

MEMORANDUM

To: Monterey Coastkeeper/The Otter Project
Date: May 28, 2018
Re: Safe and Affordable Drinking Water Act Trailer Bill
Cc: Co-counsel (Golden Gate University School of Law Environmental Law and Justice Clinic and California Rural Legal Assistance)

INTRODUCTION

Pursuant to your request, this memorandum provides a legal analysis of the proposed changes to the California Water Code that are presently include in the Safe and Affordable Drinking Water Act, a trailer bill on the Governor’s budget proposal (originally introduced as Senate Bill 623). The trailer bill creates a fund for replacement water projects to address the very pressing problem of getting safe, potable drinking water to communities whose water wells have been contaminated by nitrates and other pollutants. Such funding is necessary to fulfill California’s commitment that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” Cal. Water Code § 106.3(a).

As currently drafted, however, the Safe and Affordable Drinking Water Act trailer bill also includes a “safe harbor” provision that exempts agricultural polluters from responsibility and liability under the Porter-Cologne Water Quality Control Act (“Porter-Cologne Act”) for their discharges of nitrates to groundwater. This provision threatens to undermine the efforts of the Water Boards and concerned public interest groups to bring agricultural practices into the twenty-first century and ensure enforcement of Porter-Cologne Act mandates. In particular, the trailer bill exempts agricultural dischargers from past, present, and future liability for nitrate contamination as long as they are “in compliance” with the specific provisions of an Agricultural Order adopted by the State or Regional Boards under Water Code section 13263 (waste discharge requirements) or section 13269 (waivers of waste discharge requirements). As detailed in Attachment A, prepared by the Environmental Law and Justice Clinic, however, the existing Agricultural Orders, which were vigorously resisted and effectively diluted by the industry, are both legally defective and practically inadequate to address the enormous water quality problem that presently exists in many rural agricultural communities.

There is no dispute that agricultural discharges are the source of substantial groundwater contamination, especially in the Tulare Lake Basin and the Salinas Valley. See Thomas Harter and Jay R. Lund, *Addressing Nitrate in California’s Drinking Water* (Jan. 2012) (“U.C. Davis Report”), available at <http://groundwaternitrate.ucdavis.edu/> (explaining that “[a]gricultural fertilizers and animal wastes applied to cropland are by far

the largest regional sources of nitrate to groundwater”). In effect, the safe harbor provision of the trailer bill will reward past discharge behavior and effectively lock in that same behavior for decades to come by shielding from future liability the very parties who caused, and are continuing to cause, nitrate contamination of our public groundwater aquifers. With ineffective Agricultural Orders in place and the liability protections of the trailer bill, agricultural operations will have no incentive to adopt environmentally superior and more appropriate on-farm practices. The trailer bill also may undermine several ongoing, publicly-spirited lawsuits attempting to compel the State and Regional Water Boards to establish actual discharge standards and milestones for agricultural activities. The remainder of this memo evaluates in more detail the legal and policy implications of the trailer bill’s proposed revisions to the California Water Code

FACTUAL BACKGROUND

Nitrate contamination of drinking water from agricultural discharges is a serious and widespread problem, particularly in California’s rural farming communities. The primary source of this contamination is excess fertilizer application. The U.C. Davis Report, which was commissioned by the Legislature, in focusing its attention on the slow progress the State was making to clean up agricultural pollution, concluded: “A significant fraction of nitrogen applied in food production worldwide is in excess of crop needs, resulting in nitrate leaching to groundwater, eutrophication of aquatic ecosystems via surface run off, and air pollution from toxic emissions of ammonia and ozone-depleting greenhouse gases.”¹

In the five California counties evaluated by the U.C. Davis study (totaling 40 percent of the state’s irrigated cropland), the authors found that: (1) “[c]ropland is by far the largest nitrate source, contributing an estimated 96% of all nitrate leached to groundwater”; (2) “[t]he nitrogen leached to groundwater nearly matches the amount of synthetic fertilizer applied to the same cropland, suggesting large system surpluses of nitrogen use on cropland”; and (3) “[t]he total amount of nitrogen intentionally or incidentally applied to study area cropland from various sources each year is about three times larger than the amount of nitrogen removed in the harvest,” suggesting “significant system-wide inefficiencies in fertilizer use.”² In fact, “[a]pproximately half of the nitrogen incidentally or intentionally applied to cropland is leached to groundwater, whereas the relative groundwater loss was only about one-quarter of all N applied to cropland in 1960.”³ The “overarching finding” of the U.C. Davis Report is that “cropland recharge has and continues to significantly degrade groundwater quality,” with nitrogen loading at more than double the rate of the 1970s, and that significant reductions in synthetic fertilizer use are necessary.⁴

¹ U.C. Davis Report, Technical Report 2, at 1.

² *Id.* at 9, 12, 50.

³ *Id.* at 50.

⁴ *Id.* at 50-51.

There is no question that the nitrate contamination problem caused by irrigated agricultural in rural and often poor communities presents a serious human health and environmental problem. The U.C. Davis Report evaluated over 100,000 nitrate samples from nearly 20,000 wells in the Tulare Basin and Salinas Valley. That study concludes that approximately 1 of every 10 samples exceeded federal drinking water standards for nitrates and that more unregulated domestic and small system wells have high nitrate concentrations due to their shallow depth. In some parts of Fresno, King, and Monterey Counties, one-third of domestic and irrigation wells exceed drinking water standards. Moreover, data from both public and private wells show that the number of wells with nitrate contamination above background levels has steadily increased over the past half century, from one-third of wells in the 1950s to nearly two-thirds of wells in the 2000s.⁵

On the Central Coast, the Regional Water Board has concluded, based on substantial empirical data, that nitrates from irrigated agricultural operations have “severely impaired or polluted” water quality and beneficial uses, including drinking water, throughout the Salinas Valley.⁶ Use of fertilizers in irrigated agriculture accounts for 78 to 96 percent of the nitrate contamination in the Valley’s groundwater. Tens of millions of pounds of nitrates – roughly 40 percent of the nitrogen fertilizer applied – leach into the Valley’s water supply annually. As a result, the Regional Water Board believes that nitrate contamination poses “arguably the most serious and widespread of all pollution problems in the Central Coast Region.”

Nitrate contamination along the Central Coast is both “widespread and increasing.” Up to 50 percent of the wells surveyed by the Regional Water Board in Monterey County are contaminated at average levels of nearly double the EPA drinking water standard. And the problem is getting worse, not better. In the 14 years between 1993 and 2007, mean nitrate concentration increased 50 percent in Salinas Valley groundwater. If nitrate contamination continues unchecked, the groundwater for 80 percent of the people in the Valley will likely be undrinkable by 2050, according to projections. Surface water is also severely impacted. In the lower Salinas Valley alone, 47 waterbodies are listed as impaired for nitrogen. Of 250 surface water sites evaluated by the Board, 30 percent exceed drinking water standards, in some cases by fivefold or more. And approximately 60 percent of the surface water monitoring sites had nitrate contamination that exceeded applicable aquatic life standards.

Similar water contamination problems plague portions of the Central Valley, like the Eastern San Joaquin region, that are heavily farmed. In 2008, the Regional Water Board reported that nitrate concentrations exceeded drinking water standards in 25 percent of the Eastern San Joaquin domestic wells tested and that 23 different pesticides

⁵ *Id.* at 35-45.

⁶ All data, citations, and quotations in this discussion are taken directly from the Central Coast Regional Water Board’s March 17, 2011 Staff Report and Appendix G, Report on Water Quality Conditions.

were detected in 41 of the 60 groundwater samples collected.⁷ The report indicated that numerous toxic pesticides (chlorpyrifos, diazinon, thiobencarb, dieldrin, DDT, and DDD) were detected in one or more waterbodies in concentrations that exceed water quality objectives and that insecticides may be causing the “large toxicity problem” in the Eastern San Joaquin region. It further found that “many of the rivers and agriculture drainages located in the region contain low [dissolved oxygen],” which can be attributed in part to nutrient loading from agricultural runoff. A 207 analysis of more recent data from the California Environmental Data Exchange Network shows no trend of improvement nitrate or pesticide water contamination for this region.⁸

The State Water Board’s most recent Clean Water Act section 303(d) list of impaired waterbodies for the Central Valley, last issued in 2010, identifies agriculture as the source of impairment for 269 water segments, cover 1,572 miles of waterway and 96,147 acres of open water, and the Integrated Report which the State Water Board issued in 2014 as part of the section 303(d) update showed a 38 percent increase in the number of listed impaired waterbodies in the Central Valley, undermining any claim that water quality is improving. The State Water Board has estimated that over 200 community water systems rely on groundwater that has been contaminated above drinking water standards by anthropogenic nitrogen.⁹ In short, agricultural discharges in the Central Valley, like the Central Coast, are a significant source – indeed, most likely the primary source – of water contamination.

LEGAL BACKGROUND

Unfortunately, the nation’s core water quality law, the Clean Water Act, has failed to provide the legal tools for addressing the increasingly serious problem of agricultural pollution.¹⁰ In 1977, the agricultural industry successfully lobbied for and

⁷ Data from Central Valley Regional Water Board, Irrigated Lands Regulatory Program, “Existing Conditions Report,” (Dec. 2008).

⁸ Dr. Revital Katznelson, Eastern San Joaquin Data Review Notes (Dec. 21, 2017), submitted as Attachment 3 to Dec. 22, 2017 Comments of California Coastkeeper Alliance and California Rural Legal Assistance on Eastern San Joaquin River Watershed Agricultural Order A-2239(a)-(c).

⁹ State Water Board, *Communities that Rely on a Contaminated Groundwater Source for Drinking Water*, at 6 (Jan. 2013).

¹⁰ As a threshold matter, the Clean Water Act applies only to “navigable” waters of the United State and thus does not apply to groundwater. Additionally, the Clean Water Act’s central permitting program, the National Pollutant Discharge Elimination System (“NPDES”) permit program under section 1342 applies only to the “discharge of any pollutant,” which in turn is defined as the addition of a pollutant to a navigable water from a discrete conveyance or “point source.” 33 U.S.C. § 1362(12). Although channelized urban stormwater is generally subject to permitting, most overland flow outside urban areas is not considered a “point source” and thus is not covered by the

obtained a blanket exemption from any discharge liability; Congress amended the statute to exclude from the definition of “point source” – and thus from any permitting requirements – both “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14). As a result, even where growers channelize and actively discharge contaminated wastewater to navigable waters, they are entirely exempt from any requirements, responsibility, or liability under the Clean Water Act – an exemption not enjoyed by any other major polluting industry. It is no doubt for this reason that, while we have seen significant improvements in industrial water pollution over the last four decades, the problem of agricultural pollution across the nation has significantly worsened over the same period.

In contrast to federal law, California’s bedrock water quality law, the Porter-Cologne Act (which was enacted before the Clean Water Act) does not contain this special interest loophole. The Porter-Cologne Act applies to all “waters of the state,” defined broadly to include “any surface water or groundwater, including saline waters, within the boundaries of the state.” Cal. Water Code § 13050(e). Additionally, any person discharging waste, broadly defined, that “could affect the quality of the waters of the state” must file a report of waste discharge (that is, a permit application) and obtain waste discharge requirements (that is, a permit) before discharging. *Id.* §§ 13260(a)(1), 13263(a), 13264(a). Because the Porter-Cologne Act does not exempt agricultural discharges from permitting or liability, and because the definition of “waste” includes any substance from any “producing, manufacturing, or processing operation,” *id.* § 13050(d), agricultural discharges are and have always been regulated under state law.

Nevertheless, California has historically focused its water permitting and enforcement efforts on industrial sources other than agricultural producers. This fact allowed growers to escape close scrutiny or discharge requirements even as other industries came into compliance with regulatory conditions and significantly reduced their pollution loading. As a result, agricultural discharges are now arguably the most significant source of remaining water pollution. Recognizing this fact, Regional Water Boards with significant agricultural activities within their boundaries have finally begun to turn their attention to this problem. Unfortunately, as detailed in the separate “History of Agricultural Orders” attached to this memo, State and Regional Water Board efforts to date have been wholly inadequate to address the magnitude and urgency of the problem, but public interest organizations are successfully using the courts to ensure agency accountability and enforce the mandates of the Porter-Cologne Act. *See* Attachment A.

In particular, Attachment A explains that, contrary to California’s Nonpoint Source Pollution Control regulations adopted more than a decade ago, existing Agricultural Orders do not include enforceable standards, deadlines or time schedules, milestones for measurable progress, feedback mechanisms, antidegradation requirements, or adequate monitoring to detect water quality violations. For instance, the most recent

permit program. But even where agricultural runoff is channelized into a discrete conveyance, the Clean Water Act includes an express exemption, as discussed below.

Agricultural Order issued by the State Water Board for the Eastern San Joaquin region, which is intended to set statewide precedent for future orders, allows dischargers to control and prevent public disclosure of the monitoring data necessary to measure water quality conditions. The current agricultural waiver for the Central Coast incorporates provisions that the courts have already held to be unlawful, including a vague direction to adopt “improved” management practices if prior practices are inadequate. *See* Attachment A. Thus, although the Agricultural Orders are a necessary first step to implementing the mandates of the Porter-Cologne Act, as presently written they allow agricultural dischargers to continue the very activities that led to the contamination.

ANALYSIS OF PROPOSED LEGISLATION

I. The Proposed Legislative Findings in New Section 13278(a) Undermine Arguments in Existing Enforcement Actions.

The legislative findings state that (1) agricultural dischargers implementing “best management practices” “can reduce but not always completely prevent” nitrates from reaching groundwater, (2) “[d]espite progress in controlling discharges of nitrogen . . . it is important to have in place a program for mitigating these impacts,” and (3) “[t]he regional boards will continue to regulate discharges to reduce nitrogen loading and protect beneficial uses of water and groundwater basins; the state board, regional boards, and courts will ensure compliance with those orders; and dischargers will pay for mitigation of nitrate pollution . . .” Proposed Water Code § 13278(a)(1), (4), and (5). These findings make inaccurate factual assertions and erroneously suggest that the Water Boards are currently mandating agricultural practices that have reduced nitrate contamination or improved water quality. As the foregoing discussion of existing water quality conditions and Attachment A on the history of regulation clarify, nitrate contamination is not being reduced by State or Regional Water Board actions and compliance with existing Agricultural Orders will not ensure that water quality objectives are met or beneficial uses are protected.

Besides being inaccurate and highly misleading, this language may be used by the agricultural industry to undermine existing lawsuits attempting to ensure compliance with Porter-Cologne Act mandates, including pending lawsuits challenging the most recent Agricultural Orders issued for the Central Coast (2017 waiver) and the Central Valley (2018 waste discharge requirements for Eastern San Joaquin region). Industry intervenors may argue, for instance, that the Legislature is aware of the status of nitrate contamination and has made a policy judgment that the mandates of the Porter-Cologne Act, including the Antidegradation and Nonpoint Source regulations, are unwarranted or infeasible as applied to agricultural discharges. Such a conclusion is neither justified by the facts nor an accurate reflection of legislative engagement on these issues, but a court might infer from the legislative findings that compliance with statutory mandates is no longer intended for nitrate pollution to groundwater. Thus, the trailer bill legislative finding may adversely affect pending and future litigation over the adequacy of Agricultural Orders.

II. The Proposed Language Will Provide a Broad Safe Harbor from Liability for Past, Present, and Future Nitrate Discharges to Groundwater and Eliminate Any Incentive for Growers to Adopt Better Practices.

Proposed Water Code section 13278.1(a) provides a broad exemption from any enforcement by the State and Regional Water Boards for nitrate contamination “under Chapter 5 (commencing with Section 13300)” if a discharger “is in compliance with all applicable provisions prescribed” in an Agricultural Order. Some advocates for the trailer bill assert that this language provides only “limited enforcement protection” because it “does not allow additional nitrate discharge beyond the state water quality standards.” Given the fact that existing Agricultural Orders are not intended or designed to achieve state water quality standards, and do not contain any mechanism to do so, as the courts have repeatedly held (*see* Attachment A), such assertions are at best misleading. To understand the expansive breadth of the proposed safe harbor provision, we break the trailer bill language into its relevant components.

The “in compliance with” language of section 13278.1(a)(1) does nothing to ensure that nitrate dischargers will satisfy state water quality standards. As detailed in Attachment A, the State and Regional Water Boards have been drafting ineffective agricultural waivers or waste discharge requirements since the 1980s – and water quality has continued to worsen, particularly nitrate contamination in groundwater. Newer Agricultural Orders do little or nothing to reverse this trend. For instance, the proposed trailer bill language requires compliance with “monitoring and reporting requirements” and “applicable timelines” – conditions that either do not exist in adopted Agricultural Orders or are wholly delegated to the industry. *See* Attachment A. Likewise, the proposed trailer bill language requiring that dischargers use “best efforts” to “implement best practicable treatment or control” provisions in Agricultural Orders is virtually meaningless; with respect to nitrate discharges, in particular, the Water Boards have declined to impose nitrate balancing requirements, instead leaving growers free to apply excess amounts of inexpensive fertilizers – the source of nitrate contamination in groundwater. In short, requiring “compliance” with orders that do little or nothing to require or incentivize reductions in the application of nitrogen, as a condition of receiving liability protection, will *not* ensure that California moves toward meeting water quality objectives in the future. Indeed, the combination of weak Agricultural Orders and a safe harbor provision will virtually guarantee that agricultural operations take no significant action to reduce fertilizer use and runoff.

The trailer bill will ensure that agricultural dischargers are never held responsible for their ongoing nitrate discharges to groundwater. Proposed section 13278.1(c) provides that any discharge of nitrate to groundwater in compliance with an Agricultural Order “shall not be admissible in a future enforcement action” or “to apportion responsibility” in any enforcement action under Chapter 5 of the Porter-Cologne Act. Thus, discharges that occur over the next decade, when the original version of section 13278.1(c) expires, will be forever exempt from liability. Because there are no enforceable standards in Agricultural Orders, and virtually no enforcement of even the minimal requirements of such orders, this language has the practical effect of allowing

growers to continue “business as usual” without fear that they will ever be accountable for cleanup of their pollution. In effect, the trailer language ensures that growers have no incentive to improve farm practices or reduce nitrate pollution, thereby codifying the status quo and accepting degraded water quality in rural agricultural communities in perpetuity.

The exemption in proposed section 13278.1(a)(2) confirms the breadth of the safe harbor liability protections. While section 13278.1(a)(1) requires compliance with “the applicable provisions” of a Water Board Agricultural Order, section 13278.1(a)(2) provides that a discharger need not, however, be in compliance with any provision “that prohibits in general terms a discharge from causing or contributing, or threatening to cause or contribute, to an exceedance of a water quality objective for nitrate in groundwater or a condition of pollution or nuisance for nitrate in groundwater.” This exemption from the compliance requirement was necessary, in industry’s view, because all Agricultural Orders necessarily recite mandatory Porter-Cologne Act language requiring that a discharge not cause exceedance of a water quality standard; all existing Agricultural Orders then go on to authorize discharge practices that do cause such exceedances, effectively overriding the statutory mandate.¹¹ Thus, in order to take advantage of the trailer bill’s liability protection, a discharger explicitly does *not* have to comply with the fundamental Porter-Cologne Act mandate to refrain from causing or contributing to a water quality violation or causing a condition of pollution or nuisance.

The safe harbor from any enforcement under Chapter 5 of the Porter-Cologne Act (commencing with Water Code section 13300) is expansive and complete. Chapter 5 of the Porter-Cologne Act contains all of the enforcement tools available to the State and Regional Water Boards, including cease and desist orders (Water Code section 13301), cleanup and abatement orders (Water Code section 13304), pollution and nuisance abatement notices (Water Code section 13305), and compliance and civil penalty schedules (Water Code section 13308). While the trailer bill does not alter the Water Boards’ ability to conduct investigations or require reports (*see* proposed section 13278.1(d)(1)), such actions are meaningless where, as here, the Boards cannot take followup enforcement action. Similarly, the trailer bill’s preservation of enforcement activities “under Chapter 5.5 (commencing with section 13370)” provides no protection because that chapter of the Porter-Cologne Act deals exclusively with enforcement of the federal NPDES permit program under the Clean Water Act, which does not apply to or regulate discharges from irrigated agriculture. Likewise, the preservation of private nuisance suits in proposed section 13278.4 is a red herring. Given the high burden of proof and special injury requirements, third-party nuisance suits are exceedingly difficult to litigate and, for that reason, are almost never used with respect to

¹¹ This disparity between the mandatory requirements of the Porter-Cologne Act and its implementing regulations – as embedded in the hortatory language of the Agricultural Orders – and the actual operative provisions of the Agricultural Orders is the legal basis for each of the pending legal challenges to the 2017 Central Coast waiver and the 2018 Central Valley waste discharge requirement for the Eastern San Joaquin region.

groundwater contamination; such lawsuits cannot replace agency enforcement or serve as an effective backstop for such agency enforcement.

In short, the liability protections offered by the trailer bill are not “limited” as some contend; they are, in fact, broad and sweeping. And because the Porter-Cologne Act does not contain a citizen suit enforcement provision, the prohibition on Water Board enforcement activity under Chapter 5 guarantees that no enforcement will occur. That result undermines recent Regional Water Board efforts in the Salinas Valley to use the threat of agency enforcement against growers discharging excess nitrates as leverage to obtain better on-farm practices.

The provision in the trailer bill that purports to exclude prior violators from liability protection is entirely illusory. Proposed section 13278.1(b) is drafted to create the misimpression that those who previously violated an Agricultural Order “within the preceding 12 months” may not take advantage of the safe harbor liability protection. That impression is misleading, for two reasons. First, in reality there have been no real enforcement actions against violators of Agricultural Orders within the preceding 12 months – or ever. Second, the proposed language of section 13278.1(b) is circular and preserves nothing. Subsection (b)(1) purports to exclude from liability protection anyone who has been subject to an enforcement order “within the preceding 12 months for violation” of an Agricultural Order, but then subsection (b)(2) expressly “does not apply to an enforcement order issued after January 1, 2016, and before January 1, 2019” – virtually the entire time period covered by “the preceding 12 months” provision. In short, the class of “prior violators” purportedly excluded from the safe harbor protections is a null set.

III. The Trailer Bill Extends Liability Protections for Fifteen Years.

As drafted, proposed section 13278.1 would provide blanket liability protection, as discussed above, for any discharges occurring before January 1, 2029, when proposed section 13278.2 would then become operative and provide additional liability protection for any discharges occurring before January 1, 2034. The only functional difference between these two provisions is that the safe harbor protections extend to all enforcement actions for discharges occurring during the first ten years, and then only to section 13304 cleanup and abatement actions for discharges occurring during the next five years. This slight adjustment in the safe harbor protections at year ten has little practical significance. The most typical and useful enforcement vehicle against dischargers who cause or contribute to exceedances of water quality standards is a section 13304 cleanup and abatement order. Thus, even if Water Boards were to alter their long history of non-enforcement and begin exercising their enforcement authority at year ten, the trailer bill shields growers from any effective remedy for discharges that occur between year ten and year fifteen. If the trailer bill is enacted, agricultural operations may continue to pollute with impunity, and without any fear of enforcement, for the next fifteen years. In effect, this bill would codify a state policy that allows nitrate contamination of groundwater to continue and worsen in the decades to come.

CONCLUSION

California is just beginning to make progress in bringing long-recalcitrant agricultural dischargers into the twenty-first century to do their fair share in helping to protect the quality of state waters. Immunity from liability and statutory requirements will stop these efforts in their tracks – which is precisely what the industry hopes – and send California on a backward path. Once agricultural dischargers are exempted from the law, we should fully expect groundwater and surface pollution to increase, just as it has across the country in response to the Clean Water Act exemptions for these dischargers. Unless we want to permanently “write off” large portions of our groundwater aquifers and surface waters, California should not seriously consider a “pay to pollute” approach to water quality regulation.

In California, water is a precious and increasingly scarce public trust resource which must be carefully and thoughtfully managed. The state has never embraced a “pay to pollute” approach to water quality. It should not start now. While ensuring safe, clean drinking water for communities impacted by nitrates and other contamination should be a high priority, that outcome does not depend on exempting the agricultural industry from the fundamental Porter-Cologne Act requirements applicable to every other industry. To the contrary, shielding agricultural dischargers from responsibility for their ongoing or future pollution in return for payment into a fund would move California in the wrong direction and most likely “lock in” continued long-term degradation of our surface waters and groundwater. Given recent progress in the court to begin bringing farm operations into compliance with state water quality standards, and given the absence of any federal backstop, this is precisely the wrong time to carve out a special interest exception for agricultural dischargers.

ATTACHMENT A

History of Agricultural Orders

Under the Porter-Cologne Water Quality Control Act (“Porter-Cologne Act”), the State and Regional Boards are California’s primary water quality regulators and have the ultimate duty for attaining and maintaining the state’s water quality objectives. The Boards have long known that pollution from irrigated agriculture is the predominant cause of the state’s violation of nitrate standards. Despite this knowledge, the Boards’ regulatory efforts have been woefully inadequate. Even though the State Legislature has directed its attention to the problem several times, the pollution continues unabated, and the state’s water supply is in serious jeopardy from nitrate contamination because the Boards have failed in their regulatory duties. Because the Boards’ failure to set standards and milestones in the only mechanism they have selected to address agricultural pollution – conditional waivers and waste discharge requirements – solving the dire problem for vulnerable communities, which undoubtedly must be addressed immediately, cannot nevertheless rest on relying on these mechanisms as the backstop. They should hardly serve as a backstop, as even a brief examination of the history of failed regulation in the two largest growing regions of the State shows.

Since 1970, the effective date of the Porter-Cologne Act, the Boards have had the obligation to regulate agricultural discharges. The agencies, however, did not begin their regulatory efforts until 1982 and 1984, respectively, in the Central Valley and the Central Coast, the State's largest growing areas. Those early efforts relied on education and voluntary efforts and famously failed to rein in pollution. Increasingly frustrated with deteriorating water quality caused by agricultural discharges, which were not being regulated by the State Board or Regional Water Boards or were being officially authorized under waivers of waste discharge requirements that contained no enforceable standards, the California Legislature intervened in 1999 (SB 390) and 2003 (SB 923) to amend the Porter-Cologne Act to protect the public from insufficient regulation.

Following these amendments, both the Central Valley and the Central Coast adopted conditional waivers regulating irrigated agriculture beginning in 2003 and 2004, respectively, with successive versions following. Several courts have found such waivers woefully inadequate to comply with the Porter-Cologne Act. *See Asociacion de Gente Unida por el Agua v. Cent. Valley Regional Water Quality Control Bd.*, 210 Cal. App. 4th 1255 (2012) (hereinafter "*Agua*") (holding that general waste discharge requirements for Central Valley dairies did not comply with California's antidegradation policy); Ruling, *San Joaquin County Res. Conservation Dist. v. Central Valley Regional Water Quality Control Bd.*, Case No. 34-2012-80001186, 19 & 21 (May 21, 2013) (hereinafter "*San Joaquin*") (concluding that the Central Valley 2011 waiver violates the State's regulation governing antidegradation and nonpoint sources because it does not detect degradation, only exceedances, and it is unclear there are adequate means of identifying and taking actions against dischargers who are violating water quality objectives are exceeded or of ensuring that Best Practicable Treatment or Control is being implemented when high quality water is being degraded; and violates the State's regulation governing nonpoint sources because the waiver fails to include feedback mechanisms to determine whether the program is achieving its stated purpose or whether additional or different management practices or other actions are required); Ruling on Submitted Matter, *Monterey Coastkeeper v. State Water Res. Control Bd.*, Case No. 34-2012-80001324, at 33, 38 (May 15, 2015) (hereinafter "*Monterey Coastkeeper*") (holding that the Central Coast 2012 waiver, as modified by the State Board, is noncompliant because "it lacks adequate monitoring and reporting to verify compliance with requirements and measure progress over time; specific time schedules designed to measure progress toward reaching quantifiable milestones, and a description of the action(s) to be taken if verification/feedback mechanisms indicate or demonstrate management practices are failing to achieve the stated objectives"); Ruling and Order Granting Declaratory Relief and Petition for Peremptory Mandate, *Zamora v. Central Coast Regional Water Quality Control Bd.*, Case No. 15CV-0247, 2106 WL 7163991, at 8-9 (Oct. 28, 2016) (holding general agricultural order to be noncompliant with nonpoint source regulations because it lacked sufficient feedback mechanisms or public access to information).

Despite these decisions, the current waiver for the Central Coast and the waste discharge requirements for Eastern San Joaquin still violate the Porter-Cologne Act.

The 2017 Central Coast Waiver

The Central Coast waivers issued in 1983, 2004, and 2012 (as modified in 2013 by the State Board) governing irrigated agriculture failed to improve water quality. When the 2012/2013 waiver was put in place, the Boards made repeated representations to the public and to the courts (both trial and appellate courts) that the waiver was part of an “iterative” process whereby future conditional waivers or other orders would be more protective of water quality. Notwithstanding the court’s holding in *Monterey Coastkeeper* that the 2012/2013 waiver was illegal, and the Boards’ repeated representation that regulation of irrigated agriculture would improve in successive versions, in March 2017, the Central Coast Regional Board adopted a waiver that was in substance essentially unchanged from the 2012/2013 version.

Just one provision of the waiver (the same in both the 2012/2013 version and the 2017 version) will suffice to illustrate why the waiver cannot be an adequate backstop for the proposed safe harbor provision. The 2017 Waiver now in place, exactly as did the 2012/2013 waiver, requires only that dischargers make an effort to identify “improved” management practices, without defining what “improved” means or how it will be measured or enforced. The court in *Monterey Coastkeeper* found this aspect of the waiver that governs discharges of pollutants, including nitrates, to be fundamentally problematic:

[T]here must be some means to verify that implemented management practices are effectively controlling the relevant discharge. If they are not, the Waiver must ensure that dischargers will implement effective management practices that will make measurable progress towards attaining water quality standards. The [Waiver] does not do that.

...

The [Waiver] does not define what constitutes “improved” management practices, or include any additional monitoring or standards by which to verify the “improved” management practices are effectively reducing pollution. Under the [Waiver], compliance is achieved as long as the discharger implements a new management practice which the discharger *believes* will be an improvement. [footnote text:] This assumes, of course, that growers acknowledge their operations are “causing or contributing to” the exceedance. As a practical matter, growers may deny that their operations are responsible, and point the finger at other operations. It is not clear how the Regional Board would prove otherwise. [end of footnote text] In this court’s view, this is inadequate to ensure any meaningful progress toward achieving quantifiable reductions in pollution discharges. (*See* RB 5149 [Regional Board staff rejecting a similar proposal by agricultural interests because the proposal did not contain adequate verification monitoring or feedback mechanisms to determine if management practices were working or whether additional management practices should be taken].)

... [The Waiver] does not set any benchmarks for defining how much “improvement” a grower must show to demonstrate compliance. The Waiver

seems to assume that any perceived improvement is enough as long as the improved management practice was implemented in good faith. It is difficult for the court to see how this is an enforceable standards. In effect, the [Waiver] guarantees that the Regional Board will not take enforcement action against a discharger as long as the discharger believes it is implementing “improved” management practices, even if the “improved” management practices remain completely ineffective at controlling discharge of waste.

Id. at 34-35.

In addition to this fundamental problem, the court also held that the 2012/2013 waiver violated the Porter-Cologne Act because it lacks “specific time schedules designed to measure progress toward reaching quantifiable milestones; and a description of the action(s) to be taken if verification/feedback mechanisms indicate or demonstrate management practices are failing to achieve stated objectives.” *Id.* at 38. As to antidegradation, the court stated that it was “unable to decide” whether the Board had failed to comply with the earlier court decision in *Agua* because the Board had “failed to apply the [antidegradation regulation] in the manner directed there. *Id.* at 39.

In short, the 2017 Central Coast Waiver, which is fundamentally unchanged from the 2012/2013 waiver, is also illegal and cannot serve as a backstop to the proposed enforcement safe harbor.

The 2018 Waste Discharge Requirements for Eastern San Joaquin

The Eastern San Joaquin Agricultural waste discharge requirements or Order (covering a small portion of the Central Valley Regional Board’s area) has, so far, taken over six years to develop, and is intended to replace the earlier version that the *San Joaquin* court found illegal. While this Order has numerous requirements, they lead to a dead end. For example, compliance with standards, including with water quality objectives for nitrates, is required to occur within ten years, but it is unclear when, if at all, the ten-year timeframe commences since detection of water quality problems must first occur to trigger the ten-year clock; and such detection is likely difficult or impossible because the monitoring program is not designed for such detection. In addition, like the Central Coast 2017 waiver, the Eastern San Joaquin Order fails to mandate enforceable standards against which pollution reduction could be measured, enforceable compliance deadlines, and reporting and monitoring required to ensure that measures are reducing pollution, including nitrates. The Order also affirmatively allows data to be hidden such that the public will be unable to determine which operations are contributing even to the worst water quality degradation. Ultimately, the Order perpetuates the problems that have led much of the region’s waters to be degraded to the point that water is undrinkable and unusable for its designated uses.

In addition, while portrayed as a “final” version, the Order calls for additional study and expert reports on such basic issues as surface water monitoring to detect pollution. The Order creates a new metric of “nitrogen applied” (that is, fertilizer

application) divided by “nitrogen removed” (that is, nitrogen that is taken up by crop) to determine the potential impact of agricultural fertilizers on groundwater. “Nitrogen removed” is not known for most crops and will take years, if ever, of scientific analysis to determine. After the scientific determination of nitrogen removed, the State Board allows for a third party coalition, managed and directed by the growers themselves, to gather and aggregate data: “The nitrogen management data collected by the third-party from individual Members will be aggregated by the township where the enrolled parcel is located and will *not* be associated with the Member [that is, the irrigated operation subject to the discharge requirement] or their enrolled parcel” making it difficult or impossible to track-back pollution to the responsible party (emphasis added). The Order places no limit on fertilizer applied or overapplied and instead contemplates years, if ever, of study before regulation: “It is premature at this point to project the manner in which the multi-year A/R [applied/removed] ratio target values might serve as regulatory tools. That determination will be informed by the data collected and the research conducted in the next several years. If we move forward with a new regulatory approach in the future, we expect to do so only after convening an expert panel that can help evaluate and consider the appropriate use of the acceptable ranges for multi-year A/R ratio target values in irrigated lands regulatory programs statewide.” *See* State Water Resources Control Board Order No. 2018-0002, at 74 (Feb. 7, 2018).

Thus, like the 2017 Central Coast Waiver, the 2018 Eastern San Joaquin Order does not serve as an effective backstop for nitrate pollution.