



The Otter Project

www.otterproject.org

and Monterey Coastkeeper

Steve Shimek

Elliot Higgins



Santa Barbara
CHANNELKEEPER®

Ben Pitterle

Savannah Schultz Fletcher


Stanford Environmental Law Clinic



**On the ground Ag Order problems
we all know**

and when we knew them



- 
- **Tiering**
 - **Pesticide Switching**
 - **Down-Tiering**
 - **Human Right to Water legislation**
 - **New Impairments**
 - **Anti-Degradation Ruling (AGUA)**
 - **Total Nutrient Applied Data**
 - **Photo Monitoring**
 - **Coastkeeper et al v State Board**
 - **Imidacloprid Report Released**
 - **Los Angeles RWQCB Waiver**

Tiering

The Order relies on tiering. It was widely acknowledged during development of the 2012 Order that, generally, Tier 1 was less restrictive than the 2005 Order, Tier 2 about the same, and Tier 3 was more restrictive.

During development of the 2012 Order, staff originally estimated Tier 3 would include:

- 11% of dischargers
- 54% of acreage

With changes, staff estimated Tier 3 would include

- 100 operations
- 14% of acreage

Tiering

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During development of the 2012 Order, staff originally estimated Tier 3 would include:

- 11% operation (~480 dischargers)
- ~227,880 acres (54% of acreage)

With changes, staff estimated Tier 3 would include

- 100 operations (~2.3% of dischargers)
- ~59,080 acres (14% of acreage)

Where we ended up

- 24 operations (one half of one-percent)
- 20,003 acres (~4.74% of acreage)
- **Of those 24 operations, 10 self-report they HAVE NO DISCHARGE and therefore are not require to report or monitor discharges**

Tiering

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What we learned: **For whatever reason, Tier 3 failed to contain a significant number of operations or acreage.**

When we knew it: **We knew this at the very beginning, during enrollment**

Amount of time available to make adjustments? **The Board had 4.5 years to make adjustments**

Pesticide Switching

The Order relies on tiering: Only farms that have a high potential to discharge nitrogen to groundwater AND are greater than 500 acres

Or

Apply chlorpyrifos or diazinon AND discharge to a 2010 listed waterbody

are captured in Tier 3 (the more restrictive tier)

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		Agricultural Pounds Applied			
Chemical	Class	2008	2010	2012	2014
Chlorpyrifos	organophosphate	68,616	49,870	24,084	12,372
Diazinon	organophosphate	117,923	38,367	11,874	3,980
Imidacloprid	neonicitinoid	15,358	18,568	22,052	22,243
Permethrin	pyrethroid	20,133	22,290	33,470	38,299
Total Pounds Applied		7,893,327	8,727,282	9,214,278	9,389,183

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Or
Apply chlorpyrifos or diazinon AND discharge to a 2010 list waterbody

Are captured in Tier 3 (the more restrictive tier)

What we learned: **Growers switch pesticides. Perhaps, growers switched away from pesticides in order to avoid regulation. It appears they switched to at least some pesticides that can be more toxic and are more persistent in the environment and groundwater.**

When we knew it: **We suspected this would happen even before the Order was put in place. We certainly knew this at the very beginning, during enrollment**

Amount of time available to make adjustments? **The Board had 4.5 years to make adjustments**

Down-Tiering

The Order relies on tiering. It was widely acknowledged during development of the 2012 Order that, generally, Tier 1 was less restrictive than the 2005 Order, Tier 2 about the same, and Tier 3 was more restrictive.

Since March 2012 when the Order was implemented, staff has responded to a minimum of 130 down-tiering requests from agricultural operations (referenced in a 2014 staff report). Some of these requests ask for down-tiering of multiple ranches.

We have not fully analyzed these requests

- In one sample of 17 requests, 16 of 17 were approved.
- In another sample of 11 requests, 9 of 11 were approved

Down-Tiering

The Order relies on tiering. It was widely acknowledged during development of the 2012 Order that, generally, Tier 1 was less restrictive than the 2005 Order, Tier 2 about the same, and Tier 3 was more restrictive.

What we learned: **The RWQCB can be extremely responsive in light of new information from the growers**

When we knew it: **Immediately**

Amount of time available to make adjustments? **It took staff from only less than a week to six weeks to make a determination and down-tier an operation.**

Human Right to Water legislation

On September 25, 2012, the California legislature passed and the Governor signed AB 625, The Human Right to Water. Case law suggests this means (source: UC Berkeley School of Law):

- First, when considering a range of policies or regulations, agencies must give preference and adopt policies that advance the human right to water.
- Second, agencies must refrain from adopting policies or regulations that run contrary to securing universal access to safe drinking water.
- Third, agencies must note in the record the impact of the agency's actions on access to safe and affordable drinking water.

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- Third, agencies must note in the record the impact of the agency's actions on access to safe and affordable drinking water.

What we learned: **The RWQCB has a duty to specifically address the Human Right to Water**

When we knew it: **September 25, 2012**

Amount of time available to make adjustments? **4.5 years**

New Impairments

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FALL 2014: DPR/SWAMP/CMP Region 3

Salinas and Santa Maria Valley Sites	<i>Hyalella</i> 10d water	<i>Chironomus</i> 10d water	EPA 3 species chronic
Water Sample	SWAMP		CMP
Alisal Slough @ Hartnell Rd	T	T	-
Chualar Creek @ Chualar River Road*	T	NT	NT
Main St. Ditch @ Main St.	NT	NT	NT
Orcutt Creek @ West Main	T	T	NT
Oso Flaco Creek @ OF Lake Rd	T	T	NT
Quail Creek @ SR-101	T	T	NT
Rec Ditch III (Near Airport Blvd)	T	T	NT
Solomon Creek @ SR-1	NT	T	NT
Tembladero Slough @ Haro	T	NT	NT
Percent Toxic	78%	67%	0%
Combined Percent Toxic	89%		

While the CC Cooperative Monitoring Program found 0 of 8 sites/samples toxic, follow up sampling found 8 of 9 sites/samples toxic.

New Impairments

Researchers from UC Davis, Granite Canyon Lab, have conducted studies that determined the Cooperative Monitoring Program dramatically underestimates the toxicity of some Central Coast surface waters.

What we learned: **New classes of pesticides were causing toxicity and very likely impairments, not detected by the Cooperative Monitoring Program, in surface waters in agricultural settings.**

When we knew it: **This was not particularly new information. The May 2015 Executive Officers Report to the Board brings this information to the Board's attention.**

Amount of time available to make adjustments? **1 yr. 10 months.**

Antidegradation Ruling

The State and Regional Boards must protect high quality surface and groundwaters and must take steps to restore impacted waters.

In 2012, the Court of Appeal found that that the [CV] Regional Board failed to determine whether discharges permitted under the Dairy Order would result in the degradation of high quality groundwater.

In a May 21, 2013, the Sacramento Superior Court ruled the [CV] Regional Board failed to conduct the required antidegradation analysis.

In May 2015, the Sacramento Superior Court ruled the Central Coast Regional Board failed to conduct the required antidegradation analysis.

Antidegradation Ruling

The State and Regional Boards must protect high quality surface and groundwaters and must take steps to restore impacted waters.

What we learned: **It is not enough to simply state that an Order is protective and therefore by fiat high quality waters are protected. Likewise, it is not enough to find that waters are impacted and therefore more must be done. A detailed analysis is required and affirmative steps must then be taken.**

When we knew it: **November 2012.**

Amount of time available to make adjustments? **4 years 4 months.**

Total Nutrient Applied Data

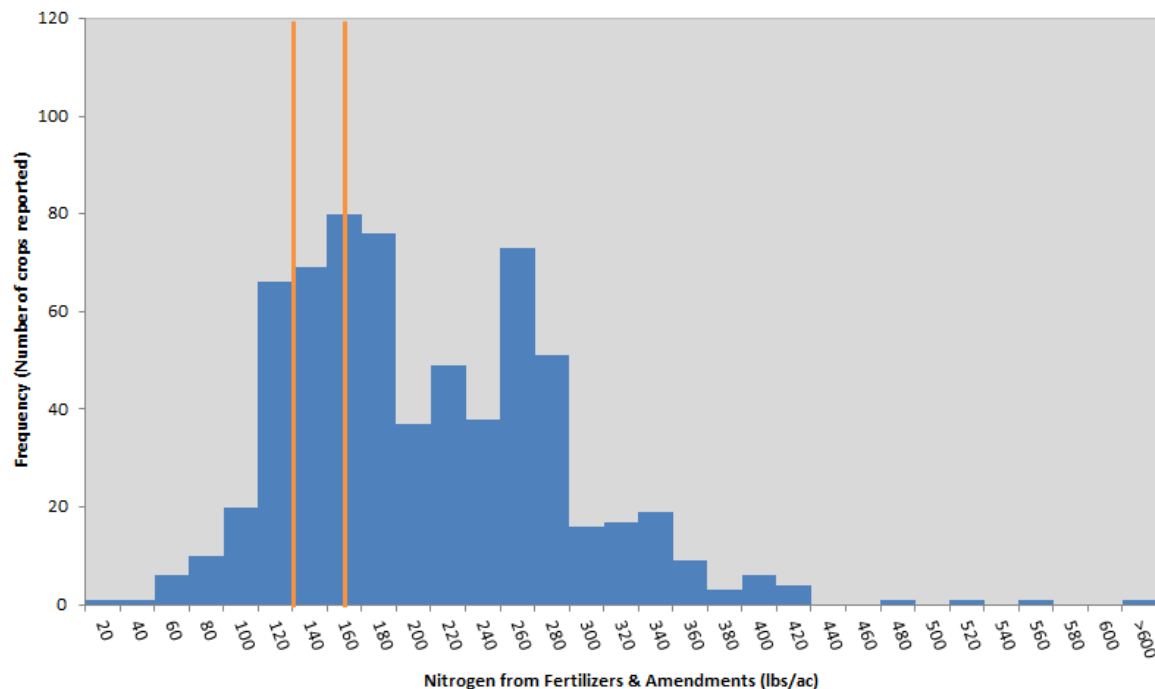
Tier 2 and 3 ranches with a high risk of loading nitrogen to groundwater are required to submit a total nitrogen applied report annually by October 1. The first total nitrogen applied reports were due on October 1, 2014.

- Numerous research studies and reports have documented the over application of total nitrogen (fertilizer and N in irrigation water).
- Staff had documentation of wide-spread overapplication, and the sometimes extreme degree of overapplication in October 2014.
- Staff reported the data to the Board on March 18, 2016.

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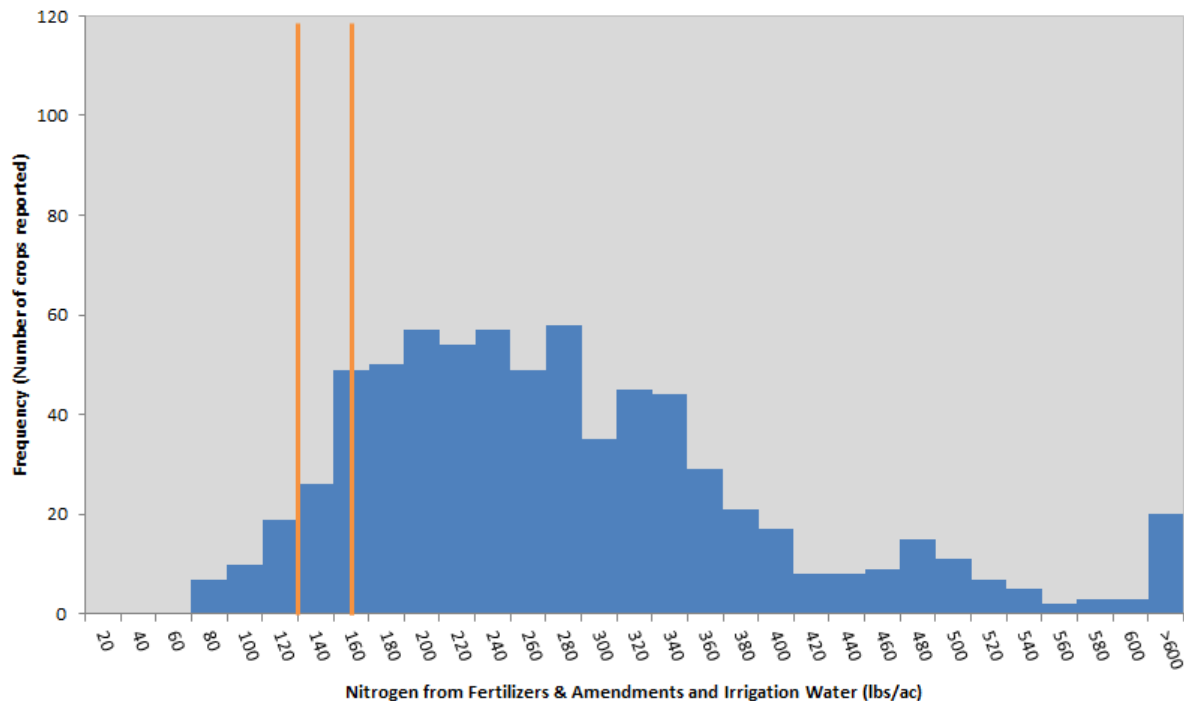
Lettuce Records (2014)
Nitrogen from Fertilizers & Amendments Only



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Lettuce Records (2015)
Nitrogen from Fertilizer & Amendments and Irrigation Water



Total Nutrient Applied Data

Tier 2 and 3 ranches with a high risk of loading nitrogen to groundwater are required to submit a total nitrogen applied report annually by October 1. The first total nitrogen applied reports were due on October 1, 2014.

What we learned: **Despite denials by some growers that overapplication of N is a problem and despite years of resource manager, crop advisor, and regulatory agency advise and warnings, overapplication of fertilizers and nitrogen is a critical and widespread problem impacting drinking water, endangered species, and coastal economies.**

When we knew it: **It has been known for a long time. Staff had data in October 2014. Board had data in March 2016.**

Amount of time available to make adjustments? **Decades to 1 year.**

Photo Monitoring

Surface water was once abundant

Photo Monitoring

**A NEW WATER
SUPPLY SOURCE,
Castroville Lakes to Yield
Eighty Million Gallons
a Day.**

NATURAL FILTRATION.

Plans and Estimates for a System
That Might Solve the Water
Problem for All Time.

What bears on the face of it the stamp of the best and most practicable plan that has ever been broached for supplying San Francisco with a cheap, ample and pure water supply is that which is now being pushed forward by the men interested in the Castroville lakes.

If all that these men claim for this projected system be true—and the statements appear to be such as can be readily proven or disproven—then it seems a safe prediction that not only San Francisco, but all the near-by cities and towns will eventually be supplied with water, from the Castro lakes system.

No definite financial plan has yet been formed, but surveys, tests, measurements and estimates have been made, and upon these two of the gentlemen most interested, Attorney M. E. Babb and Civil Engineer S. J. Henshaw,

San Francisco Call, Volume 79, Number 50, 19 January 1896

Photo Monitoring

Surface water was once abundant and supported rich wetland and riparian ecosystems

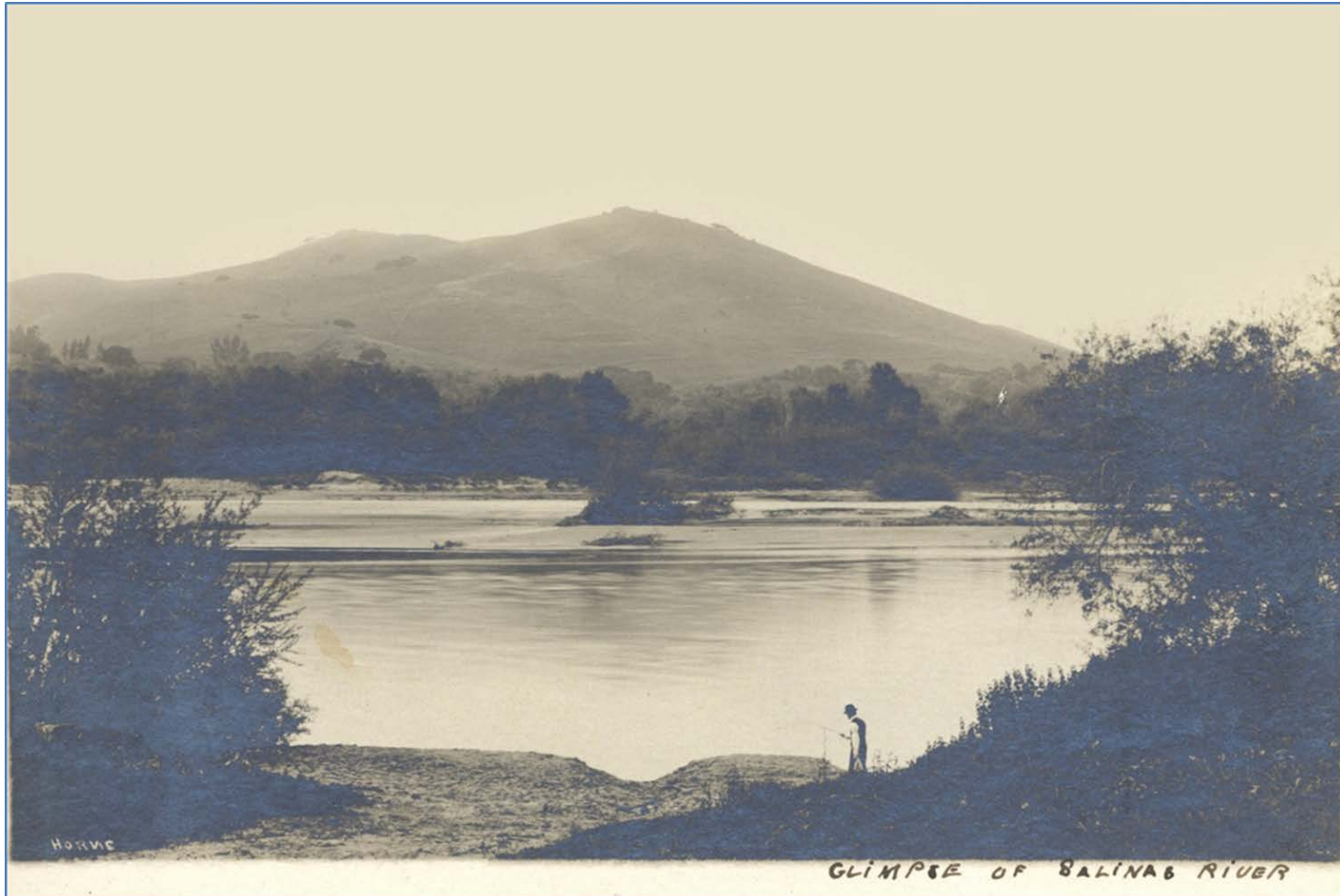


Photo Monitoring



Salinas River upstream of Gonzales Bridge in 1989. Arrows mark edge of channel.

Photo Monitoring



Identical view of Salinas River at Gonzales in 2012. Arrows mark edge of 1989 channel.

Photo Monitoring

Surface water was once abundant and supported rich wetland and riparian ecosystems

The Photo Monitoring requirement was meant to end the ripping out and filling in of the wetland and riparian systems that naturally clean contaminated waters.

While we realize photo monitoring was burdensome, and perhaps even ineffective, “repeal and replace” is essential.

We recommend photo monitoring be required until a replacement provision is substituted.

Coastkeeper et al v State Board

The Sacramento Superior Court ruled on September 30, 2015 that the Central Coast Regional Water Control Board's Waiver, as modified by the State, was not in the Public Interest.

On February 8, 2016 the State Board released the Draft Waste Discharge Requirements for Growers Within the Eastern San Joaquin River Watershed, FOUR MONTHS AFTER THE COURTS DECISION.

The State Board took the Court's Ruling into partial consideration as footnoted on page 13 of that draft:

“On September 30, 2015, the County of Sacramento Superior Court issued a judgment and peremptory writ of mandate compelling the State Water Board to set aside Order WQ 2013-0101 and reconsider the Central Coast Agricultural Order. Our appeal of the judgment and writ is currently pending. Accordingly, we reference our findings and conclusions in Order WQ-2013- 0101 in this order only where those findings and conclusions have not been specifically called into question by the Sacramento Superior Court Ruling. We also discuss and reference conclusions of the Sacramento Superior Court Ruling where relevant.”
underline added.

Coastkeeper et al v State Board

The Sacramento Superior Court ruled on August 10, 2015 that the Central Coast Regional Water Control Board's Waiver, as modified by the State, was not in the Public Interest.

What we learned: **Despite the appeal of the trial court's Coastkeeper et al decision, the decision has, at least partially, framed the discussions around the East San Joaquin [and Los Angeles] Order[s]. The East San Joaquin was released only four months after the court's decision.**

When we knew it: **Ruling was August 2015; Judgement September 30**

Amount of time available to make adjustments? **18 months.**

Imidacloprid

As reference in “New Impairments,” in May 2015 the Board was made aware of toxicity related to a class of pesticides known as noenicitinoids.

On September 1, 2016, the Department of Pesticide Regulation released an updated paper entitled “Environmental Fate of Imidacloprid,” the largest selling pesticide in the world.

- Imidacloprid is a threat to ground water
- Imidacloprid is highly toxic
- Imidacloprid is persistent
- Imidacloprid is widely used and the leading use is in wine grapes

Table 2. Top ten use sites for imidacloprid in California in 2014, according to PUR

<u>Site</u>	<u>Pounds imidacloprid</u>
Grape, Wine	56,254
Structural Pest Control	44,093
Grape	36,939
Tomato, Processing	35,344
Orange	22,160
Broccoli	15,970
Landscape Maintenance	15,084
Tangerine	14,244
Pistachio	12,643
Lettuce, Head	12,471

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- Imidacloprid is highly toxic
- Imidacloprid is persistent
- Imidacloprid is widely used and the leading use is in wine grapes

What we learned: **Imidacloprid is widely used on the Central Coast, especially in wine grapes – including grapes SIP Certified**

When we knew it: **September 2016**

Amount of time available to make adjustments? **5 months.**

What We Learned From Los Angeles Ag Order

Los Angeles Region – Conditional Ag Waiver (Order No. R4-2016-0143)

“ Dischargers shall submit the results of water quality monitoring to the Regional Water Board every year in accordance with the Monitoring and Reporting Requirements in Appendix 1.

If the monitoring results demonstrate an exceedance of any Water Quality Benchmark, identified in Appendices 4 and 5, then the Individual Discharger shall develop a WQMP, and implement management practices identified in the WQMP in order to attain Water Quality Benchmarks. Water Quality Benchmarks must be attained by the deadlines specified in Table 2. The deadlines in Table 2 take into consideration the relative difficulty in achieving Water Quality Benchmarks for different constituents and are based on TMDL compliance dates. Requirements for a WQMP are set forth in the Monitoring and Reporting Requirements. Appendix 1. ”

Section D.2 (pg 18)

What We Learned From Los Angeles Ag Order

Table 2. Water Quality Benchmark Compliance Deadlines

TMDL Constituents	Compliance Date
Malibu Creek Watershed Nutrients TMDL	October 14, 2022
Santa Clara River Nitrogen Compounds TMDL	October 14, 2022
Ventura River Estuary Trash TMDL	October 14, 2020
Calleguas Creek Nitrogen Compounds and Related Effects TMDL	October 14, 2025
Revolon Slough and Beardsley Wash Trash TMDL	October 14, 2020
Upper Santa Clara River Chloride TMDL	October 14, 2020
Calleguas Creek Watershed and Mugu Lagoon Siltation TMDL*	March 24, 2015
Calleguas Creek Watershed and Mugu Lagoon Toxicity, Chlorpyrifos, and Diazinon TMDL	March 24, 2022
Ventura River Algae TMDL	June 28, 2019
McGrath Lake OC Pesticides and PCBs TMDL	June 30, 2021
Malibu Creek Watershed Sedimentation and Nutrients TMDL	July 2, 2021
Calleguas Creek Watershed and Mugu Lagoon Metals and Selenium TMDL	March 26, 2022
Calleguas Creek Watershed Boron, Chloride, Sulfate and TDS (Salts) TMDL	Dec. 23, 2023
Santa Clara River Estuary Toxaphene TMDL	October 7, 2025
Calleguas Creek Watershed and Mugu Lagoon OC Pesticides & PCBs TMDL	March 24, 2026
Oxnard Drain #3 Pesticides, PCBs, and Sediment Toxicity TMDL	April 14, 2026
Santa Clara River Bacteria TMDL	March 21, 2023 dry March 21, 2029 wet

*Additional time may be added to this TMDL deadline should a TMDL reconsideration revise the implementation schedule based on the results of special studies.

What We Learned From Los Angeles Ag Order

Los Angeles Region – Conditional Ag Waiver (Order No. R4-2016-0143)

“

The conditions of this Order require the identification and implementation of management practices to attain Water Quality Benchmarks. To satisfy the conditions of this Order, an Individual Discharger or Discharger Group must submit technical reports and conduct required monitoring programs. In addition to the foregoing, a Discharger must, where necessary to attain Water Quality Benchmarks, implement management practices, evaluate the effectiveness of those practices, and upgrade those practices to improve their effectiveness as necessary to attain Water Quality Benchmarks. If a Discharger fails to implement any of the conditions in this Order, including implementation of management practices and upgraded management practices as necessary to attain Water Quality Benchmarks, then the Discharger may be subject to enforcement. If TMDL-associated Water Quality Benchmarks are not attained by the deadlines in Table 2, then Dischargers shall comply with discharge limitations, using individual discharge monitoring as described in Section 2.d of Appendix 2 or 3.”

Section F.3 (pg 23)

What We Learned From Los Angeles Ag Order

Los Angeles Region – Conditional Ag Waiver (Order No. R4-2016-0143)

“ c) Individual Discharge Monitoring Requirements – For Certain Members

For Discharger Group monitoring sites where TMDL-associated Water Quality Benchmarks are not attained by the deadlines in Section 2.d, Table 3, either:

1. all members with sites draining to the Discharger Group monitoring site and all members with sites in the encompassing and adjacent HUC-12 watersheds as defined in Section 2.a.i shall submit individual MRPs within three months or
2. the Discharger Group may submit a revised group MRP within three months to include individual discharge monitoring for the affected member sites.

Appendix 3. Section
1.C

What We Learned From Los Angeles Ag Order

Los Angeles Region – Conditional Ag Waiver (Order No. R4-2016-0143)

“


Samples shall be collected from each individual discharge monitoring point. One sample shall be collected per year in wet weather and/or dry weather, depending on the nature of the exceedance at the Discharger Group monitoring site, until Water Quality Benchmarks are attained at each individual discharge monitoring point or at the Discharger Group monitoring site.

Dry-weather monitoring must be conducted during an irrigation event of the type and length that would produce the most runoff on the portion of the site draining to the monitoring point. If there is no runoff at the monitoring point, then the observation of no runoff shall be documented in the field data sheet. The sampling event shall be rescheduled or the discharger shall submit a declaration that their irrigation practices produce no runoff. Dry-weather sampling for toxicity and for currently applied pesticides”

Appendix 3. Section
1.C

What We Learned From Los Angeles Ag Order

- Mechanism for verification monitoring

- 
- Mechanism for verification monitoring
 - Compliance endpoint schedule with enforceable discharge limitations

The Draft Agricultural Order Does Not Comply with the Law

Stanford Environmental Law Clinic on behalf of

Monterey Coastkeeper

A Program of The Otter Project

March 7, 2017

The Draft Order Is Inconsistent with:

- California Water Code Section 13629
- Nonpoint Source Policy
- Antidegradation Policy
- The Water Boards' Own Stated Positions
- The Regional Board's CEQA Duty
- The Regional Board's Public Trust Obligations
- The State's Unreasonable Use Doctrine
- The Public Interest
- The State's Human Right to Drinking Water Policy
- The Regional Board's Duty to Remedy a Public Nuisance

The Draft Order violates Water Code section 13269 for 3 reasons.

1. The Draft Order Does Not Comply with the Basin Plan Because Its Iterative Management Approach Lacks Enforceable Measures and Feedback Mechanisms Needed to Meet the Plan's Water Quality Objectives.
2. The Draft Order Is Not Consistent with the State Board's Nonpoint Source Policy.
3. The Draft Order Is Not Consistent with the State Board's Antidegradation Policy.

**1. The Draft Order Does Not Comply with the Basin Plan
Because Its Iterative Management Approach Lacks
Enforceable Measures and Feedback Mechanisms
Needed to Meet the Plan's Water Quality Objectives.**

The iterative management approach, in its present form, is still illegal.

“It is unreasonable for the Board to keep doing the same things it has been doing and expect different results.”

--Judge Timothy Frawley, *Monterey Coastkeeper, et al. v. California State Water Resources Control Board* (2015).

We understand that the agricultural pollution problem cannot be solved immediately.

- Nonetheless, the waivers must include requirements reasonably designed to show measurable progress toward improving water quality over the short-term and achieving water quality standards in a meaningful timeframe.
- Unfortunately, this draft waiver, that simply continues the 2012 approach, cannot show measurable progress.

Regulatory History

1983: Blanket Waiver

1999: Senate Bill 390

2004 Waiver

2012 Waiver: 2008-2011 drafts

2012 Waiver: Monterey Coastkeeper v. California State Water Resources Control Board
Judge Timothy Frawley held that the 2012 Waiver was illegal.

The 2012 Waiver violates Water Code section 13269 because it is not consistent with the Basin Plan, does not include adequate monitoring provisions, and is not in the public interest.

The current order is nearly identical to the order Judge Frawley held to be illegal.

At the July 28, 2016 Board meeting, staff presented their plan for March 2017 renewal of an Ag Order that: “will be largely unchanged from the current order in most aspects, but will have new compliance dates. This proposed 2017 ag order will not address currently unresolved ag order-related litigation and petitions, as it is not likely that these outstanding issues will be decided with sufficient time to include within the proposed 2017 ag order in March 2017.”

The Draft Order relies on the iterative management approach

Discharges must implement “management practices” to prevent or reduce discharges of waste that are causing or contributing to exceedances of water quality standards.

To the extent monitoring data shows implemented management practices have not been effective in preventing discharges from causing or contributing to exceedances, the draft waiver requires the discharger to implement improved management practices.

The iterative management approach, in its present form, does not work for three reasons:

- i. No accountability
- ii. No meaningful standards
- iii. Few Tier 3 growers

i. The Draft Order has no individual accountability due to cooperative monitoring group approach

In practice, this approach is highly unlikely to work because the receiving water monitoring data, submitted in most cases by a cooperative monitoring group, does not identify the individual discharges that are “causing or contributing to the exceedance.

As a result, neither the Board nor the cooperative monitoring group, nor the grower, can identify where the pollution is coming from or whether the grower’s management practices are effectively reducing pollution and degradation.

ii. The Draft Order does not have meaningful standards

The draft waiver doesn't 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 draft waiver, compliance is achieved as long as the discharger implements a new management practice which the discharger *believes* will be an improvement. This is not adequate to ensure any meaningful progress toward achieve quantifiable reductions in pollutant discharges.

iii. Most of the Draft Order's substantive provisions apply only to Tier 3 growers, a small and dwindling group.

The Draft Order imposes its most stringent requirements on Tier 3 growers.

The Regional Board's early proposals would have placed 11 percent of dischargers and 13 percent of "operations covering 54% of the total irrigated crop acres" in Tier 3, while the 2012 Waiver and the Draft Waiver place only 3 percent of dischargers and 14 percent of irrigated acreage in Tier 3.

Approximately 97 percent of dischargers escape the Draft Waiver's most stringent requirements, such as they are.

And due to the pesticide-specific classification of Tier 3, growers switched pesticides to avoid enrolling in Tier 3. As a result, the actual numbers now show that only .5 % of ranches, and 4.7% of the total acreage, are now in Tier 3.

In sum, the Draft Order's iterative management approach violates the law of California.

Implementing management practices is not a substitute for actual compliance with water quality standards.

Management practices are merely a means to achieve water quality standards. Adherence to management practices does not ensure that standards are being met. The draft waiver recognizes this, but fails to do anything about it.

The Draft Order Is Not Consistent with the State Board's Nonpoint Source Policy.

Nonpoint Source Policy

The Basin Plan incorporates the State Board's Nonpoint Source Policy.

The Policy requires that any program to control nonpoint sources (such as diffuse agricultural runoff) include "sufficient feedback mechanisms" for determining the program's efficacy.

The Regional Board acknowledges that it has "primary responsibility" for ensuring that the Policy be implemented and that such responsibility entails achieving water quality objectives and "antidegradation requirements."

NPS Policy: Key Requirement

Nonpoint programs must include “management practices” that permit the Regional Board to “determine that there is a high likelihood the implementation program will attain the [Regional Board’s] state water quality objectives,” quantifiable requirements and a specified time schedule, and “sufficient feedback mechanisms” to show that requirements are in fact being met.

Applying NPS Policy to the Draft Order

- The Draft Waiver does not meet any of NPS Policy requirements.
- As discussed, the Board fails to demonstrate how the Draft Waiver will achieve the water quality objectives, let alone create a “high likelihood” of doing so.
- Moreover, its monitoring program lacks “sufficient feedback mechanisms” to evaluate the Waiver’s efficacy.

The Draft Order Is Not Consistent with the State Board's Antidegradation Policy.

Antidegradation Policy

Definition: The Antidegradation Policy prohibits the degradation of “high quality” waters absent specific findings and requires the maintenance or restoration of waters that have been degraded. *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.*, 210 Cal. App. 4th 1255, 1260-62 (2012).

The Board must apply the Antidegradation Policy in the manner directed by AGUA before formally issuing this waiver.

Antidegradation Policy Step 1: Are there high quality waters?

This process requires the Regional Board to compare baseline water quality – the highest water quality achieved since 1968 – to water quality objectives for receiving waters affected by the discharge.

“High quality waters” are defined as those waters whose quality has exceeded water quality objectives at any time since 1968.

If “baseline water quality” is better than water quality objectives and the permitted activity will result in a discharge of waste, the Policy is triggered, and water quality must be maintained in the absence of additional findings by the Board.

Once the Policy is triggered, degradation of the receiving water by the discharge is presumed.

Thus, in the absence of evidence to the contrary, the Board may only authorize a discharge to high quality waters if it makes the specific findings set forth in the policy.

Application

In the Draft Order, as Judge Frawley stated with regard to the nearly identical 2012 waiver, “there is little to support a conclusion that the Waiver will . . . arrest the continued degradation of the region’s waters.”

Thus, the Board has failed to rebut the presumption that permitted discharges will lead to further degradation and must make the required findings, which the Board has failed to do.

Antidegradation Policy Step 2: Balancing of Interests

After identifying high quality waters into which discharges will occur, the Antidegradation Policy requires an analysis of the appropriate balancing of maximum benefit to the people of California, the effect on present and anticipated beneficial uses, prescribed water quality objectives, and use of best practicable treatment or control of discharges. See AGUA, 210 Cal. App. 4th at 1278.

Application

- The Draft Order fails to do Step 2 of the antidegradation analysis.
- Instead, the Order states that dischargers degrading water quality will be subject to “best practicable treatment or control,” but includes no more than a boilerplate statement that dischargers must “maintain the highest water quality consistent with the maximum benefit to the people,” with no discussion of how that would be accomplished or of economic or social cost.
- Such conclusory boilerplate declarations are insufficient. As here, the order in AGUA “prohibit[ed] further degradation of groundwater,” without more.
- In sum, the Regional Board should not issue the new waiver without conducting an antidegradation analysis.

The Draft Order Is Inconsistent with The Water Boards' Own Stated Positions

The Water Boards have repeatedly argued that the 2012 Waiver was just one step in an iterative approach to meet water quality standards.

“The Nonpoint Source Policy recognizes that water quality standards will be met over a period of time through iterative improvements.” State Board Reply Brief at 47.

The Board described the 2012 Waiver “as just the most recent step in an iterative process that requires a long-term commitment to achieve water quality objectives.” State Board Opening Brief at 22.

Similarly, while appearing before the State Board, Regional Board Staff Member, Michael Thomas, testified that the 2012 “Order is just an iterative step. It's not the answer. It's just a step. And the next Order will be another step.” SB 5949.

Yet by presenting a new, unchanged waiver, the Board has explicitly chosen not to take another step toward achieving water quality objective.

Instead, the Board has remained on the same flawed step as the 2012 Order and made no progress towards water quality objectives in violation of its own iterative approach.

Additionally, the Water Boards have justified the 2012 Waiver as an interim determination that the Board would revisit once the Expert Panel concluded its study.

In court, the State Board argued the “2012 Waiver addressed several issues as an interim measure, pending the conclusions of the Expert Panel.” State Water Board Opening Brief at 40.

The State Board’s Senior Staff Counsel, Emel Wadhvani, likewise claimed the 2012 Order only “constitute[d] an interim approach to regulating agricultural discharges,” SB 6480, while the State Board’s original order presented the 2012 Waiver as “only an interim determination . . . pending the Expert Panel’s more thorough examination of the underlying issues.” SB 7165.

The Expert Panel completed its report on September 9, 2014, but the Board has failed to make substantive changes to its iterative order in light of the panel’s findings.

Instead, the Board hides behind the same language from the defective 2012 Waiver, requiring that dischargers “improve” management practices without providing adequate, let alone improved, standards or implementing effective feedback and monitoring mechanisms.

The Regional Board Must Conduct Supplemental Environmental Review Before Adopting this 2017 Order

In the draft order, the Regional Board relies on the environmental review prepared in 2009 for the 2012 Agricultural Order. The Regional Board cannot do so pursuant to CEQA.

The State Board did not conduct any further environmental review of the order as modified in 2013. Recognizing this failure, Judge Frawley required the State Board to consider supplemental review in connection with the 2012 Order.

Moreover, new information has come to light since 2013 that further prompts the need for supplemental review. Tier 3 is covering far fewer growers. Growers have moved to more persistent and more broadly toxic pesticides. Therefore, the new order is less protective of water quality, and a new CEQA analysis is required.

The Regional Board has a duty to review the new information and assess the ecological impacts before adopting the 2017 waiver.

The Regional Board Has a Public Trust Obligation to Ensure the Order Balances Trust Resources

The Regional Water Board holds all navigable waterways for the benefit of the people so that “they may enjoy the **navigation of the water**, carry on commerce over them, and have liberty of **fishing** therein **freed from the obstruction or interference of private parties.**”*

The proposed Order allows the discharge of agricultural wastewater into public trust waters to continue, violating the Board’s duty to protect the water, wildlife, recreation, and aesthetic of these waters.**

The Board must ensure the Order balances and preserves the multiple uses and interests in this resource to the extent feasible.

**Illinois Central Railroad v. Illinois*, 146 U.S. 452, 460 (1892).

***National Audubon v. Superior Court*, 33 Cal. 3d 419, 434 (1983).

The Regional Board Has Historically Failed to Uphold its Public Trust Duties

Example of the increasing pollution over time as nitrate concentrations exceed safe standards in Salinas Valley

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	49 (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)	80.3 (55.9)	85.1	106 (63)
Forebay	38.1 (33.8)	54.4 (42.7)	42.5	79 (54)
Upper Valley	28.3 (26.0)	51.7 (47.5)	67.5	90 (78)
Total	N/A	N/A	36.1	56 (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 Regional Board Has Broad Powers to Do Everything Necessary to Protect the Public Trust

The core of the public trust doctrine is the Board's absolute power to continuously supervise and control the navigable waters of the state and all upstream tributaries in order to "prevent[] any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."*

The Board has both the duty and power to protect the waters being discharged into from dangerous levels of pollution that will harm natural marine habitat and the public's ability to use this water for fishing and other recreation.

**National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 425, 437, 445 (1983).

The Board Must Balance Various Interests



Lovers Point, Monterey Bay

Morro Bay, San Luis Obispo



It Is the Regional Board's Duty to Protect this Public Resource

The Public Trust places an affirmative “duty upon the government to protect” public trust resources.* The state cannot neglect or end these duties as trustee.**

As stated in the draft Order, “the **Central Coast Water Board is the lead agency** pursuant to the California Environmental Quality Act.” They have the “primary responsibility for the coordination and control of water quality pursuant to the Porter-Cologne Water Quality Control Act [. . .] considering precipitation, topography, **population, recreation, agriculture, industry, and economic development.**” (Pages 1 and 9 of the draft Order)

**Center for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008).

***National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983).

The Draft Order Must Comply with the Reasonable Use Doctrine

The overriding principle governing the use of water in California is that all water use must be reasonable.*

In the Central Coast Region, the Reasonable Use Doctrine commands the Boards to consider the many critical functions the Region's waters serve, and the variety of beneficial uses to which the Region's waters are put – not only agriculture. While undoubtedly important, agriculture is but one of many designated beneficial uses of water in the Region, and often at the expense of other important societal interests.

It is unreasonable to permit the continued degradation of the Region's waters by allowing irrigated agriculture to go unchecked, particularly where simple, known practices can be implemented to control agricultural discharges.* Moreover, it is unreasonable to permit agricultural operations in the Region to continue operating under a Waiver that has proven ineffective for ensuring water is capable of serving all the beneficial uses for which it has been designated.

**People ex rel. State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750 (1976).

The Board Must Balance Various Interests



Lovers Point, Monterey Bay

Morro Bay, San Luis Obispo



The Draft Order is Not in the Public Interest

Water is the lifeblood of the Central Coast Region. In considering these many factors, the Board should consider what is in the public interest.

Encompassed are rugged seacoasts of Santa Cruz, Monterey, San Luis Obispo, and Santa Barbara Counties, where land dramatically meets the sea. Recreation and tourism economies of this Region depend not only on its famed waterways and bays such as Monterey Bay, Morro Bay, and the Santa Barbara Channel, but the abundant wildlife that healthy watersheds support, including that within the Monterey Bay National Marine Sanctuary.



The Central Coast Region

The Draft Order is Not in the Public Interest

The Region's river and streamside habitats support some of the most significant biodiversity of any temperate region in the world: some of the last remaining populations of the California sea otter, endangered steelhead, endangered coho salmon, and other imperiled species. The Region has also historically supported prolific commercial fisheries, clam beds, and shellfishing and sportfishing grounds important to the State's economy.



The Draft Order Must Consider the Human Right to Water

The human right to water is an established policy of California, which declares **the right of every human being to “safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”** In the State of California, “the use of water or domestic purposes is the highest use of water, and [] the next highest use is for irrigation.” The Board is mandated to consider these codified policies in adopting the waiver.

The State Water Board, in response to the codification of the human right to water, declared in 2015 its mission “[t]o preserve, enhance, and restore the quality of California’s water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resources allocation and efficient use, for the benefit of present and future generations.” This resolution addresses discharges into water that could threaten human health, stating they “are **among the Water Boards’ highest priorities, and such discharges should be regulated to attain the highest water quality** which is reasonable.”

California Water Code § 106.

The Draft Order Must Consider the Human Right to Water

The Legislature left it up to the Water Boards to ensure the State's policy to be implemented. Yet the draft waiver fails to consider the human right to water.

The Regional Board must analyze

- How the draft waiver achieves the policy to provide water in compliance with the human right to water
- How many communities and **residents will be left without safe drinking water**
- The **costs to those communities** that result from the contamination
- A **timeline** of when these communities can expect to have safe drinking water

The draft Order renders the human right to water a mere goal, when it must be a guarantee.

The Regional Board Must Prevent a Public Nuisance

A nuisance is “anything which is **injurious to health** . . . or is indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin.”*

The Board is liable for a public nuisance by allowing the continuation of these polluted waterways.**

By failing to enact more stringent regulations of agriculture, the Board creates a public nuisance. They must take concrete action that will actually guarantee a limit to contaminants discharged into this valuable public resource.

*Cal. Civ. Code § 3479.

** *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540 (2009).

Thank you for your time and consideration.

