The Environmental Justice Coalition for Water
Water Justice for All

January 9, 2017

John M. Robertson
Executive Officer
California Regional Water Quality Control Board, Central Coast Region
895 Aerovista Place
Suite 101
San Luis Obispo, CA 93401

AgNOI@waterboards.ca.gov

RE: Draft Agricultural Order, Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands Order No. R3-2017-0002 and associated Monitoring and Reporting Programs for Tier 1, Tier 2 and Tier 3 ranches (R3-2017-0002-01, R3-2017-0002-02, R3-2017-0002-03, respectively)

Dear Mr. Robertson:

The Environmental Justice Coalition for Water ("EJCW") writes to oppose the draft Conditional Waiver of Waste Discharge Requirements for Discharges From Irrigated Lands ("2017 Draft Waiver"), Order No. R3-2017-0002, proposed for adoption March 7-9, 2017, by the California Regional Water Quality Control Board, Central Coast Region ("Regional Board"). The 2017 Draft Waiver, as written, violates the California Environmental Quality Act (Public Resources Code Section 21000 et seq.), Water Code section 13269, the state's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy), and the State's Antidegradation Policy.

As written, the 2017 Draft Waiver is a near verbatim copy of the 2012 Conditional Waiver of Waste Discharge Requirements for Discharges From Irrigated Lands ("2012 Waiver"), as modified by the State Water Resources Control Board ("SWRCB") in Water Quality Order 2013-0101. The only notable changes include the addition of toxicity testing for a new pesticide (neonicotinoids), slight changes to Irrigation and Nutrient Management Plan procedures, minor modification of total nitrogen applied requirements, and a mild expansion of the antidegradation analysis. However, these modest alterations are insufficient to cure the waiver's established legal shortcomings.[1] Further, statements from staff that the 2017 Waiver will be "short term" or "likely renewed in less than five years" are inadequate to alleviate the Regional Board's duty to approve a legally sufficient waiver today. (see Regional Board Staff

[1] The 2012 Waiver was found legally insufficient in *Monterey Coastkeeper v. California State Water Resources Control Bd.*, Super. Ct. Sacramento County, 2015, No. 34-2012-80001324.

presentation, August & November, 2016; 2017 Draft Waiver, p. 35 [setting an expiration date of three years, March 8, 2020, instead of the legal maximum of five years].)

We recognize that waste discharges from irrigated lands and nonpoint sources, in general, are difficult to address and may take time to reach full compliance with all applicable water quality standards. However, this difficulty does not give license to the Regional Board to delay taking action towards addressing these discharges today. Instead, the Regional Board must issue a waiver that will ensure progress is made towards meeting water quality standards in a reasonable time.

During the 2012 Waiver process, EJCW submitted comments, stating, "We strongly urge [the Regional Board] to implement a reasonable time-frame and regulations that ensure communities will not continue suffering from contaminated water for another ten years." (EJCW, et al. submitted January 3, 2011.) It is truly tragic that if the 2017 Draft Waiver is adopted by the Regional Board as presented, communities throughout the Central Coast will be guaranteed to continue to suffer the negative consequences of underregulated agricultural discharges, for some categories of growers, and effectively unregulated agricultural discharges, for the majority of growers, today, and into the future. The proposed expiration date of March 8, 2020, unfortunately, proves the ten-year time-frame quoted in our 2011 warning, above, to be all too accurate.

California Environmental Quality Act

The current 2017 Draft Waiver has been characterized by the Regional Board as a replacement of the previous Agricultural Order adopted in 2012, which itself replaced the 2004 Agricultural Order. (2017 Draft Waiver, p. 10-11.) Prior to the pending order, the Regional Board prepared a Subsequent EIR ("SEIR") for the 2012 waiver to bolster the Negative Declaration prepared for the 2004 waiver. Additionally, the Regional Board issued an Addendum to the SEIR to reflect revisions to the 2012 Waiver and the Board's conclusion that a new SEIR was not required. The Final SEIR and statement of overriding considerations was certified by the Regional Board on March 15, 2012, for the 2012 Agricultural Waiver. (Regional Water Quality Control Board, Central Coast Region, Resolution No. R3-2012-0012.) In order to satisfy the requirements of the California Environmental Quality Act ("CEQA") for the 2017 Draft Waiver, the Regional Board relies, exclusively, on the 2004 Negative Declaration and the 2012 Final SEIR. (2017 Draft Waiver, p. 11.) This is improper and in violation of CEQA, primarily, because new information of substantial importance is available today that was not available in 2012.

The California Environmental Quality Act (Public Resources Code Section 21000 et seq.) requires a public agency to prepare an environmental impact report (EIR) for any project that may have a significant effect on the environment. (Pub. Res. Code, § 21151.) A subsequent or supplemental EIR must be prepared if new information becomes available, which was not known and could not have been known with the exercise of reasonable diligence at the time the EIR was certified as complete. (Pub. Res. Code, § 21166, subd. (c); Cal. Code. Regs, tit. 14 § 15162, subd. (a)(3) [hereafter CEQA Guidelines].) New information will justify a subsequent or supplemental EIR if it is of substantial importance and shows that the project will have a significant effect not discussed in the EIR, significant effects discussed in the EIR will be substantially more severe, mitigation measures or alternatives found to be infeasible will be feasible and would substantially reduce a significant effect, or mitigation measures or alternatives considerably different from those discussed in the EIR would substantially reduce a significant effect. (CEQA Guidelines, § 15162, subd. (a)(3)(A)-(D*); Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1200.) Further, if a project was approved prior to the discovery or

release of new information, a subsequent EIR must be prepared by the public agency that grants the next discretionary approval for the project. (CEQA Guidelines, § 15162, subd. (a)(1).) A supplemental EIR may be prepared instead of a subsequent EIR if only minor additions or changes would be necessary to make the previous EIR adequate. (CEQA Guidelines, § 15163, subd. (a)(2).)

Before approving the 2017 Draft Waiver, the Regional Board is required to prepare a subsequent EIR because there is new information available, today, of substantial importance that was not known and could not have been known when the SEIR was certified on March 15, 2012. This information is of substantial importance and shows that the agency action will have a significant effect on hydrology and water quality not discussed in the EIR.

Since the 2012 Waiver, there have been significant advances in the empirical understanding of nitrate contamination in the Salinas Valley, Santa Maria Valley, and throughout the Central Coast region. At least seven substantial reports have been issued within the last five years, including:

- *Addressing Nitrate in California's Drinking Water*. Center for Watershed Sciences, University of California, Davis. 2012 (updated July 2012).
- *Communities That Rely On a Contaminated Groundwater Source for Drinking Water*. State Water Resources Control Board. January, 2013.
- *Recommendations Addressing Nitrate in Groundwater*, State Water Resources Control Board. 20 February 2013.
- *Nitrogen Tracking and Reporting Task Force: FINAL REPORT.* California Department of Food and Agriculture. December, 2013
- *The California Nitrogen Assessment: Challenges and Solutions for People, Agriculture, and the Environment.* Thomas P. Tomich (Editor). June 2016.
- *Nitrogen fertilizer use in California: Assessing the data, trends and a way forward*. Todd S. Rosenstock, et al. California Agriculture, volume 67, number 1. January-March 2013.
- *Conclusions of the Agricultural Expert Panel: Recommendations to the State Water Resources Control Board pertaining to the Irrigated Lands Regulatory Program.* Irrigation Training & Research Center, California Polytechnic State University. September 9, 2014.

Many of these reports were commissioned or published by the State Water Resources Control Board ("State Board" or "SWRCB"). Along with these reports, the Regional Board has been collecting data for the last five years under the 2012 Waiver, including farm plans, total nitrogen applied forms, irrigation and nutrient management plans, and letters of exceedances. Despite this relative wealth of information, the Regional Board has issued a draft waiver that is not substantially different than the 2012 Waiver and has chosen to proceed with the 2017 Draft Waiver without additional environmental review, in our view, in violation of CEQA.

New Information Shows Significant Effects Not Discussed in the EIR

Appendix G of the CEQA Guidelines is an "Environmental Checklist Form" that may be used to determine if a project could have a significant effect on the environment and whether it is necessary to prepare a negative declaration or an EIR. (CEQA Guidelines, Appen. G; see e.g., *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896 & fn. 5.) The Regional Board utilized this checklist in the Initial Study prepared for the 2004 Waiver. (Initial Study and Negative Declaration for Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, July 2004, p. 19-28 [hereafter "Initial Study"].)

Hydrology and Water Quality

Section VIII of Appendix G includes six questions regarding hydrology and water quality, in relevant part asking if the project would: "Violate any water quality standards or waste discharge requirements?" The Regional Board determined there was no impact. (Initial Study, p. 23-24.)

The 2016 Water Quality Control Plan for the Central Coastal Basin ("Basin Plan") establishes water quality objectives to protect beneficial uses of water and is the metric used to evaluate if there is a water quality standard violation. The Basin Plan holds that ground water throughout the Central Coastal Basin, except for the Soda Lake Sub-basin, is suitable for municipal and domestic water supply. (Basin Plan, 2-1.) More specifically, the Basin Plan provides that, "wastewaters percolated into the ground waters shall be of such quality at the point where they enter the ground so as to assure the continued usability of all ground waters of the basin." (Basin Plan, 5-5.) And, "wastes discharged to ground waters shall be free of toxic substances in excess of accepted drinking water standards; taste, odor, or color producing substances; and nitrogenous compounds in quantities which *could* result in a ground water nitrate concentration above 45 mg/L. (Basin Plan, 5-8 [emphasis added].)[2]

The 2017 Draft Waiver itself acknowledges that, "Nitrate pollution of drinking water supplies is a critical problem throughout the Central Coast Region. Studies indicate that fertilizer from irrigated agriculture is the largest primary source of nitrate pollution in drinking water wells and that significant loading of nitrate continues as a result of agricultural fertilizer practices." (2017 Draft Waiver, p. 2-3.) And that, "Hundreds of drinking water wells serving thousands of people throughout the region have nitrate levels exceeding the drinking water standard. This presents a significant threat to human health as *pollution gets substantially worse each year*." (*Id.* at p. 3 [emphasis added].)

These statements were true when stated in 2012 and continue to be reinforced today by studies published since 2012. (See, e.g., *Addressing Nitrate in California's Drinking Water*. Center for Watershed Sciences, University of California, Davis. 2012 (updated July 2012), p. 35; [3] *Communities That Rely on a Contaminated Groundwater Source for Drinking Water*. State Water Resources Control Board. January, 2013, p. 18, 56.) Further, other studies indicate that nitrogen application to irrigated lands is increasing. (See e.g., *The California Nitrogen Assessment: Challenges and Solutions for People, Agriculture, and the Environment.* Thomas P. Tomich (Editor). June 2016; *Nitrogen fertilizer use in California: Assessing the data, trends and a way forward*. Todd S. Rosenstock, et al. California Agriculture, volume 67, number 1. January-March 2013.)

---

[2] The State Maximum Contaminant Level (MCL) was previously expressed as 45 mg/L as Nitrate (NO_3), but has been revised to 10 mg/L as Nitrogen (N) to ensure consistency with federal standards. (see e.g., 22 C.C.R. § 64431 [change without regulatory effect].)

[3] In relevant part, "Average nitrate concentrations in public [drinking water] supply wells of the Tulare Lake Basin and Salinas Valley have increased by 2.5 mg/L (±0.9 mg/L) per decade over the past three decades. Average trends of similar magnitude are observed in private wells. As a result, the number of wells with nitrate above background levels (> 9 mg/L) 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."

In relying on the previously completed environmental review, the 2017 Draft Waiver states in relevant part:

> This Order is substantially similar to the 2012 Agricultural Order, with the only differences being the addition of new or revised monitoring and reporting requirements. These new or revised monitoring and reporting requirements will not result in a physical change to the environment. (2017 Draft Waiver, p. 11.)

The new information available today, which was not known and could not have been known with the exercise of reasonable diligence in 2012, demonstrates that there is a high likelihood that the 2017 Draft Waiver, if adopted as proposed, will lead to a violation of water quality standards, specifically, the standard that requires discharges to ground water to be free of nitrogenous compounds in quantities that *could* result in a ground water nitrate concentration above 45 mg/L. This new information is of substantial importance, evidenced, in part, by its publication or solicitation (and presentation to the State Legislature) by the SWRCB. Further, this new information shows that the project will have a significant effect on hydrology and water quality not discussed in the SEIR. These circumstances are sufficient to meet CEQA's standard for a subsequent EIR or, at minimum, a supplemental EIR. The Regional Board will be acting in violation of CEQA, if it proceeds to adopt the 2017 Draft Waiver without additional environmental review.

Water Code Section 13269

Water Code section 13269 requires the Regional Board to determine that any waiver of waste discharge requirements is consistent with any applicable water quality control plan and that the waiver is in the public interest. (Wat. Code, § 13269, subd. (a).) As will be shown, the 2017 Draft Waiver fails both of these requirements.

I. The 2017 Draft Waiver is Inconsistent with the 2016 Water Quality Control Plan for the Central Coastal Basin

The 2016 Water Quality Control Plan for the Central Coastal Basin ("Basin Plan") establishes water quality objectives to protect beneficial uses of water, establishes a program of implementation to achieve water quality objectives, and incorporates other state plans and policies, including the Antidegradation Policy.

As a broad policy, the Basin Plan seeks "to insure that the water resources of the Central Coastal Basin are preserved for future generations of Californians [and to] protect and enhance all basin waters, surface and underground, fresh and saline, for present and anticipated beneficial uses." (Basin Plan, 4-2.) The Basin Plan further finds that ground water throughout the Central Coastal Basin, except for the Soda Lake Sub-basin, is suitable for municipal and domestic water supply. (Basin Plan, 2-1.) More specifically, the Basin Plan provides that, "wastewaters percolated into the ground waters shall be of such quality at the point where they enter the ground so as to assure the continued usability of all ground waters of the basin." (Basin Plan, 5-5.) And, "wastes discharged to ground waters shall be free of toxic substances in excess of accepted drinking water standards; taste, odor, or color producing substances; and nitrogenous

compounds in quantities which *could* result in a ground water nitrate concentration above 45 mg/L. (Basin Plan, 5-8 [emphasis added].)[4]

The 2017 Draft Waiver is inconsistent with the Basin Plan because the proscribed measures are insufficient to meet the Basin Plan's water quality objectives. Specifically, the 2017 Draft Waiver directly conflicts with the Basin Plan's narrative prohibition on discharges to groundwater that *could* result in a ground water nitrate concentration above 45 mg/L. The UC Davis report prepared for the SWRCB, *Addressing Nitrate in California's Drinking Water*, found that almost 10 percent (254,000) of the 2.6 million people in the Tulare Lake Basin and Salinas Valley rely on groundwater that is highly susceptible to exceeding the nitrate standard of 45 mg/L. (Harter, et al., *Addressing Nitrate in California's Drinking Water* (2012) pp. 49 [hereafter "UC Davis Report"].) The study further found that croplands contribute 93.7% of the total nitrate leaching in the study area (of which synthetic fertilizer was the largest contributor). (*Id.* at pp. 17-18.) The study utilized nitrogen balance (the difference between nitrogen applied and nitrogen removed) as a key indicator of cropland nitrogen use efficiency. (*Id.* at p. 29.) The study further provided a wide range of policy options to reduce nitrate sources of contamination to groundwater. (*Id.* at pp. 63-65.) It then identified four discrete areas of action:

a) safe drinking water actions (such as point-of-use treatment)
b) source reduction actions (to reduce long-term nitrate contamination to groundwater)
c) monitoring and assessment of groundwater and drinking water, and
d) funding identification (for all actions). (*Id.* at pp. 67-72.)

Notably, the UC Davis Report expressly separated monitoring and assessment from actions that will actually reduce groundwater nitrate contamination. The report expressly acknowledged that monitoring and assessment is only a method of assessing the nitrate problem or the effectiveness of the other action items, such as safe drinking water and nitrate source loading reduction actions. (*Id.* at p. 69.) Implicit in this analysis is that monitoring and assessment is but one necessary piece of an otherwise effective multi-pronged strategy to address nitrate contamination in ground water. Without leading to safe drinking water and nitrate source loading reduction actions, monitoring and assessment is insufficient to adequately address new nitrate contamination in ground water.

The Agricultural Expert Panel—convened at the behest of the SWRCB—similarly concluded that a comprehensive, proactive regulatory program would be required to address the groundwater nitrate problem. (*Conclusions of the Agricultural Expert Panel: Recommendations to the State Water Resources Control Board pertaining to the Irrigated Lands Regulatory Program*. Irrigation Training & Research Center, California Polytechnic State University. September 9, 2014, p. ii [hereafter "Expert Panel"].) The Expert Panel stated, plainly, "If more nitrogen is applied to a field than is removed, over the long term, most of the excess nitrogen applications will be leached to groundwater. This is a simple concept that does not require modeling to illustrate." (Expert Panel, p. iii.) Therefore, the Panel recommended regulatory action that includes, "long-term monitoring, source control, and education. (*Id.* at p. 26

[4] The State Maximum Contaminant Level (MCL) was previously expressed as 45 mg/L as Nitrate (NO_3), but has been revised to 10 mg/L as Nitrogen (N) to ensure consistency with federal standards. (see e.g., 22 C.C.R. § 64431 [change without regulatory effect].)

[emphasis in original].) The Panel reasoned that to effectively regulate nonpoint sources, a regulatory program must encompass all irrigated areas, not only areas directly above high nitrate aquifers. (*Id.*)

The Panel determined a simple metric to identify progress towards reducing ground water contamination—an "A/R ratio" that calculates the difference between nitrogen applied and nitrogen removed—would be a key element of any effective regulatory program. (*Id.*) The Panel further recommended the creation and implementation of comprehensive, customized nitrogen/water management plans, along with required reporting of key values (e.g. crop type, acreage, total nitrogen applied, and total nitrogen removed). (*Id.* at p. 27)[5]

In contrast, the approach taken to date by the Regional Board —through the 2012 Waiver—has relied on monitoring and reporting as its primary strategy to achieve compliance with the Basin Plan. However, as above, the 2012 Waiver has been found to be legally insufficient. (*Monterey Coastkeeper v. California State Water Resources Control Bd.*, Super. Ct. Sacramento County, 2015, No. 34-2012-80001324.) There, the Court held the 2012 Waiver violated Water Code section 13269 because it did not include sufficiently specific, enforceable measures and feedback mechanisms to ensure consistency with the Basin Plan and was not in the public interest. (*Id.* at p. 32.) Notably, enforceable "nitrogen balance ratios" were eliminated from the waiver by the SWRCB. (*Id.* at pp. 16, 22 & 23.)

The 2017 Draft Waiver—like the 2012 Waiver—relies primarily on monitoring and reporting strategies to achieve compliance with the Basin Plan. Further, by the Regional Board's own admission the 2017 Draft Waiver is "is substantially similar to the 2012 Agricultural Order, with the only differences being the addition of new or revised monitoring and reporting requirements." (2017 Draft Waiver, p. 11.) Like the 2012 Waiver, the 2017 Draft Waiver risks legal challenge in its current form, as it proscribes insufficient standards for actually reducing nitrate loading and groundwater contamination in order to meet the Basin Plan's quality standards. The 2017 Draft Waiver requires dischargers to:

1. Enroll by filing an electronic-notice of intent to discharge;
2. Develop and implement a farm water quality management plan;
3. Implement management practices to protect water quality;
4. Conduct surface water receiving monitoring and reporting (cooperatively or individually);
5. Conduct groundwater monitoring and reporting (cooperatively or individually);
6. Install backflow prevention devices;
7. Submit annual compliance forms (Tier 2 and Tier 3 only);
8. Report total nitrogen applied (subset of Tier 2 and Tier 3 only);
9. Conduct individual discharge monitoring and reporting (Tier 3 only);
10. Develop and implement a certified irrigation and nutrient management plan (Tier 3 only); and
11. Develop and implement water quality buffer plan (Tier 3 only).

[5] The Expert Panel recommended a total of eight "key elements" to include in any regulatory program. (Expert Panel, p. 26-27.)

The vast majority of the requirements of these actions are limited to monitoring and reporting. This is an essential first step to gaining greater understanding the problem of nitrate contamination, but itself is insufficient to ensure compliance with the Basin Plan. The nebulous requirement to implement effective management practices to ensure compliance with water quality standards is wholly insufficient. Further, relying on dischargers to self-evaluate the effectiveness of their management practices and to "improv[e] as needed" is a wholly insufficient backstop to ensure compliance with the Basin Plan standards. (See 2017 Draft Waiver, p. 4.) Even the irrigation and nutrient management plans—which have the most potential to minimize nitrate loading and most closely fit the Expert Panel recommendations of using A/R ratios with nitrogen/water management plans—are rendered almost unenforceable because they are not actually submitted to the Regional Board and apply to only a minimal subset of dischargers. (Draft Monitoring and Reporting Program, Order No. R3-2017-0002-03, p. 23.) Instead, only an "Effectiveness Report" is submitted, which removes almost all public accountability from the process. (*Id.* [where only methodology must be reported, not the facts and data used to determine effectiveness].) As per the Expert Panel's findings, regulatory requirements should apply to all irrigated lands, regardless of whether it overlays a high nitrate aquifer or not.

Instead, the Regional Board must construct a regulatory program that will ensure consistency with the Basin Plan. This can best be accomplished through enforceable A/R ratio targets, nitrogen/water management plans, and other enforceable measures that apply to all farms/ranches—as recommended by the Expert Panel.

II. The 2017 Draft Waiver is Not in the Public Interest

Water Code section 13269 requires the Regional Board to determine that any waiver of waste discharge requirements is consistent with any applicable water quality control plan and that the waiver is in the public interest. (Wat. Code, § 13269, subd. (a).)

The 2017 Draft Waiver claims to be in the public interest because:

a. The Order was adopted in compliance with Water Code Sections 13260, 13263, and 13269 and other applicable law;
b. The Order requires compliance with water quality standards;
c. The Order includes conditions that are intended to eliminate, reduce and prevent pollution and nuisance and protect the beneficial uses of the waters of the State;
d. The Order contains more specific and more stringent conditions for protection of water quality compared to the 2004 and 2012 Agricultural Orders.
e. The Order contains conditions that are similar to the conditions of municipal stormwater NPDES permits, including evaluation and implementation of management practices to meet applicable water quality standards and a more specific MRP;
f. The Order focuses on the highest priority water quality issues and most severely impaired waters;
g. The Order provides for an efficient and effective use of Central Coast Water Board resources, given the magnitude of the discharges and number of persons who discharge waste from irrigated lands;
h. The Order provides reasonable flexibility for the Dischargers who seek coverage under this Order by providing them with a reasonable time schedule and options for complying with the Water Code.

Despite these broad proclamations, we find the waiver to not be in the public interest because it fails to effectively regulate irrigated lands within the Central Coast to protect all beneficial uses.

Specifically, the most vulnerable populations will continue to suffer from nitrate-contaminated water if the 2017 Draft Waiver is approved as proposed.

Antidegradation

The State's Statement of Policy with Respect to Maintaining High Quality of Waters in California ("Antidegradation Policy") is expressly incorporated into the Basin Plan. (Basin Plan, 3-2.) This policy recognizes that the disposal of wastes into the waters of the State shall be regulated as to achieve the, "highest water quality consistent with maximum benefit to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State." (State Water Resources Control Board Resolution No. 68-16, October 28, 1968.) To this end, existing high quality water must be maintained unless a change:

- will be consistent with the maximum benefit to the people of the State,
- will not unreasonably affect any beneficial use, and
- will not result in water quality that is below that prescribed by water policies.

(*Asociation de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1259.)

High quality water is the best water quality achieved since the adoption of the antidegradation policy in 1968. (*Id.*) Further, any activity which produces a waste or discharges to existing high quality waters must include the best practicable treatment or control to assure that a pollution or nuisance will not occur and the highest water quality consistent with maximum benefit to the people of the State will be maintained. (State Water Resources Control Board Resolution No. 68-16, October 28, 1968.)

The Third District Court of Appeals in *Asociation de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* ("*AGUA*") found monitoring of domestic and agricultural supply wells to be insufficient to detect groundwater degradation, much less prevent it. (*AGUA* at pp.1272-73.) There, the Court held that monitoring wells were located in improper areas to detect degradation, would not show pollution until several years after its release, and failed to test for all constituents of concern. (*Id.* at p. 1275.)

The 2017 Draft Waiver adds a modest antidegredation analysis. The Regional Board acknowledges that the waiver is subject to the Antidegredation Policy, the existence of high quality surface and groundwater, and that agricultural discharges have degraded and threaten to degrade high quality waters within the Central Coast Region. (2017 Draft Waiver, Attachment A, pp. 46-47.) However, the Regional Board has failed to make the subsequent requisite findings, including the best practicable treatment or control and that the highest water quality consistent with maximum benefit to the people of the State will be maintained. Instead, the Regional Board improperly delays these findings until the next iteration of the agricultural waiver, presumably in 2020. (2017 Draft Waiver, Attachment A, pp. 47-49.)

The Antidegretation Policy provides no leeway to delay making the proscribed findings when a discharge is made to an existing high quality water. Here, it is clear from recent and existing scientific studies that nitrate pollution from agricultural discharges to groundwater threaten drinking water supplies and the health and safety of the people of the Central Coast who rely on them. The Regional Board must make the requisite findings at the time of authorizing these discharges to satisfy the Antidegredation Policy's requirements.

Nonpoint Source Policy

The Nonpoint Source (NPS) Policy, adopted by the State Water Resources Control Board ("SWRCB") in 2004, seeks to implement and enforce the State's nonpoint source pollution control program, as required by State and Federal law. (Wat. Code, § 13369, subd. (a); see 33 U.S.C. § 1329 [Clean Water Act, section 319].) The NPS Policy guides the Regional Board with the force and effect of a regulation. (See *Waterkeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452.) Additionally, all Regional Board orders must be consistent with State water quality policies, including the NPS policy. (see Wat. Code, § 13146.) The 2017 Draft Waiver acknowledges it is subject to the NPS policy. (2017 Draft Waiver, p. 4; 2017 Draft Waiver, Attachment A, p. 45.)

The NPS Policy includes five "Key Elements" that must be included in any NPS control program adopted by a regional board. (NPS Policy, p. 11-15.) Most applicable, here, are Key Elements 3, 4, and 5, as explained below.

Further, before approving or endorsing a specific NPS pollution control implementation program, a regional board must determine that there is a "high likelihood" the implementation program will achieve any applicable water quality objectives. (NPS Policy, p. 11.) Factors to be considered include consideration of management practices and the process for ensuring their implementation, assessment of the effectiveness of management practices, and the level of discharger participation. (NPS Policy, p.11.)

Here, the 2017 Draft Waiver is an almost verbatim copy of the 2012 Waiver that was held to be legally insufficient on this point. (*Monterey Coastkeeper v. California State Water Resources Control Bd.*, Super. Ct. Sacramento County, 2015, No. 34-2012-80001324, p. 36-38.) Although the 2017 Draft Waiver states that dischargers must meet all water quality standards, its proscribed management practices are insufficient to ensure compliance. The Regional Board has also failed to determine that there is a high likelihood that implementation of this waiver will be successful in attaining the applicable water quality standards. Further, the level of meaningful discharger participation in the 2017 Draft Waiver is likely too limited to create a high likelihood of success of the program.

The 2017 Draft Waiver also fails to satisfy the specific requirements of the Key Elements of the NPS Policy.

I. Key Element 3

Key Element 3 states, "Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program shall include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements." (NPS Policy, p.13.) Further, the time schedule may not be longer than what is "reasonably necessary" to achieve water quality objectives. (*Id.*)

Here, the 2017 Draft Waiver fails this element because it does not contain, "a specific time schedule" or "quantifiable milestones" that will ensure progress towards achieving water quality standards. Instead, the time schedules identified in Table 2, Table 3, and Table 4 of the waiver only ensure compliance with the waiver provisions, not compliance with water quality standards. (See 2017 Draft Waiver, p.39-42.) Further, these time schedules have simply been extended from what was required in the 2012 Waiver, which fails to demonstrate that they are no longer than what is "reasonably necessary" to achieve compliance with water quality standards.

The nitrate milestones cannot be said to be "quantifiable" or to ensure progress towards compliance with water quality standards. Instead, these milestones simply require a discharger to show "measurable progress towards water quality standards" for all dischargers and for Tier 3 dischargers to "achieve an annual *reduction* in nitrogen loading to groundwater." (2017 Draft Waiver, p.41-42.) These milestones are too amorphous to satisfy the requirement of quantifiability.

II. Key Element 4

Key Element 4 states, "An NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required." (NPS Policy, p.13.)

The 2017 Draft Waiver fails this element because the monitoring and reporting requirements apply to an insufficiently small subsection of dischargers and the "feedback mechanism" of monitoring and reporting is insufficient to determine compliance with the Basin Plan.

III. Key Element 5

Key Element 5 states, "Each RWQCB shall make clear, in advance, the potential consequences for failure to achieve an NPS control implementation program's stated purposes." (NPS Policy, p.14.) While not all NPS programs need be directly enforceable, any enforcement limitations that might be encountered should be well understood by the RWQCB prior to approving or endorsing the program. (*Id.*)

The 2017 Draft Waiver does not make clear what, if any, consequences will be imposed for failure to comply with the management practices and monitoring/reporting requirements of the waiver. Instead, the waiver provides only a tentative and ambiguous enforcement policy. (2017 Draft Waiver, p. 4.) The 2017 Draft Waiver simply states, "if the discharger fails to address impacts to water quality by taking the actions required by this Order, including evaluating the effectiveness of their management practices and improving as needed, *the discharger may then be subject to progressive enforcement and possible monetary liability.*" (*Id.* [emphasis added].) This policy seems to indicate that an enforcement action will be forthcoming if a discharger fails to comply with the waiver, but fails to analyze enforcement limitations that might be encountered. Further, the type of enforcement action is not even specified—such as whether the board will proceed through an informal or formal action. There are countless difficulties to enforcement that the Regional Board could face, whether acting through a notice of violation, time schedule, cleanup or abatement order, cease and desist order, notice to comply, civil administrative order, referral for criminal penalty, or any other enforcement mechanism. None of the potential hurdles to enforcement have been analyzed to the point of being "well understood" as required by this element of the NPS policy.

The Regional Board is also required to analyze other non-enforcement mechanisms that could be used to ensure compliance with water quality standards, such as rescinding the waiver, terminating its applicability to individual dischargers that fail to comply, or the possibility of issuing waste discharge requirements in place of the waiver and individualized enforcement actions. (See NPS Policy, p.5.) Similarly, these other mechanisms have not been sufficiently analyzed to satisfy this key element.

Although the 2017 Draft Waiver expressly acknowledges it is subject to the NPS policy, as described above, it fails to satisfy its requirements. The waiver purports to satisfy the NPS Policy through management practices and monitoring/reporting requirements, but these elements are insufficient to satisfy the Key Elements of the NPS Policy.

The Human Right to Water

Water Code section 106.3 declares that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes, and requires all relevant state agencies to consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria. The State Water Board Resolution No. 2016-0010 identifies the human right to water as a top priority and core value of the state and regional Water Boards, and affirmed the State Water Board's commitment to consider how its activities impact and advance the human right to safe, clean, and affordable water to support basic human needs.

Although the 2017 Draft Waiver acknowledge the human right to water, it fails to meaningfully consider the consequences of approving the proposed regulatory program on the safety, cleanliness, and affordability of the water in communities that rely on water that either is or will be contaminated, as a result of the discharges it will allow to occur. (see 2017 Draft Waiver, Attachment A, p. 43.)

Conclusion

For the foregoing reasons, we urge the Regional Board to reconsider the 2017 Draft Waiver.

Colin Bailey
Executive Director
The Environmental Justice Coalition for Water

Randy Reck
Legal Fellow
The Environmental Justice Coalition for Water