilizer applied to irrigated croplands.<sup>23</sup> SB 3171. The scientists then evaluated potential  
25 solutions based on cost, scalability, and political feasibility. SB 3176; SB 3197-3202. Independent  
26

27 <sup>23</sup> The U.C. Davis report also identifies 4,634 Salinas Valley residents currently at risk of drinking water  
28 contaminated with nitrates in excess of the maximum contaminant level. SB 4602. Another 120,000 Salinas  
Valley residents pay higher water rates because their drinking water providers must blend or treat their water to  
lower nitrate levels under the maximum level. *Id.*

1 scientific experts and the State Board reviewed the final Report.<sup>24</sup> The State Board acknowledged the  
2 Report’s importance and “relied on [it] as a foundation” for its own report to the Legislature on  
3 groundwater pollution in the Salinas and Central Valleys.<sup>25</sup>

4         Though the final Report was published on March 13, 2012, the Regional Board had received a  
5 draft of the Report in February, a full month before it issued the 2012 Waiver. When Petitioner  
6 Monterey Coastkeeper attempted to introduce the Report during the March 15, 2012, public hearing on  
7 the 2012 Waiver, the Regional Board declined, saying the administrative record had already been  
8 finalized. RB 8130-32. After Petitioners and Intervenors filed their petitions to the State Board,  
9 however, the Regional Board formally requested that the State Board consider the U.C. Davis Report in  
10 its review of the 2012 Waiver. SB 7163 n.2. The State Board acknowledged that the Report was  
11 prepared specifically for its benefit and recognized the Report’s “high significance . . . in understanding  
12 the impact of nitrate on drinking water and potential solutions to that issue.” SB 7163. Nonetheless,  
13 the State Board refused to consider the Report on the ground that “the administrative record already  
14 before us contains sufficient evidence of the impact of agricultural practices on drinking water . . . as  
15 well as practices that may ameliorate the problem.” *Id.* The State Board also said it would ask the  
16 Expert Panel to “consider the findings” of the Report for a subsequent waiver. *Id.*

17         The State Board’s decision to exclude the U.C. Davis Report was unreasonable under section  
18 13320(b) of the Porter-Cologne Act, which provides that “[t]he evidence before the state board shall  
19 consist of the record before the regional board, and any other relevant evidence which, in the judgment  
20 of the state board, should be considered to effectuate and implement the policies of” the water quality  
21 provisions of the Act. Water Code § 13320(b); *see also* 23 Cal. Code Regs. § 2050.6 (implementing §  
22 13320(b)). Although section 13320(b) vests the State Board with discretion to decide whether to  
23 review additional evidence, the State Board has a duty to exercise that discretion reasonably. *See Cal.*  
24 *Ass’n of Sanitation Agencies v. SWRCB*, 208 Cal. App. 4th 1438, 1461-62 (2012) (Water Boards’  
25 authority under the Porter-Cologne Act is not a grant of “unfettered discretion”).

26 \_\_\_\_\_  
27 <sup>24</sup> Questions and Answers, U.C. Davis Report for the SWRCB SBX2 1 Report to the Legislature, *available at*  
<http://groundwater.nitrate.ucdavis.edu/q-and-a/>.

28 <sup>25</sup> SWRCB Report to the Legislature, *Recommendations Addressing Nitrate in Groundwater 5* (2013),  
*available at* [http://www.waterboards.ca.gov/water\\_issues/programs/nitrate\\_project/docs/nitrate\\_rpt.pdf](http://www.waterboards.ca.gov/water_issues/programs/nitrate_project/docs/nitrate_rpt.pdf).

1 The State Board did not exercise its discretion reasonably here. The U.C. Davis Report was not  
2 cumulative because, unlike other evidence in the record, it (1) conclusively identified irrigated  
3 agriculture as the single worst contributor to nitrate contamination in the Salinas Valley, SB 3185; (2)  
4 systematically evaluated predictions of the cost of reducing on-farm nitrate leaching in the Valley, SB  
5 3907-35; (3) provided a cost-benefit analysis of several technological and policy strategies for  
6 achieving nitrate reductions, enabling it to single out the most promising solutions, SB 3204-06, 3231-  
7 32; (4) provided new data on pollutant saturation from hundreds of test points and generates new  
8 solutions for implementing appropriate on-farm management strategies, SB 3173, 3176; and (5)  
9 uniquely proposed use of a nitrogen fee in conjunction with other management techniques, SB 3235-41.  
10 In addition, the U.C. Davis Report represented the *most current scientific information available*; by the  
11 time the State Board issued the Modified Waiver in 2013, several years had passed since much of the  
12 data and the analyses upon which it relied were gathered and prepared. *See Sierra Club v. EPA*, 671  
13 F.3d 955, 963-68 (9<sup>th</sup> Cir. 2012) (EPA acted unreasonably in refusing to consider most current  
14 information); *Ass'n of Irrigated Residents v. EPA*, 686 F.3d 668, 677 (9<sup>th</sup> Cir. 2012) (same).

15 The State Board's decision to exclude the U.C. Davis Report was also unreasonable under  
16 Government Code section 11513(f). In an adjudicative proceeding, such as the hearing through which  
17 the State Board reviewed the 2012 Waiver,<sup>26</sup> “[a]ny relevant evidence shall be admitted if it is the sort  
18 of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.”  
19 Cal. Gov't Code § 11513(c). The State Board may only “exclude evidence if its probative value is  
20 substantially outweighed by the probability that its admission will necessitate undue consumption of  
21 time.” *Id.* § 11513(f). Although it is not binding, courts look to the Evidence Code in interpreting  
22 section 11513. *McCoy v. Bd. of Ret.*, 183 Cal. App. 3d 1044, 1054 (1986) (applying Evidence Code  
23 section 210's definition of “relevance”).

24 Section 11513(c) sets a low bar for admissibility, and the U.C. Davis Report clears it easily. In  
25 *McCoy*, the agency violated section 11513(c) by excluding stipulations entered into by an employee

26 <sup>26</sup> See Michael A.M. Lauffer, *Summary of Regulations Governing Adjudicative Proceedings Before the California*  
27 *Water Boards*, 2 (2006), available at  
28 [http://www.swrcb.ca.gov/laws\\_regulations/docs/adjudicative\\_hearing\\_process.pdf](http://www.swrcb.ca.gov/laws_regulations/docs/adjudicative_hearing_process.pdf) (conditional waivers are issued  
through adjudicatory hearings). The State Board conducts adjudicative proceedings pursuant to section 11513. 23  
Cal. Code Regs. § 648.5.1.

1 and his employer in a previous hearing. 183 Cal. App. 3d at 1055. Those stipulations, though not  
2 binding and not expert opinions, nevertheless satisfied section 11513(c) because they could have helped  
3 the Board of Retirement assess conflicting expert testimony. *Id.*; *see also Lake v. Reed*, 16 Cal. 4th  
4 448, 460-61, 467 (1997) (holding that even unsworn police reports and forensic reports are relevant  
5 under section 11513(c)). Here, the U.C. Davis Report was prepared by experts for the State Board; the  
6 Report would have enabled the Board to review the 2012 Waiver fully and prescribe the practices best  
7 suited to protecting water quality. Those practices included a “suite” of methods, based on detailed  
8 “vulnerability assessments,” for reducing nitrate loading from irrigated cropland. *See* SB 3176, 3197-  
9 3202-06, 3231-32, 3235-41, 3907-35.

10 In short, the U.C. Davis Report contained unique, highly relevant, current information and  
11 analysis indispensable for addressing groundwater contamination in the Salinas Valley. The State  
12 Board’s refusal to consider the Report enabled the Board to issue a conditional waiver that fails to  
13 address that contamination adequately.

14 **V. The State Board Violated CEQA by Failing to Conduct Supplemental Review of the**  
15 **Modified Waiver.**

16 Environmental Impact Reports are “the heart of CEQA.” *Cnty. of Inyo v. Yorty*, 32 Cal. App. 3d  
17 795, 810 (1973). They “protec[t] not only the environment but also informed self-government.”  
18 *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988). CEQA  
19 requires that environmental reviews remain up-to-date and that agencies prepare supplemental reviews  
20 where, among other things, “substantial changes are proposed in the project” which “will require major  
21 revisions of the previous EIR or negative declaration due to the involvement of new significant  
22 environmental effects or a substantial increase in the severity of previously identified significant  
23 effects,” or “new information, which was not known and could not have been known at the time the  
24 environmental impact report was certified as complete, becomes available.” Cal. Pub. Res. Code §  
25 21166; 14 Cal. Code Regs. § 15162(a)(1). As pertinent here, new information includes information  
26 which demonstrates that a project will have significant effects not previously reviewed or that effects  
27 examined in the previous EIR will be substantially more severe than anticipated. 14 Cal. Code Regs. §  
28 15162; *Am. Canyon*, 145 Cal. App. 4th at 1083-84.

1 In its subsequent Environmental Impact Report for the 2012 Waiver, the Regional Board  
2 concluded that, “[e]ven if the effects could be more severe [than those of the 2004 Waiver], they can be  
3 mitigated due to actions by dischargers” pursuant to the 2012 Waiver. RB 8848. In conducting this  
4 analysis, the Regional Board recognized that substantial changes to the Waiver’s provisions, possible  
5 new effects, and new information warranted updated environmental review. Yet when the State Board  
6 substantially modified the 2012 Waiver, and was presented with new information in the form of the  
7 U.C. Davis Report, the Board decided to forego further environmental review. This decision is not  
8 supported by substantial evidence.

9 The Modified Waiver substantially alters critical provisions of the 2012 Waiver, and those  
10 changes will lead to new significant effects. Consider three examples. In the 2012 Waiver, Provision  
11 11 required dischargers to demonstrate “a reasonable chance of eliminating toxicity” within five years  
12 and “water quality improvement and the efficacy of a project.” SB 7342-43. The Modified Waiver  
13 now requires dischargers only to demonstrate “a reasonable chance of improving water quality and/or  
14 reducing pollutant loading” and “provide indicators of water quality improvement” and efficacy. *Id.* In  
15 addition, dischargers now need only monitor “on a scale sufficient to track progress in small sub-  
16 basins.” SB 7343. Likewise, Provision 44(g) of the 2012 Waiver required that each farm have a Farm  
17 Plan containing a “[d]escription and results of methods used to verify practice effectiveness and  
18 compliance with this Order.” SB 7190. The Modified Waiver revises 44(g) to require only a  
19 description of the “method and schedule for assessing the effectiveness of each management practice,”  
20 and “advanced methods”—like actual sampling—are not required. *Id.*; SB 7351.

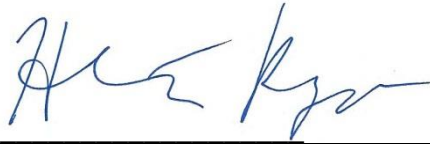
21 Finally, in the form of Provision 87.5, the Modified Waiver gives dischargers an escape valve  
22 from the Waiver’s general requirements. *See supra* pp. 23-24. Under that provision, dischargers may  
23 simply assert that they are “implement[ing] management practices” and, if those practices do not work,  
24 that they are “implement[ing] improved management practices.” SB 7187; SB 7362. Taken together  
25 with the other changes we have discussed in this brief, these modifications by the State Board will lead  
26 to decreased accountability, increased pollution, and other new significant effects. Supplemental  
27 CEQA analysis was, therefore, required. *See Laurel Heights*, 47 Cal. 3d at 435 (supplemental review  
28 required for alterations not included in the initial EIR for a planned development, including increases to





1 Date: December 19, 2014

2 Respectfully submitted,

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Attorneys for PETITIONERS

1 **[PROPOSED] ORDER**

2 Having fully considered the parties’ pleadings and arguments at hearing(s), the administrative  
3 record, and all other papers in this case, IT IS HEREBY ORDERED THAT THE WRIT OF  
4 MANDATE IS GRANTED. The Court declares that, in preparing and issuing Water Quality Order  
5 No. WQ 2013-0101 (“2013 Modified Waiver”), Respondent State Water Resources Control Board  
6 (“State Board”) violated California Water Code sections 13269 and 13320, the State Antidegradation  
7 Policy, Government Code section 11513, and the California Environmental Quality Act. The Court  
8 further orders Respondent State Board to:

- 9 1. Prepare a new conditional waiver for irrigated agricultural discharges in the Central  
10 Coast Region consistent with the Court’s decision and final judgment in this case;  
11 2. Conduct supplemental environmental review under the California Environmental  
12 Quality Act, as appropriate; and  
13 3. Keep the 2013 Modified Waiver in place until Respondent State Board files a return to  
14 the Writ of Mandate.  
15 4. File a return to the Writ of Mandate within one year of the date of the Writ,  
16 demonstrating compliance with the Court’s decision and final judgment in this case.

17 The Court retains jurisdiction for purposes including, but not limited to, evaluating the return to  
18 the Writ and issue any orders necessary to enforce the Court’s decision and judgment.

19  
20 DATE: \_\_\_\_\_  
21 \_\_\_\_\_  
22 Hon. Timothy M. Frawley  
23  
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1 **PROOF OF SERVICE**

2 LYNDA F. JOHNSTON declares:

3 I am over the age of eighteen years and not a party to this action. My business address is 559  
4 Nathan Abbott Way, Stanford, California 94305-8610.

5 On December 19, 2014, I served the foregoing **PETITIONERS' OPENING BRIEF IN**  
6 **SUPPORT OF PETITION FOR WRIT OF MANDATE AND [PROPOSED] ORDER** on all persons  
7 named below by placing true and correct copies thereof for Federal Express next-business-day delivery at  
8 Stanford, California, addressed as follows:

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11 Tracy L. Winsor  
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Mist Farms and RC Farms*

1 I declare under penalty of perjury (under the laws of the State of California) that the foregoing is  
2 true and correct, and that this declaration was executed December 19, 2014 at Stanford, California.

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5 LYNDA F. JOHNSTON

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