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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

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

Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, a public agency,

Respondent,

OCEAN MIST FARMS, et al.,

Respondent-Intervenors.

Case No. 34-2012-80001324

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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

Action Filed: Nov. 29, 2012

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INTRODUCTION

The most important facts in this case are undisputed. The Central Coast Regional Water Quality Control Board ("Regional Board") and the State Water Resources Control Board ("State Board") are the only two agencies with the authority to regulate agricultural runoff in the Central Coast Region. Although the Boards have regulated such runoff since 1983, agricultural pollution in the Central Coast Region has gotten significantly worse. *See* Final Administrative Record – Regional Board ("RB") 3758-64, 4849, 5464, 8467; Final Administrative Record – State Board ("SB") 3173. Roughly "2,000 dump truck loads of pure ammonium-nitrate fertilizer" continues to leach into the Region's groundwater every year. RB 5484. If nitrate contamination continues unchecked, the groundwater for 80 percent of people in the Salinas Valley and other areas will be undrinkable by 2050. SB 3173. Meanwhile, pesticides are rendering more and more surface waters toxic to fish, insects, and other aquatic life. Worsening contamination threatens the Region's exceptional biodiversity, RB 8506, and indeed the agricultural industry itself; growers depend on clean water for irrigation, especially in this time of historic drought. In short, the State Board and Intervenors do not dispute that the Central Coast Region's surface waters and groundwater are highly polluted with pesticides and nitrates, that such pollution is getting worse, or that discharges from irrigated agriculture are primarily responsible for these problems.

Thus, the only issue before the State Board in 2012 and 2013 was how to effectively abate the pollution—more specifically, to determine what measures were required by California's Porter-Cologne Act, Central Coast Basin Plan, Nonpoint Source Policy, Antidegradation Policy, and other applicable laws and policies to achieve the Basin Plan's water quality objectives and protect beneficial uses. The true experts in this case—the staff of the Regional Board—knew the answer: "[t]he agricultural industry must implement the most effective management practices (related to irrigation, nutrient, pesticide and sediment management) that will most likely yield the greatest amount of water quality protection, and verify their effectiveness with on-farm data." RB 1129. For its part, the Regional Board "must establish a known and reasonable time schedule, with clear and direct methods of verifying compliance and monitoring progress over time." *Id.* In short, what was necessary were specific, enforceable prohibitions and standards, a robust monitoring program capable of verifying

results, and concrete timelines for compliance. Only a conditional waiver with all of these things would restore water quality in the Central Coast on a meaningful timeframe.

The State Board's Modified Waiver does not contain any of these elements, let alone all of them. The Waiver contains no prohibitions on pollution, no enforceable standards or milestones, and only weak monitoring. Respondents counter in two ways. First, they make a series of procedural arguments unrelated to the merits: Petitioners did not exhaust their administrative remedies; the Court should ignore the findings and recommendations of expert Regional Board staff; and the Court should defer to the State Board's "technical expertise." However, as this brief shows: (1) Petitioners fully exhausted their administrative remedies; (2) the Regional Board staff's findings and recommendations are highly relevant, and the State Board never rejected them during the administrative process and does not do so in this litigation; and (3) the State Board deserves far less deference than it claims a right to. Second, on the merits, Respondents contend that Petitioners demand too much regulation too quickly, and that the State Board's "minimal" changes to the 2012 Waiver "clarified" the Waiver and made it "more effective." These arguments misconstrue Petitioners' arguments and the law and are not supported by the weight of the record evidence.

At the end of the day, the State Board settled on a conditional waiver that allows agricultural polluters to continue to internalize profits and externalize costs—to take clean water, use it for their own purposes, and return it to the public heavily polluted with nitrates and pesticides. Whereas an effective waiver would comply with the law and serve the public interest by forcing polluters to internalize the costs of polluting a shared resource, the State Board's Modified Waiver continues to place most of the burden on the Regional Board and the public. That result is not only unlawful; it is unconscionable.

ARGUMENT

I. The State Board's Threshold Arguments Lack Merit.

The State Board makes three threshold arguments unrelated to the merits of Petitioners' claims: (1) Petitioners did not administratively exhaust many of their objections to the Modified Waiver; (2) Petitioners fail to distinguish between actions of the Regional Board versus those of Regional Board

staff; and (3) the State Board is an expert agency and deserves significant deference. None of these arguments has merit.

A. Petitioners Fully Exhausted Their Administrative Remedies.

The State Board argues that Petitioners did not exhaust their administrative remedies with respect to "the bulk of the issues now raised before this Court." State Board Opposition Brief ("SB Opp. Br.) at 13; *see also* Intervenors Opposition Brief ("Int. Opp. Br.") at 37, 40. Specifically, the State Board contends that Petitioners must have raised each and every issue they raise in this litigation in their administrative petition to the State Board. SB Opp. Br. at 8; *see also id.* at 18 n.10, 23, 31, 43. The Board also implies that, during the administrative process, Petitioners, not other parties, must have raised the issues they now raise in this litigation, and Petitioners must have precisely raised their specific objections to the Modified Waiver. *See id.* at 10 & n.8, 18 n.10, 20, 22, 24, 31, 37 n.26, 38-40 & n.29, 43.

These arguments directly contradict the State Board's admission, in its demurrer to Petitioners' California Environmental Quality Act ("CEQA") claim, that "Petitioners exhausted their administrative remedies regarding all of their other four causes of action by explicitly raising their contentions about the alleged deficiencies of the State Board order in their public comments prior to its adoption on September 24, 2013." State Board Demurrer ("Demurrer") at 4. Petitioners' arguments in their opening brief stem directly from their writ petition in this case, which the State Board had before it when it made this admission.

The State Board's admission is correct: all of the issues Petitioners raise in this litigation were raised during the administrative process for the Modified Waiver, and therefore are properly before this Court. The primary purpose of the exhaustion requirement is to ensure that an agency is apprised of all the relevant facts and issues, so that it can consider and fix any legal errors during the administrative process. *Ctr. for Biological Diversity v. Cnty. of San Bernardino*, 185 Cal. App. 4th 866, 890 (2010). That purpose is satisfied where interested parties raise their concerns during the administrative process, regardless of (1) when those comments are raised (in this case, during the Regional Board process, the State Board process, or in administrative petitions for review), or (2) who raised them (Petitioners or other interested parties).

That conclusion flows from the fact that "[c]onsideration of whether exhaustion of administrative remedies has occurred depends upon the procedures applicable to the public agency in question." *Citizens for Open Gov't v. City of Lodi*, 144 Cal. App. 4th 865, 876 (2006). The State Board's appeal process is set forth in Water Code section 13320, which provides, in pertinent part: "Within 30 days of any action or failure to act by a regional board . . ., an aggrieved person may petition the state board to review that action or failure to act. . . . The state board may, on its own motion, at any time, review the regional board's action or failure to act." Cal. Water Code ("Water Code") § 13320(a).

Such language does not require an "aggrieved person" to specify the issues for review in an administrative petition, nor does it limit the State Board's consideration of the 2012 Waiver to the issues raised by the person filing the petition. These rules make sense. As was the case in *Citizens for Open Government*, the petition for review is a transfer of final decision-making authority from the Regional Board to the State Board—that is, a procedural mechanism for triggering the State Board's independent and new consideration of the 2012 Waiver. *See Citizens for Open Gov't*, 144 Cal. App. 4th at 877. The State Board's final September 24, 2013, order ("State Board Order") reflects its role not as an appellate tribunal but as an independent decision-making body. In other words, the State Board did not just affirm or deny the Regional Board's decision; rather, it took the entire 2012 Waiver under consideration, accepted public comments concerning all relevant issues, made findings, and reached a new decision. *See* SB 5637 ("[T]he State Water Board has decided to review the Agricultural Order on its own motion."). As such, the issues that were raised in comments and objections made by Petitioners and other interested parties throughout the Regional Board and State Board administrative process were before the State Board and are properly before this Court. Like the City of Lodi in *Citizens for Open Government*, the State Board had "as full an 'opportunity to receive and respond to articulated factual and legal theories' before making its decision as it did before it had to respond to

[Petitioners'] petition for writ of mandate." *Citizens for Open Gov't*, 144 Cal. App. 4th at 878.[1] Tellingly, during the administrative process for the Modified Waiver, the State Board never objected to Petitioners' comments on the ground that they were not raised in their administrative petition for review, and in fact allowed all comments based "upon evidence *in the record* or upon legal argument." SB 5640 (emphasis added).

Other authorities undermine any notion that Petitioners are limited to the issues they (1) personally and (2) precisely raised. Regarding who may raise concerns, first, the Water Code provides that "any aggrieved party"—not just those who participated in the administrative process—may file a petition challenging a decision by the State Board. Water Code § 13330(a). Second, the Board's regulations contain no restrictions on who may petition. *See* 23 Cal. Code Reg. §§ 2050-2068. Third, the courts have repeatedly held that exhaustion is satisfied so long as the issue was raised during the administrative process, regardless of who raised it. In *Evans v. City of San Jose*, 128 Cal. App. 4th 1123, 1137 (2005), a case involving a challenge to a city redevelopment plan, the court rejected the argument that a party "can only raise issues in her legal action that she herself personally raised during the administrative hearings." In *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1199 (2004), the court explained in a CEQA action that a "party can litigate issues that were timely raised by others," so long as "that party objected to the project approval on any ground during the public comment period or prior to the close of the public hearing on the project" (quotation marks omitted). As the *Evans* court observed, the primary purpose of exhaustion—to apprise an agency of all relevant concerns—is satisfied regardless of who raises the concerns at issue. *Evans*, 128 Cal. App. 4th at 1137 (citing *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 268 (1972) ("Nothing more could effectuate the policy of the exhaustion doctrine. To require [the named plaintiffs]

[1] The two authorities the State Board cites, from 1977 and 1987, are not to the contrary. *See* SB Opp. Br. at 8. In *Hampson v. Superior Court*, 67 Cal. App. 3d 472, 484 (1977), no review whatsoever was sought of the Regional Board's decision under section 13320. As for *People v. Barry*, 194 Cal. App. 3d 158, 178-79 (1987), while it is true that the court refused to consider an issue that the petitioner "never tendered . . . in his petition for review" to the State Board, there is no indication that the appellant or anyone else ever raised the issue at any point during the Regional Board or State Board administrative proceedings. *See id.* at 161-69. (In fact, there was not even a proceeding before the State Board because the Board denied the appellant's petition for review. *Id.* at 168.) As discussed below, the same cannot be said of *any* issue Petitioners raise in this litigation.

to have personally appeared, in addition to the others, . . . would serve no additional purpose."), *disapproved of on other grounds by Kowis v. Howard*, 3 Cal. 4th 888 (1992).

Regarding the precision with which a party must raise its concerns, a petitioner is neither required to "identify[ ] the precise legal inadequacy" at issue, *Save Our Residential Env't v. City of W. Hollywood*, 9 Cal. App. 4th 1745, 1750 (1992), nor use "magic words" to flag its objection, *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 795 (2006). Rather, a petitioner need only "fairly apprise[ ]" the agency of the "substance of the issue[s]." *Save Our Residential Env't*, 9 Cal. App. 4th at 1750; *see also Sierra Club v. Tahoe Reg'l Planning Agency*, 916 F. Supp. 2d 1098, 1109 (E.D. Cal. 2013) (a party's objections only need to be "'sufficiently specific so that the agency has the opportunity to evaluate and respond to them'" (quoting *Tracy First v. City of Tracy*, 177 Cal. App. 4th 912, 926 (2009)). Consistent with these principles, the courts routinely consider issues related to those that are specifically raised in Regional Board and State Board administrative proceedings. *See, e.g.*, *N. Gualala Water Co. v. State Water Res. Control Bd.*, 139 Cal. App. 4th 1577, 1605 (2006), *as modified on denial of reh'g* (June 16, 2006) (considering the merits of a "specific argument," even though it was not raised during the administrative proceedings for a State Board groundwater pumping permit, "because the argument is closely related to [the petitioner's] other objections").

The State Board also objects to many of Petitioners' arguments on the ground that they were raised in response to the Board's subsequent draft orders, in alleged violation of 23 Cal. Code Reg. § 2067 ("Written arguments submitted after the workshop meeting shall be limited to revisions to the proposed order that was considered by the state board at the workshop meeting."). *See* SB Opp. Br. at 12-13, 23. However, Petitioners fully complied with section 2067. The State Board released its first and second draft orders on June 6 and August 20, 2013. SB 5645, 6181. Then, at 8 p.m. on September 9, 2013, the night before the hearing on the second draft, the State Board issued its third draft order. SB 6390; *see also* SB 6462, 6730. The third draft was an about-face: it abandoned much of the first and second drafts and gutted the 2012 Waiver. SB 6730; *see also* SB 6713 ("Additional, last minute changes posted the night before the hearing seriously diluted our support for the [earlier drafts]."). Petitioners filed detailed comments objecting to the significant changes proposed in the third draft (which the State Board ultimately adopted in the Modified Waiver). *See* SB 6712-19, 6730-43.

Thus, in full compliance with section 2067, Petitioners' and other parties' comments focused on the changes in *each specific draft* that the State Board prepared. *See* SB 6712-19, 6730-43. Given the Board's ever-shifting target, Petitioners could not have raised (and were not required to raise) their objections to the State Board's ultimate proposal any earlier in the administrative process.

Trying a different tack, the State Board and Intervenors argue that Petitioners filed their writ petition "only against the State Board, and only for review of the State Board Order," not against the Regional Board or 2012 Waiver. SB Opp. Br. at 9; *see also* Int. Opp. Br. at 30. The implication is that anything that was part of the 2012 Waiver and left unchanged by the State Board is off-limits in this litigation. This argument is a straw man. As discussed above, the State Board "decided to review" the entire 2012 Waiver "on its own motion." SB 5637. The parts of the 2012 Waiver that the State Board left unchanged, and against which Petitioners level some of their objections, are also part of the State Board Order and the resulting Modified Waiver. Put another way, the State Board and members of the public viewed the Modified Waiver as the sum of all its parts. Petitioners may appropriately raise objections to any part of the State Board's final decision, which consists of the State Board's reasoning in its final water quality order and the resulting conditional waiver. *Cf. Cal. Water Impact Network v. Newhall Cnty. Water Dist.*, 161 Cal. App. 4th 1464, 1489 (2008) ("Each step in the administrative proceeding cannot be reviewed separately, any more than each ruling in the trial of a civil action may be separately reviewed by a separate appeal.").

The remainder of this brief demonstrates that each and every issue Petitioners raise in this litigation was fully exhausted during the administrative process.

B. The Court Must Review the Entire Record in this Case, Not Just Those Limited Portions the State Board Now Argues Are Relevant.

The State Board argues that "Petitioners fail to distinguish . . . between drafts published by the Regional Board's staff and actions taken by the Regional Board itself in adopting the 2012 Waiver." SB Opp. Br. at 13 (emphasis removed). In the State Board's view, "the Regional Board never acted on or adopted the draft staff recommendations, so they have no relevancy to this proceeding." *Id.* at 8; *see also id.* at 22, 33.

1 This argument falters for at least three reasons. First, all of the documents before the Regional
2 Board and State Board, including drafts prepared by Regional Board staff, are relevant to the Court's
3 assessment of Petitioners' claims under Code of Civil Procedure section 1094.5. *See Ocheltree*
4 *v. Gourley*, 102 Cal. App. 4th 1013, 1017 (2002) ("In an administrative mandamus case, the
5 administrative record contains the evidence introduced at the administrative hearing.") (citing Cal. Civ.
6 Proc. Code § 1094.5(a) ("All or part of the record of the proceedings before the inferior tribunal,
7 corporation, board, or officer may be filed with the petition.")); *see also Cal. Youth Auth. v. State Pers.*
8 *Bd.*, 104 Cal. App. 4th 575, 586 (2002) ("In assessing whether substantial evidence exists, we consider
9 all evidence presented, including that which fairly detracts from the evidence supporting the Board's
10 determination" (quotation marks omitted).). The State Board did not object to including the Regional
11 Board staff's drafts or other documents in the administrative record for this case.

12 Second, the history behind the Modified Waiver is as relevant as the Waiver itself. As the Court
13 of Appeal noted in *California Water Impact Network*, "[e]ach step in the administrative proceeding
14 cannot be reviewed separately, any more than each ruling in the trial of a civil action may be separately
15 reviewed by a separate appeal." 161 Cal. App. 4th at 1489. The countless reports, studies, and draft
16 proposals prepared by the Regional Board staff were relevant to the State Board's deliberations, and
17 during its administrative process the State Board never limited itself or interested parties to documents
18 that only Regional Board members prepared. *See* SB 5640 ("All comments shall be based solely upon
19 *evidence contained in the record* or upon legal argument"). Indeed, the Regional Board Executive
20 Officer's goals for a new waiver, sent to prospective advisory committee members on December 12,
21 2008 (*see* RB 606), were reflected in every Regional Board draft of the waiver, and the degree to which
22 the Modified Waiver fulfills those goals is still an important measure of the Waiver's success or failure.

23 Third, the State Board's newfangled attempt to disavow the Regional Board staff's work is
24 disingenuous. Regional Board members are part-time political appointees who, rather than experts in
25 water quality regulation, often represent "key economic sectors in a given region, such as agriculture."
26 Water Code § 13201(a)-(b). Much of the real, objective expertise lies with the permanent Regional
27 Board staff who have degrees in water science, engineering, geology, and policy, and who presumably
28 are at least somewhat insulated from industry and political pressure. Neither the Regional Board nor

the State Board rejected, disavowed, or otherwise disapproved of the Regional Board staff's thorough analyses and findings (and do not do so in this Court). Indeed, in the Modified Waiver, the State Board copied or relied on much of the Regional Board staff's work. *Compare, e.g.*, RB 5488 (March 2011 Staff Report) *with* SB 7276 (final Modified Waiver adopting many findings in Staff Report); RB 3767-68 (November 2010 Regional Board staff draft waiver) *with* SB 7236-38 (final Modified Waiver copying draft waiver's findings).

C. The State Board Deserves Little Deference to its Legal Interpretations or "Technical Expertise."

Many of the State Board's arguments are premised on one idea: the Court owes the Board great deference. The Board asserts that the Court must defer to its "interpretation of the statutory and regulatory scheme" under the Water Code, bow to its "technical expertise," and accept its decisions "regarding regulatory methods to achieve water quality." SB Opp. Br. at 1, 11-12, 14, 17, 25, 30, 33, 37, 40, 42.

The Court's role is not so servile. Under the independent judgment standard that applies to the Board's interpretations of the laws it administers, those interpretations are given only that amount of deference "*appropriate* to the circumstances of the agency action." *Arenas v. San Diego Cnty. Bd. of Supervisors*, 93 Cal. App. 4th 210, 214 (2001), *as modified on denial of reh'g* (Nov. 13, 2001). Put another way, "[b]ecause an interpretation [of a statute] is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998); *see also Cal. Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11 (1990), *as modified on denial of reh'g* (Sept. 20, 1990) ("[C]ourts are the ultimate arbiters of the construction of a statute.").

And even where an agency reasonably interprets the law, it still may not abuse its discretion in applying the law to the facts before it. "The purpose of the writ of mandamus procedure is not to rubber-stamp every administrative decision that is rendered. If that were the case, there would be no point in reviewing administrative decisions at all. Reversal is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason. While the agency has discretion to act, that discretion is not unfettered." *Hankla v. Long Beach Civil Serv. Comm'n*, 34 Cal. App. 4th 1216,

1222 (1995); *see also* Cal. Code Civ. Proc. § 1094.5 (abuse of discretion exists where agency (1) proceeds contrary to the law, (2) issues an order or decision unsupported by its findings, or (3) makes findings unsupported by the evidence.). The Court, while not an expert in water quality or specific management practices, is the only body capable of deciding whether the Modified Waiver contains the ingredients, in kind and degree, that the law requires. Careful review shows that it does not.

II. The Modified Waiver Is Contrary to Law and Unsupported by the Record.

A. The Modified Waiver Violates Water Code Section 13269(a)(1) Because It Is Not Consistent with the Basin Plan and Is Not in the Public Interest.

The Porter-Cologne Act requires conditional waivers to be "consistent with any applicable state or regional water quality control plan and . . . in the public interest." Water Code § 13269(a)(1). The applicable "control plan" here is the Central Coast Basin Plan, which establishes water quality objectives to "ensure the reasonable protection of beneficial uses and the prevention of nuisances." Water Code §§ 13240-13241; Petitioners' Opening Brief ("Pet. Op. Br.") at 17-18 (describing specific objectives). Those objectives, in turn, must be attained through "[c]ontrol measures implemented by the Regional Board." RB 9211.

As Petitioners explained in their opening brief, the Modified Waiver is neither consistent with the Basin Plan nor in the public interest. The Waiver lacks specific, enforceable standards to attain water quality objectives on a meaningful timeframe, does not require adequate monitoring of water quality or management practices, does not comply with the Nonpoint Source Policy or Antidegradation Policy, and will not significantly improve water quality for the millions of people who live along the Central Coast. *See* Pet. Op. Br. at 17-31. Respondents' arguments to the contrary misconstrue Petitioners' arguments and the law and are not supported by the record.

1. Petitioners Argue that the Modified Waiver Must Lead to Compliance with the Basin Plan on a Meaningful Timeframe, Not that the Waiver Must Achieve "Immediate" Compliance or Specify the Method of Compliance.

The State Board contends that "Petitioners' fundamental grievance with the Modified Waiver is that it does not attempt to immediately solve all water quality problems in the Central Coast region"; a slower, "iterative" approach is necessary. SB Opp. Br. at 13; *see also id.* at 15, 25-28 & n.22, 34, 42.

Intervenors likewise argue that the Porter-Cologne Act requires just "reasonable" regulation, cleaning up agricultural pollution is expensive, and Petitioners want a solution that is "extreme" and contravenes the Water Code's prohibition against prescribing methods of compliance. Int. Opp. Br. at 1-3, 6-8, 23-24.

These arguments misconstrue Petitioners' arguments and the law. Petitioners recognize that abating agricultural pollution will take time and is costly, and accordingly do not argue that the Modified Waiver must achieve "instantaneous compliance," "instantly and extremely regulate" growers' practices, or satisfy Petitioners' "subjective view" of the law. *Id.* at 3, 8, 24; SB Opp. Br. at 15, 35. Rather, Petitioners argue only that the Modified Waiver must *actually lead to compliance with the Basin Plan on a meaningful timeframe*. And this is exactly what the Porter-Cologne Act requires: (1) a Basin Plan to achieve the "highest water quality which is reasonable," (2) water quality objectives that will meet that goal, (3) conditional waivers that set "[c]ontrol measures" which "*provide for the attainment of th[e] Basin Plan's beneficial uses and water quality objectives*," and (4) a "time schedule" no "longer than that which is reasonably necessary to achieve a[Nonpoint Source] implementation program's water quality objectives." Water Code §§ 13000, 13269(a)(1); RB 9211 (emphasis added); RB 9415.

In an attempt to rewrite these requirements, Intervenors cite to various sections of the Porter-Cologne Act that contain the word "reasonable" and then use them to argue that a waiver complies with the law so long as it is "reasonable." Int. Opp. Br at 6-7, 20-22. But those other sections do not prescribe the standards for conditional waivers—section 13269 does—and in any event do not mandate that requirements imposed upon polluters be "reasonable." Section 13263, for example, uses the word "reasonably" to refer to the water quality objectives set forth in the Basin Plan. *See* Water Code § 13263 (requiring Regional Board to "take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241"). Similarly, section 13000's mandate to regulate so as "to attain the highest water quality which is reasonable" sets the standard for Basin Plans, not waivers. *Id.* § 13000. Section 13000 is also, as Intervenors concede, "a general statement of legislative intent" that "does not impose any affirmative duty that would be enforceable through a writ

of mandate." *City of Arcadia v. State Water Res. Control Bd.*, 191 Cal. App. 4th 156, 176 (2010), *as modified on denial of reh'g* (Jan. 20, 2011); Int. Opp. Br. at 20 n.9. Indeed, because sections 13000 and 13263 guide the development of Basin Plans and water quality objectives, the reasonable balancing Intervenors seek is already reflected in the Central Coast Basin Plan's water quality objectives. Section 13269, which is the only provision governing conditional waivers, does not require a consideration of reasonableness, costs of compliance, or anything else. Rather, it simply requires that waivers be "consistent with" the Basin Plan, "in the public interest," and have adequate monitoring provisions. The Modified Waiver does not meet these requirements, for all the reasons discussed below and in Petitioners' opening brief.

Petitioners also do not argue that a conditional waiver should specify the method of compliance, in violation of Water Code section 13360(a). *See* Int. Opp. Br. at 23-24. Rather, Petitioners contend that the Modified Waiver fails to include enforceable standards, such as compliance targets and source-level monitoring data, to adequately verify the Waiver's effectiveness. Petitioners point to, for example, Provision 87.5, whose problems are described below and could be ameliorated by, among other things, requiring dischargers to employ one or more of a suite of pollution controls identified in the Regional Board's earliest proposals or in the U.C. Davis Report. *See, e.g.*, Pet. Op. Br. at 46.

2. The Modified Waiver Lacks the Specific, Enforceable Standards and Prohibitions Needed to Comply with the Basin Plan.

Stripped of their misrepresentations of Petitioners' arguments and the law, the State Board and Intervenors are left with the specific provisions of the Modified Waiver itself. The State Board argues that its changes to the 2012 Waiver were "minimal" and made the Waiver more "effective," and points to a "significant set of management practices and feedback mechanisms" that are "designed to achieve compliance with the Basin Plan." SB Opp. Br. at 33 & n.23; *see also* Int. Opp. Br. at 25. As we show below, these arguments fall short. Many of the Modified Waiver's provisions are necessary, but they are not enough to actually bring water quality into compliance with the Basin Plan's water quality objectives on a meaningful timeframe.

a. "Management Practice" Implementation

To defend the adequacy of nearly every provision in the Modified Waiver, the State Board and Intervenors insist that the Modified Waiver requires dischargers to implement "management practices." However, it is not enough to simply *implement* management practices; those practices must actually bring water quality into compliance with the Basin Plan's stated objectives. The Basin Plan, the Regional Board, and the courts all recognize that implementing management practices is not the same thing as achieving compliance. *See* RB 9214 (Basin Plan cautioning that "[t]he use of Best Management Practices does not necessarily ensure compliance with effluent limitations or receiving water objectives. . . . Monitoring and evaluation of Best Management Practices is an important part of the nonpoint source control programs."); RB 9413 (explaining that, under the Nonpoint Source Policy, "[management practice] implementation . . . may not be substituted for actual compliance with water quality requirements"); *see also Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986) ("The [Best Management Practices ("BMPs")], however, are merely a means to achieve the appropriate state Plan water quality standards. There is no indication . . . that the BMPs were to be considered standards in and of themselves. Adherence to the BMPs does not automatically ensure that the applicable state standards are being met."), *rev'd on other grounds sub nom. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

It is no coincidence that the "management practice" provision upon which the State Board and Intervenors rely most heavily to defend the Modified Waiver—Provision 87.5—is the most problematic. Again, that provision simply requires dischargers to "implement management practices that prevent or reduce discharges of waste that are causing or contributing to exceedances of water quality standards," and, when those efforts fail, to "implement improved management practices." SB 7187. Dischargers need only make a "conscientious effort to identify and implement management practices that effectively address the relevant water quality issue. SB 7186.

Thus, in the State Board's view, compliance with the Basin Plan is achieved when a discharger *believes* a management practice will be effective, not when the practice actually *is* effective.[2]

[2] Reinforcing this view, the State Board explained that its changes sought to make clear that a discharger would not "be in violation" of the Modified Waiver if the discharger is merely "implementing management practices in good faith to address problem discharges." SB 7186.

Similarly, according to Intervenors, Provision 87.5 "means that farmers . . . must comply with water quality standards, including [water quality objectives], *by implementing management practices*. If a farmer's implementation of initial practices is not effective, then Provision 87.5 requires the farmer to *implement new practices*." Int. Opp. Br. at 32 (emphasis added). Because Provision 87.5 effectively requires only the implementation of management practices, it unsurprisingly provides no standards by which to evaluate whether existing or "improved" management practices are actually working.[3] *See Asociacion de Gente Unida Por el Agua v. Central Valley Reg'l Water Quality Control Bd.*, 210 Cal. App. 4th 1255, 1277 (2012) ("*AGUA*") (lack of standards governing agency discretion fails to ensure compliance). And Provision 87.5 guarantees that the "[Regional] Board will not take enforcement action against a discharger that is implementing and improving management practices to address discharges impacting water quality." SB 7186; *see also* RB 5148-50 (Regional Board criticizing growers' request for a similar arrangement as inconsistent with the Porter-Cologne Act, Basin Plan, and Nonpoint Source Policy).

b. Nitrogen Reduction and Reporting

The Basin Plan prohibits nitrate concentrations above 45 milligrams per liter ("mg/L") in drinking water. RB 5476, 9199. For purposes of sustaining aquatic life, the Basin Plan directs that waters "shall not contain biostimulatory substances in concentrations that promote aquatic growths to the extent that such growths cause nuisance or adversely affect beneficial uses." RB 9195. Regional Board staff have interpreted this narrative standard to mean that nitrate concentrations cannot rise above 4.43 mg/L.[4] RB 5450, 9195. The State Board concedes that "nitrate pollution is a critical problem in the Central Coast Region." SB Opp. Br. at 16.

[3] Contrary to the State Board's "iterative" interpretation, *see* SB Opp. Br. at 27, Key Element 2 of the Nonpoint Source Policy requires that a control program describe the practices necessary to assure attainment of the program's stated purpose, the process for selecting practices, and the process for making sure those practices work. RB 9418. "[Management practices] implementation never may be a substitute for meeting water quality requirements." *Id.*

[4] The drinking water and aquatic life standards expressed above are expressed in the form of nitrates as nitrates; they may also be expressed as 10 and 1 mg/L nitrates as nitrogen, respectively. *See* Pet. Op. Br. at 6 n.3. Intervenors suggest that the Court should ignore the 4.43 mg/L aquatic life standard because (1) Regional Board staff, but not the Board itself, has adopted it and (2) the Regional Board deleted any reference to the standard in the 2012 Waiver. Int. Opp. Br. at 9-10. However, Intervenors discount staff's relevant expertise and omit that the State Board expressly included this standard in the Modified Waiver. *See* SB 7288.

Nitrogen balance ratios are one of the simplest and most effective ways for agricultural dischargers to reduce nitrate pollution to meet the Basin Plan's standards—specifically, by balancing how much fertilizer they apply with how much crops actually need. *See* RB 3789-90, 3928-29. Yet in the Modified Waiver, the State Board decided against requiring dischargers to meet or even just calculate nitrogen balance ratios. *See* Pet. Op. Br. at 19-20 (citing RB 8327; SB 7216, 7359-60). The Board justifies this decision on the ground that nitrogen balancing is "speculative" and "unreliable" because "crop nitrogen uptake (absorption) levels are not widely available and vary among those crops where levels are known." SB Opp. Br. at 17. In its Order, the State Board cited no evidence for these assertions, *see* SB 7210, 7216, while in its brief, the Board cites to staff notes from meetings with crop experts and technical advisers, *see* SB Opp. Br. at 17 (citing RB 3020, 3037-49, 3054). However, those notes show only that there is a range of uptake values for different conditions, not that there is uncertainty or that uptake values are unavailable.[5]

And there is no such uncertainty. As early as 2003, industry-funded research programs such as the Fertilizer Research and Education Program, administered by the California Department of Food and Agriculture, began disseminating literature regarding appropriate rates of nitrogen application based on crop nitrogen uptake. *See* RB 18591 (reference sheet produced for farmers showing charts with crop nitrogen uptake ranges for crops commonly produced in the Central Coast Region, including broccoli (180-220 pounds N/acre), cauliflower (18-220 pounds N/acre), celery (200-240 pounds N/acre), and lettuce (80-120 pounds N/acre)). Farm advisors subsequently have been implementing state-funded research grants to educate growers on nitrogen management based on nitrogen uptake. *See* RB 9020, 9023. Many other articles and reports discuss the wealth of information about crop nitrogen uptake and management practices available to address nitrate leaching. *See* RB 17564, 18440, 18486. Based on this and other information, the Regional Board amassed substantial evidence that nitrogen balance ratios could and should be calculated and implemented to reduce nitrogen loading to surface and groundwater. *See* RB 3019, 3041-3049; *see generally* RB 3012-61. The Regional Board and outside

[5] Curiously, the State Board had no concern about relying on statistical projections instead of actual data for groundwater monitoring. *See infra* pp. 29-30.

experts even agreed that values at the higher end of uptake ranges should be used in the ratios. RB 3048.

In light of the availability of industry-sponsored information, state-funded research, and other resources that show the value of nitrogen balancing ratios, the State Board's decision to eliminate any requirement for dischargers to meet, or at least report progress towards meeting, such ratios is unsupported by the evidence in the record. The Board's decision is particularly unreasonable given the absence of any other effective prohibition on nitrate pollution in the Modified Waiver.

c. Farm Plans and Management Practice Effectiveness

Farm Plans are comprehensive documents that guide what agricultural dischargers do to control pollution. Specifically, they are supposed "to identify the management practices that have been or will be implemented to protect and improve water quality" and "contain a schedule for implementation of practices and an evaluation of progress in achieving water quality improvement." RB 8532.

The Regional Board's early proposed waiver would have required dischargers to show in their Farm Plans that their discharges would not impair water quality. RB 3786. Subsequent revisions eroded this critical requirement. In the 2012 Waiver, the Regional Board required Farm Plans to require only a "[d]escription and results of methods used to verify practice effectiveness and compliance with this Order." RB 8486. In the Modified Waiver, the State Board whittled this requirement further to simply a "description of the method and schedule for assessing the effectiveness of each management practice, treatment, and control measure." SB 7190, 7351.

Respondents argue that the State Board's final change merely clarified the term "verify" to make clear that studies and statistical analysis were unnecessary. SB Opp. Br. at 20-21; Int. Opp. Br. at 29-30. If only that were true. By changing "[d]escription and *results of methods* used to verify practice effectiveness" to "*description* of the *method* and schedule for assessing the effectiveness of each management practice, treatment, and control measure," the Modified Waiver made it such that dischargers went from having to show whether their practices were reducing pollution to merely describing how they would ascertain whether their practices would reduce pollution. If the State Board had intended simply to clarify what "methods" dischargers should use, it could have just specifically

identified those methods (which it did).[6] The Board's significant revision of the Modified Waiver's Farm Plan requirements eliminated a critical feedback mechanism for ensuring that—or at least assessing whether—management practices are working. Without such information, the State Board cannot ensure that the Modified Waiver will lead to compliance with the Basin Plan.

d. Toxic Pesticides

The Basin Plan requires that "[a]ll waters shall be maintained free of toxic substances in concentrations which are toxic to, or which produce detrimental physiological human responses in, human, plant, animal, or aquatic life." RB 9196. Pesticides similarly shall not "reach concentrations that adversely affect beneficial uses." *Id.* Nonetheless, the State Board settled on a Modified Waiver that does not specifically prohibit or limit the use of pesticides, that requires growers to monitor for only 27 of hundreds of pesticides, and that determines whether a grower is subject to the strictest requirements (such as they are) based on only two pesticides, which growers can simply switch out with other toxic chemicals to avoid the stricter requirements. *See* SB 7345-46, 7404-05, 7455-56, 7525-26. Early, robust drafts of the waiver would have required much more. *See* RB 1230-32, 1258-59.

The State Board does not defend the Modified Waiver, instead choosing to hide behind the exhaustion doctrine. *See* SB Opp. Br. at 21-23 & n.15.[7] Intervenors, meanwhile, argue that the Modified Waiver has "many significant provisions that require the implementation of management practices relevant to pesticide applications," as well as pesticide monitoring. Int. Opp. Br. at 30. However, the only "provisions" to which Intervenors cite are requirements to (1) install pesticide backflow prevention devices, (2) properly handle, store, and dispose of pesticides, and (3) submit information about their compliance with Department of Pesticide Regulation conditions. SB 7254-56.

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[6] The State Board replaced action-forcing techniques like discharge sampling and calculated pollutant reductions with passive "visual inspections, photographs, soil nutrient testing, soil moisture measurements, and recordkeeping." SB 7190.

[7] The State Board is incorrect that the issue of pesticide controls was not raised until the State Board's third draft order. Many commenters, including some Petitioners, objected during the Regional Board process to using only two pesticides to classify dischargers into tiers (RB 4608-09, 4620-21, 4636), while others objected that pesticide monitoring was too limited (RB 4408). Once the State Board released its third draft order, which was markedly different from its prior two drafts, Petitioners immediately renewed their concerns. *See* SB 5999-6000, 6306, 6523.

Petitioners agree that these measures are necessary to achieve compliance with the Basin Plan, but there is no evidence they are sufficient, especially since they do nothing to curb the over-application of pesticides to crops. Similarly, the Modified Waiver's requirement for toxicity testing as part of a Sampling and Analysis Plan is too basic; among other things, it monitors pesticide discharges only to surface waters, not groundwater. *See, e.g.*, SB 7466, 7488-89; *see also* SB 7287 (State Board finding that "[r]esults from pesticide analyses . . . indicate a significant presence of pesticides in groundwater"). Moreover, the surface water monitoring that is required suffers from all of the problems associated with cooperative receiving water monitoring. *See infra* pp. 26-29. In sum, the Modified Waiver's pesticide provisions will not achieve compliance with the Basin Plan's water quality objectives.

e. Vegetation Buffers

As with pesticides, the State Board defends the Modified Waiver's failure to include provisions protecting vegetation buffers solely on the ground that Petitioners did not exhaust their administrative remedies. SB Opp. Br. at 23-24 & nn.16-17. They did.[8] Intervenors argue that the Basin Plan contains no habitat or vegetation requirements that apply to irrigated agriculture. Int. Opp. Br. at 30-31. It does. Specifically, the Basin Plan requires that an appropriately wide filter strip of vegetation be maintained "wherever possible," RB 9361, and the Regional Board interprets the Basin Plan to "require[ ] the protection of riparian habitat and the maintenance of adequate buffer zones . . . . [R]emoving riparian habitat and buffer zones on and around irrigated agricultural fields . . . is a direct violation of the Basin Plan." RB 608; *see also* RB 9262-64. Despite these requirements, despite the Regional Board's findings that vegetation buffers are critical to achieving several water quality objectives, RB 8526-31, and despite its own acknowledgment that protecting natural vegetation "is one of the most effective

[8] Petitioner Monterey Coastkeeper objected during the Regional Board to limiting the need for buffer plans to a certain subset of farms, as "[r]iparian buffer protections for all water bodies are necessary for the Conditional Waiver to be consistent with the Central Coast Region Basin Plan and for the Conditional Waiver to be 'in the public interest.'" RB 4609; *see also* RB 4407-09 (other commenter describing need for bigger vegetation buffers). During the State Board process, Petitioners' July 16, 2013, comment letter on the first draft of the State Board Order objected that in each Regional Board draft waiver the buffer requirements became less and less protective. SB 5829-30. The State Board points out that Petitioners generally approved of a water quality buffer plan, SB Opp. Br. at 24 n.17; *see also* SB 5835, but ignore their plea that all dischargers should have to prepare one, SB 6303. Petitioners' September 3, 2013, comment letter on the State Board's second draft also stated that a minimum vegetation buffer should be required for all dischargers. SB 6303; *see also* SB 6523-24 (another commenter objecting to lack of "minimum buffer requirements").

practices for protecting the[ ] most vulnerable waterways," SB 7218, the State Board failed to specify an appropriate width for vegetation buffers for the overwhelming majority of dischargers in Tiers 1 and 2, *see* SB 7360.

Intervenors point to Provision 39 in the Modified Waiver, which states that dischargers must maintain "existing, naturally occurring, riparian vegetative cover . . . in aquatic habitat areas as necessary to minimize the discharge of waste," as well as "riparian areas for effective streambank stabilization and erosion control, stream shading and temperature control, sediment and chemical filtration," and other benefits. Int. Opp. Br. at 31; SB 7255. However, this provision appears to apply only to existing vegetation buffers; where those buffers have been destroyed, a discharger does not need to restore them. Intervenors admit that growers intentionally have destroyed, and continue to destroy, riparian habitat. *See id.* at 16; *see also* RB 4897, 5511. The Modified Waiver will not maintain the vegetative cover that is so important to restoring water quality.

f. Tile Drains

The Modified Waiver fails to regulate discharges from tile drains even though, in the State Board's own words, they "carry pollutants to surface waters and are appropriate for management practice implementation." SB 7189 n.71; *see also* SB 7200; RB 3764. The State Board incorrectly argues that Petitioners failed to exhaust their administrative remedies, SB Opp. Br. at 24,[9] while Intervenors feebly argue that because "management practice requirements in the [Modified Waiver] apply to all farm discharges," they necessarily "include[ ] those from tile drains." Int. Opp. Br. at 31. Not so: the Modified Waiver admits that it "focus[es]" on "non-tile drain discharges," SB 7275, and it merely "encourages dischargers to coordinate" their practices with other dischargers, RB 8469; SB 7333. The Waiver does not require dischargers to actually adopt any practices addressing tile drains. *See also* SB 7351 (requiring only reporting of practices adopted).

[9] Petitioner Monterey Coastkeeper objected during the Regional Board process to changes that "appear[ ] to exempt tile drains from having to comply with nutrient water quality standards . . . . It is critical that the new Order address farms with tile drains along with all other dischargers." RB 4607-08; *see also* RB 4521, 4526-28 (other commenters raising similar concerns). Monterey Coastkeeper's statement during the State Board process that "I'm not disagreeing with anything" was premised on the mistaken understanding that the State Board would, in fact, regulate discharges from tile drains. SB 6594 ("Secondly, tile drains. They absolutely must be monitored where they leave the property or flow into a water of the state, and I think that's in the order."); *see also* SB 6012-13 ("Tile drains are critical. . . . The only way we're going to get the information that we need is to monitor those tile drains.").

g. Tiering

To defend the Modified Waiver, the State Board time and again relies on the marginally more stringent requirements that apply to Tier 3 dischargers. *See, e.g.*, SB Opp. Br. at 8, 18-19, 38, 46. Yet Tier 3 includes at most three percent of growers, and they can switch to a lower tier by joining a cooperative monitoring group or using pesticides other than diazinon or chlorpyrifos. RB 4854, 7755, 7779, 8481; *see also* Pet. Op. Br. at 25, 32-33.[10]

The State Board does not defend the fact that 97 percent of dischargers escape the only requirements that make the Modified Waiver more stringent than its predecessor (which the Regional Board concluded was a failure). *See* RB 3767, 4854, 5464, 7755, 7779, 8510. Instead, the State Board complains that different tiering criteria would have made for a "very complicated" process. SB Opp. Br. at 30. However, the Regional and State Boards chose the more complicated approach. While it is true that diazinon and chlorpyrifos cause toxicity in surface waters, scores of other pesticides do, as well. *See* RB 1230-32 (identifying 128 pesticides that "have an increased potential to degrade/pollute surface water"); RB 5452-54 (discussing toxicity of diazinon, chlorpyrifos, *and* malathion). Playing Whack-A-Mole as growers switch pesticides to avoid regulation is inherently confusing and ineffective. The approach proposed in the Regional Board's February 2010 draft was more sensible and more effective; it would have imposed the most stringent rules on growers that use any one of the many pesticides known to cause toxicity. *See, e.g.*, RB 1258-59.

The State Board also opines that it is a "good thing" if Tier 3 growers move to a lower tier, since it means they chose "to switch away from this class of pesticides," and/or join "third party groups" that could free up Regional Board resources and provide scaled-up technical expertise. SB Opp. Br. at 30-31. However, to change tiers, growers do not need to stop using an entire "class" of pesticides; they need only substitute diazinon or chlorpyrifos with another highly toxic pesticide in the

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[10] The State Board incorrectly argues that Petitioners "did not raise any issue regarding the tiering criteria" before filing their opening brief. SB Opp. Br. at 31. As early as November 2010, during the Regional Board process, Petitioner Monterey Coastkeeper objected that "the proposed tiering structure is not scaled appropriately to address water quality issues on the Central Coast"). RB 4607; *see also* RB 6602 (August 2011 letter in which two Petitioners and others objected that the "tiering criteria have already been relaxed to the point of near-inefficacy"); RB 4521, 4526, 4578, 4620, 4634, 4636 (other commenters raising similar concern). Petitioners and other commenters renewed their concerns throughout the entire State Board process. *See, e.g.*, SB 5458, 5999-6000, 6002, 6306, 6523, 6532.

same organophosphate class, such as malathion. *See* SB 6306 ("We believe there is clear evidence of switching from Diazinon and chlorpyrifos to other environmentally toxic pesticides such as malathion, possibly in order to avoid falling under Tier 3 requirements."). As for the supposed benefits of cooperative monitoring groups, the Regional Board was not so sanguine. *See* RB 5153-54 (condemning cooperative monitoring as not being able to "effectively characterize . . . discharge[s] from an individual grower's operations" and recommending "individual discharge monitoring to fill this information gap"); *see also infra* pp. 26-29 (discussing problems with cooperative monitoring).

Finally, the State Board says that tier changes are not "automatic" because they are "subject to evaluation" by a technical committee and to approval by the Regional Board Executive Officer. Those requirements are much less impressive than they sound. The committee has yet to be formed; the Executive Officer is not bound by the committee's findings; and the State Board weakened the standards underlying the Executive Officer's decision-making. Under the 2012 Waiver, dischargers seeking a tier change would have had to demonstrate that their proposed management practices had a "reasonable chance of *eliminating toxicity* within the permit term." RB 8479 (emphasis added). Now, a discharger need only show "*a reasonable chance of improving water quality* and/or reducing pollutant loading." SB 7249, 7343 (emphasis added).

Because the Modified Waiver is more stringent than the 2004 Waiver only by virtue of Tier 3's requirements, *see infra* pp. 36-37, the tier's limited size and ease with which dischargers can escape it are further evidence that the Waiver will not achieve compliance with water quality objectives.

h. The Expert Panel

The Modified Waiver unnecessarily and unlawfully relies on an "Expert Panel" to do what the State Board was required to do in the Waiver: adopt a program that will achieve compliance with the Basin Plan. The State Board responds that the Expert Panel is necessary because the development of a long-term program should be based on further study. SB Opp. Br. at 25.

However, the State Board's long-term approach should first and foremost be based on the Modified Waiver. By referring so many critical issues to the Expert Panel, the State Board (correctly) implies that the Board does not know whether the Modified Waiver does enough to achieve compliance with the Basin Plan. The Board's referral also correctly implies that the Modified Waiver cannot

provide the Regional Board the information it needs to implement the Waiver and make necessary adjustments. The State Board's lack of confidence is understandable, given that the Modified Waiver does not contain the specific, enforceable standards and prohibitions or adequate monitoring needed to ensure that dischargers are on their way to meeting water quality standards.

It is true that the Nonpoint Source Policy recognizes that it can take time to achieve water quality objectives. *See* SB Opp. Br. at 27 (citing RB 9419, 9422). But the Modified Waiver provides no real assessment of when the Modified Waiver will actually achieve water quality objectives. Moreover, how much compliance time is appropriate is a function of what has passed and what may come. As Intervenors recognize, the regulation of agricultural discharges in the Central Coast Region began in 1982. Int. Opp. Br. at 1, 13. From 1983 until 2013, agricultural discharges were regulated under three "waiver" programs, with the most recent program, the 2004 Waiver, failing to address the significant and growing water quality problems caused by those discharges. *See infra* pp. 36-37; Pet. Op. Br. at 11, 28-29. Now the Central Coast Region's surface waters and groundwater are as polluted as ever, and the Region is on the precipice of a public health crisis. *See infra* pp. 23-25; Pet. Op. Br. at 7, 9-10, 30-31. When there is a well-documented, persistent, public-health problem of such great magnitude, the State Board must act forcefully and quickly enough to meaningfully abate it. *See* RB 1147 (Regional Board staff recommending aggressive yet "reasonable" compliance schedules for different contaminants).

The Expert Panel is, at bottom, a stall tactic. Rather than meet its legal obligations now, the State Board has asked an outside panel to conduct more study for some future waiver that might theoretically do what the Modified Waiver was required to do now. Indeed, there is not even any process in place to ensure that the next iteration of the waiver, if the Regional Board chooses to continue this method of regulation, will be approved by the time the Modified Waiver expires. This delayed outsourcing of the Board's own duties is unlawful.

i. General Prohibitions on Pollution

Finally, the Modified Waiver, especially Provision 87.5, references other general compliance provisions that the State Board either unlawfully weakened or are laudable but empty aspirations, and on which Respondents rely to defend the Modified Waiver. *See, e.g.*, Int. Opp. Br. at 25, 30. For

example, where Provision 22 originally stated that "Dischargers must comply with applicable water quality standards," in the Modified Waiver it now says only that "Dischargers shall not cause or contribute to exceedances of" such standards." SB 7187. In other words, dischargers do not have to attain water quality objectives; they simply cannot make water quality worse than it already is. Such an approach is inconsistent with the Basin Plan's requirement that "[c]ontrol measures implemented by the Regional Board must provide for the attainment of this Basin Plan's beneficial uses and water quality objectives." RB 9211. Provision 23, meanwhile, states that dischargers "must comply with the applicable provisions" of the Basin Plan and "all other applicable water quality control plans," SB 7347, but contains no obligations to ensure such compliance. And the Modified Waiver contains a series of "non-enforceable" goals that dischargers must meet by specific dates, such as reducing nutrient loading by 50 percent by October 2015 and meeting water quality standards by October 2016. SB 7185, 7224-25. Indeed, because of the Modified Waiver's lack of enforceable standards, specific prohibitions, adequate monitoring, and other defects, the Waiver's "time schedule" for compliance with enumerated conditions (SB 7270-71, 7366-67) is incomplete and unachievable, and the Waiver's "milestones"—such as "water quality standards met" by October 1, 2016 (SB 7272-73, 7268-69)—are pure fantasy. *Cf. Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n,* 366 F.3d 692, 698 (9th Cir. 2004) (in the context of air pollution reduction plans, distinguishing between establishing general "targets" and actual requirements to meet them); *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 370-73 (E.D. Cal. 2007) (whether an action will achieve compliance is impossible to ascertain without knowing about specific reductions).

In short, the Modified Waiver is unlawful because it lacks those measures needed to "provide for the attainment of th[e] Basin Plan's beneficial uses and water quality objectives." RB 9211.

3. The Modified Waiver Is Not in the Public Interest.

The Modified Waiver is not in the public interest because there is no evidence the Waiver will lead to quantifiable improvements in water quality under the Basin Plan or arrest the continued degradation of the Central Coast Region's waters in compliance with the State Antidegradation Policy. *See* Pet. Op. Br. at 29-31.

The biggest problem, however, is that the Modified Waiver will not avert an uncontroverted public health disaster: the groundwater for 80 percent of people in the Salinas Valley and other areas will be undrinkable by 2050 due to rising nitrate contamination. SB 3173, 5814; *see also* SB 7283 (describing adverse effects of nitrate contamination). Ninety percent of Central Coast Region's millions of residents rely on groundwater wells for drinking water and other beneficial uses. RB 8506; SB 3180. The people most affected by nitrate contamination are residents of rural communities who drink from shallow domestic wells. RB 8506. Many of these people are low-income and cannot afford to pay to clean up their water or get water from somewhere else. RB 5502-04, 8514-15; SB 3215, 6139. While nitrate pollution is the primary problem, toxic pesticides are also prevalent throughout the Region and can lead to neurological diseases and pregnancy problems. RB 5500. The Modified Waiver does almost nothing to address this crisis and protect Central Coast residents' human right to clean water. *See* Water Code § 106.3(a).

The State Board responds that the Regional Board made adequate public interest findings, the Modified Waiver is more stringent than the 2004 Waiver, and agricultural pollution is too difficult to tackle any other way. SB Opp. Br. at 34-35. However, the Regional Board's findings are conclusory "without reference to the record," *AGUA*, 210 Cal. App. 4th at 1280-81; the preponderance of the evidence shows that the Waiver will not put the Central Coast Region on a path to achieving water quality objectives and protecting beneficial uses on a meaningful timeframe.[11] Finally, the notion that the Modified Waiver is the only possible means of addressing the Central Coast Region's staggering pollution is specious; the Regional Board's earliest proposals and the U.C. Davis Report identified any number of better alternatives. *See* Pet. Op. Br. at 11-13; SB 3176, 3197-206, 3231-41, 3907-35 (U.C. Davis Report recommendations).

For their part, Intervenors argue that the Modified Waiver satisfies the public interest because it requires notice to consumers when nitrates exceed the drinking water standard. Int. Opp. Br. at 35. Providing such notice is a basic function of government, and it is not enough: a waiver that warns

[11] The State Board concedes that it did not make additional findings to support the public interest, but argues that no such findings were necessary because the Modified Waiver minimally changed the 2012 Waiver. SB Opp. Br. at 35. As we have explained, the Board made substantial and material, not minimal, alterations to the 2012 Waiver; the Modified Waiver consists of the State Board's changes *and* the parts of the 2012 Waiver that were unchanged; and the Regional Board's public interest findings are unsupported by the record.

people their water is not safe to drink is next to useless when those people cannot afford to clean it or find clean, affordable water somewhere else. Intervenors also suggest that the Modified Waiver best avoids "devastating economic impact[s] on the Central Coast's agricultural industry." *Id.* at 35. No agency has ever made such a finding, and Intervenors offer no evidence to support one. To the contrary, the Regional Board said there was "no significant information" to justify growers' "speculation" that the 2012 Waiver would "result in large scale termination of agriculture," RB 8817, and for good reason: a strong waiver would benefit growers and the public alike by minimizing the application of excess fertilizer and pesticides and cleaning up increasingly scarce water supplies.

Furthermore, the Regional Board was candid that dischargers, not the public, bear responsibility for the pollution they create, and that abating agricultural pollution "will also require changes in farming practices, will impose increasing costs to individual farmers and the agricultural industry . . ., and may impact the local economy." RB 3737. The Regional Board was equally clear that growers are not as vulnerable or inflexible as Intervenors suggest:

> It is critical that the Water Board require growers to do their part, especially in areas with the most severe pollution and greatest impact on beneficial uses. Central Coast growers are highly adaptive and innovative. The industry is constantly improving and reinventing itself as markets and technologies change. Experts agree that proven solutions are available and significant water quality improvement is possible.

SB 5526. It is time for growers to stop passing on the costs of their operations in the form of polluted drinking water, toxic streams, and collapsing ecosystems. The Regional and State Boards must, and can, adopt a waiver that requires growers to meaningfully share the burdens they create.[12]

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[12] Respondents do not dispute that the Modified Waiver is not in the public interest because it does not satisfy the Regional and State Boards' duties under the public trust doctrine. As trustees of the Central Coast Region's waters, the Boards had a duty to determine that any waiver they adopt would (1) further public purposes and (2) create no substantial effect on those waters. *Ill. Cent. Ry. Co. v. Illinois*, 146 U.S. 386, 453 (1892); *see also Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 447 (1983) ("The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses."); *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th at 778 ("Thus, in determining whether it is feasible to protect public trust values like fish and wildlife in a particular instance, the Board must determine whether protection of those values, or what level of protection, is consistent with the public interest" (internal quotation marks omitted).).

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B. The Modified Waiver's Monitoring Provisions Are Inadequate Under Water Code Section 13269(a)(2).

Section 13269(a)(2) of the Porter-Cologne Act provides that a conditional waiver's monitoring provisions "shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions." Water Code § 13269(a)(2). Put another way, monitoring provisions "shall include sufficient feedback mechanisms" to ascertain "whether the program is achieving its stated purpose(s)." RB 9419 (Nonpoint Source Policy). Additionally, "monitoring results shall be made available to the public." Water Code § 13269(a)(2).

The Court of Appeal's recent decision in *AGUA* elaborates on what these requirements mean. The waiver in *AGUA* regulated waste from dairy operations by relying on monitoring to prevent further degradation of groundwater. *AGUA*, 210 Cal. App. 4th at 1258-59. The court struck down the waiver's monitoring program because (1) "the type of monitoring required by the Order[was] inadequate to determine whether the [ ]water [was] being degraded"; (2) the program did not "show pollution until several years after its release"; and (3) there were "no mandatory standards governing the exercise of the Executive Officer's discretion," and this "discretionary authority does not ensure that no further degradation of groundwater occurs." *Id.* at 1275, 1277. As we show below, the Modified Waiver suffers from precisely the same flaws.

1. The Modified Waiver's Monitoring Provisions Are Not Sufficient for "Verifying the Adequacy and Effectiveness of the Waiver's Conditions."

a. Surface Water Monitoring

The Modified Waiver relies on receiving water monitoring in lieu of discharge monitoring for most dischargers, even though the Regional Board insisted that discharge monitoring was essential to an effective waiver. RB 4850, 5153; SB 7390-91, 7435-36, 7496-97, 7513-15. The Waiver also allows dischargers to join cooperative surface water monitoring groups and create "alternative[s]" to the Waiver's monitoring requirements. SB 7174-76 & n.37, 7342-43 (Provision 11); *see also* Int. Opp. Br. at 36 (noting that a "majority of farmers [subject to the Modified Waiver] have selected to comply

1 through participation in cooperative monitoring programs"). Under these provisions, the Regional
2 Board will not be able to adequately identify where pollution is coming from or how to mitigate it.
3 The State Board defends receiving water monitoring on the ground that "the composition of
4 'end-of-field' discharges is so variable that monitoring such discharges . . . is not as valuable as
5 monitoring actual surface water quality where it counts." SB Opp. Br. at 37. If the State Board is right,
6 the variability of individual discharges only underscores the necessity of monitoring what individual
7 dischargers are doing. Moreover, much of the Central Coast Region's water quality will never be
8 monitored "where it counts." For the entire Region—the 11,274 square miles from San Mateo to Santa
9 Barbara, RB 9166-67—there are only 48 receiving monitoring sites under the Modified Waiver (one
10 every 235 square miles). *See* SB 7403. This means that many dischargers are miles and miles away
11 from the closest monitoring site, and much of their pollution disperses into and contaminates the
12 environment before reaching one. The State Board tries to reassure the Court that the Modified
13 Waiver, by retaining individual surface discharge reporting for Tier 3 dischargers, retains
14 accountability for "high-risk" discharges. SB Opp. Br. at 37-38. Again, Tier 3's benefits are of little
15 comfort when at most three percent of dischargers are in Tier 3, and when it is so easy for dischargers
16 to escape to a lower, less stringent tier.[13]
17 Intervenors contend that while "surface water monitoring results may not directly be applicable
18 to all watersheds, the Regional Board can generally extrapolate results to apply throughout the region
19 based on the types of practices implemented." Int. Opp. Br. at 34. Intervenors offer no evidence to
20 support this claim, but even if it is correct, it is an admission that the monitoring information is
21 insufficient on its face to determine the effects of individual dischargers' pollution on water quality.
22 Moreover, the Modified Waiver contains no mandatory standards for the Regional Board to determine
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[13] The State Board contends that Petitioners did not exhaust the issue of whether individual surface water monitoring should be required of dischargers outside Tier 3. SB Opp. Br. at 38. As the Board admits, this issue had already been raised by agricultural petitioners during the State Board process. *Id.*; SB 5716; *see also* RB 6060 (environmental group arguing for "extend[ing] the individual discharge monitoring requirement to Tier 2"). In addition, Petitioners and other commenters objected during the Regional Board *and* State Board processes to the absence of individual monitoring more generally. *See, e.g.*, RB 1113, 5266; SB 3071, 5837.

how to extrapolate monitoring results. Such unbounded "discretionary authority does not ensure that no further degradation of [ ]water occurs." *AGUA*, 210 Cal. App. 4th at 1277.[14]

To defend cooperative monitoring, the State Board asserts that individual monitoring provides "scattered" and "unreliable" data that would overwhelm Regional Board's "limited staff resources." SB Opp. Br. at 38. This assertion appears nowhere in the State Board Order and is therefore a post-hoc rationalization by the State Board's counsel. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . . It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *S. Cal. Edison Co. v. Pub. Util. Comm'n*, 85 Cal. App. 4th 1086, 1111 (2000) ("[A] court may not accept appellate counsel's *post hoc* rationalizations for agency action" (internal quotation marks omitted).).

In any event, the State Board's assertion is contradicted by express statements from Regional Board staff, who will be called upon to implement the Modified Waiver, and by the Regional and State Boards' own actions. For from fearing too much data, Regional Board staff implored that individual surface water monitoring was the "necessary next step to resolve the severe water quality problems" in the Region. RB 4850; *see also* RB 1219 ("Individual on-farm water quality monitoring is critical to . . . protect water quality."); RB 5153-54 (condemning cooperative receiving water monitoring as not being able to "effectively characterize . . . discharge[s] from an individual grower's operations" and recommending "individual discharge monitoring to fill this information gap," which had only gotten worse under the 2004 Waiver's cooperative monitoring program). In addition, the Regional and State Boards' choice to require (at least in theory) individual surface water monitoring for the highest risk dischargers belies any notion that such monitoring is unreliable or would overwhelm Regional Board staff.

[14] Similarly, the Modified Waiver gives the Executive Officer the authority to reduce the Waiver's 48 monitoring sites but provides no criteria for doing so. SB 7403.

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Finally, both the State Board and Intervenors point to the more stringent monitoring requirements of Tier 3. SB Opp. Br. at 37-38; Int. Opp. Br. at 33. Tier 3's benefits are illusory for all the reasons discussed above and in Petitioners' opening brief.

b. Groundwater Monitoring

Groundwater monitoring under the Modified Waiver is pitiful. Dischargers can skirt the requirement to monitor drinking water wells by designating them as irrigation wells. While dischargers have to monitor their primary irrigation wells, they do not actually have to sample the groundwater in them. Rather, Tier 1 and Tier 2 dischargers can use existing data or studies to estimate pollution levels, while dischargers in any tier, including Tier 3, can join cooperative groups and rely on existing data or "statistically valid projection[s]." SB 7194, 7396-7400, 7442-45, 7505-06. In the unlikely event a discharger chooses to forego these shortcuts and actually conduct groundwater sampling, it must do so only infrequently. SB 7396-97, 7441-42, 7502.[15]

The State Board's first response is a tautology: the Regional and State Boards determined that these provisions are "sufficient," so they are. SB Opp. Br. at 39. The State Board offers no evidence to support that claim or to address three critical concerns. One, primary irrigation wells may be located far from the area where most percolation and groundwater contamination occurs. Two, as Petitioners noted during the administrative process, "drinking water wells are often abandoned when the supply exceeds the nitrate standard," which "means the nitrate results are skewed downwards and may not

[15] The State Board is incorrect that Petitioners did not exhaust their claims concerning the limited types of wells that must be monitored or the frequency of monitoring. SB Opp. Br. at 39, 40 n.29. Petitioners and other commenters were clear throughout the Regional Board process that more groundwater monitoring data had to be collected. RB 1076, 1113, 4590, 4622, 4628, 5422, 5360; *see also* RB 5709 (Regional Board recognizing that "several comment letters objected to analytes and frequency for individual discharge monitoring"). Then, when Petitioners and others sought review of the 2012 Waiver before the State Board, the Regional Board advised the State Board in its response that "public comments from environmental justice organizations and environmental organizations have indicated that the groundwater monitoring requirements in the 2012 Order are insufficient and too infrequent." SB 5599-5600. The State Board plainly knew the adequacy of groundwater monitoring was contested.

The State Board also contends that Petitioners "indicated support" for the Modified Waiver's groundwater monitoring program. SB Opp. Br. at 39 n.28 (citing SB 5824, 5835). The prior citations prove otherwise, and the Board is confusing Petitioners' general support for groundwater monitoring with approval of the Modified Waiver's specific provisions. Petitioners were not so confused, clarifying, for example, that "[w]hile we appreciate the recommendation of staff to uphold the requirements for groundwater monitoring in the Order, we are puzzled by the concurrent effort to reduce those same requirements through the recent adoption of cooperative monitoring plans." SB 5824.

accurately portray the water quality of the aquifer." SB 5824. Three, pollution may not manifest "until several years after its release." *AGUA*, 210 Cal. App. 4th at 1275; *see also* SB 3821 (describing frequent, "years to decades" delay between when nitrates are released "and the appearance of nitrate in drinking water wells"). This delay is especially acute for deeper aquifers that supply large public drinking water systems are deeper than the shallower, smaller wells used by small communities and individuals. SB 2429, 2431, 3173, 7285.

Next, the State Board does not defend the use of existing data but offers that "the statistical approach was crafted through several weeks of careful consultation," including with public parties. SB Opp. Br. at 40. However, that consultation ignored Petitioners' longstanding pleas for more groundwater data, *see, e.g.*, RB 1076, and in any event does not make a statistical approach lawful. The Modified Waiver does not define "statistically valid," thereby leaving to dischargers and the Regional Board unfettered discretion to define it. *See AGUA*, 210 Cal. App. 4th at 1277. These and other gaps highlight the need for actual sampling data.

The State Board defends cooperative monitoring on the grounds that (1) it is cheaper than individual monitoring, and (2) the State Board clarified "the level of specificity with which a cooperative monitoring program must report water quality." SB Opp. Br. at 39-40. However, costs are not a relevant criterion under section 13269(a)(2), and groups need only "report results in a manner that is consistent with that approved by the Executive Officer in his or her approval of the cooperative groundwater monitoring proposal." SB 7195 (Order modifying Tier 1, 2, and 3 monitoring plans). No standards guide the Executive Officer's exercise of discretion. *See AGUA*, 210 Cal. App. 4th at 1276-77 (similar lack of standards rendered waiver unlawful). Intervenors take a different approach, claiming that "[a]ll dischargers," including those in groups, "must report their monitoring results." Int. Br. Op. at 33. This claim is misleading, as joining a group eliminates the need to report individually for Tier 1 and Tier 2 dischargers, and only Tier 3 dischargers with "outfalls" must conduct individual monitoring. SB 7513.

Finally, as for the frequency of any groundwater sampling that might occur, the State Board offers no defense on the merits, instead asking the Court to trust its "technical expertise." SB Opp. Br. at 40. However, the Board must do more to justify allowing 97 percent of dischargers to conduct only

two rounds of groundwater monitoring within the first year and one every five years after that where: (1) groundwater wells supply 90 percent of the drinking water for the Region's millions of residents, RB 8506; SB 3180; (2) "[n]itrate is arguably the most serious and widespread of all pollution problems in the Central Coast Region," RB 5449; (3) up to 50 percent of wells in portions of the Salinas Valley have average nitrate concentrations nearly twice the drinking water standard, RB 8512-13; and (4) concern over nitrate contamination of drinking water was one of the primary reasons for preparing a new conditional waiver, RB 1128-29. *See also* SB Opp. Br. at 16 ("There is no dispute that nitrate pollution is a critical problem in the Central Coast Region.").

c. Compliance Monitoring

In the Modified Waiver, the State Board deleted the 2012 Waiver's requirement for dischargers to report the "results of methods used to verify [management] practice effectiveness." SB 7190, 7135. The Board deleted the requirement to report progress towards nitrogen balancing, replacing it with a request for a "qualitative assessment of the discharger's experience." SB 7212-14. The Board inserted Provision 87.5, which requires dischargers to show only that they are making a "conscientious effort" to "identify and implement" practices, not that their management practices are working. SB 7186. The Board even allowed dischargers to make their Farm Plans available only "upon request," rather than submit them to the Regional Board. SB 7256.

The State Board argues that these changes merely "clarified" the Regional Board's intent. SB Opp. Br. at 41. To the contrary, the Board's changes fundamentally altered how the Modified Waiver's monitoring program works: management practice implementation is now the proxy for actual results. Put another way, whether dischargers are implementing practices is now the only measure of whether the waiver is meaningfully reducing agricultural pollution. Such a scheme does not allow the Regional Board "verify[ ] the adequacy and effectiveness of the waiver's conditions." Water Code § 13269(a)(2); *see supra* p. 13-14 (discussing problems with Modified Waiver's "management practice" scheme).

The Board also argues that its changes are consistent with the Nonpoint Source Policy, which lists various "feedback mechanisms" such as "photo monitoring" and assessments of "riparian and wetland habitat structure." SB Opp. Br. at 41 (quoting RB 9420). But the Policy only identifies these

measures as generically acceptable, and does not state or suggest that they are suitable for the agricultural pollution in the Central Coast Region. And in fact they are not, given the severity of that pollution, the high risk to drinking water supplies, and the demonstrated need for "clear and direct methods of verifying compliance and monitoring progress over time." RB 1129.

In short, "the type of monitoring" for which the Waiver provides does not enable the Regional Board to "determine whether the [Central Coast Region's]water is being degraded." *AGUA*, 210 Cal. App. 4th at 1274.

2. The Modified Waiver Fails to Disclose Adequate Monitoring Data to the Public.

The Porter-Cologne Act provides that "monitoring results shall be made available to the public." Water Code § 13269(a)(2). The Legislature added this provision specifically in response to widespread agricultural pollution. S.B. 923, 2003-2004 Assemb. (Cal. 2003). Given this mandate, and given the pervasive and continuing contamination of a public resource—water, especially drinking water—by irrigated agricultural operations in the Central Coast Region, members of the public have a legal right to know in detail what dischargers are and are not doing under the Modified Waiver, as well as the effects dischargers' actions are having on the water they drink and use.

That the Regional Board will disclose data "in compliance with applicable law" is of little comfort. SB Opp. Br. at 42. Water Code section 13752 exempts groundwater well logs from disclosure, while California's Public Records Act allows agencies to withhold any information submitted under a claim of confidentiality (virtually all groundwater well data submitted to public agencies is withheld under this provision). *See* Water Code § 13752 (referencing section 13751, which concerns groundwater monitoring); Cal. Gov't Code § 6254.5(e). More fundamentally, the Modified Waiver simply does not collect enough data or the right types of data. If the data the Regional Board collects under the Modified Waiver are not sufficient, the data the Regional Board gives to the public will not be sufficient, either. For all of the reasons set forth above, the Waiver's monitoring program does not come close to satisfying the public's right to adequate monitoring data.

C. The Modified Waiver Allows Continued Degradation of California's Waters in Violation of the State Antidegradation Policy.

Under California's Antidegradation Policy, neither the Regional Board nor the State Board may permit the degradation of State waters absent specific findings. RB 9377-78; *Admin. Procedures Update 90-004: Antidegradation Policy Implementation for NPDES Permitting* 2 (July 2, 1990) ("APU-90-004").[16] Specifically, high quality or "Tier 2" waters—those with quality levels that exceed water quality objectives—cannot be degraded unless the Boards expressly make certain findings. *See* RB 9377; *Topanga Ass'n for a Scenic Cmty. v. Cnty. of Los Angeles*, 11 Cal. 3d 506, 515 (1974). "Tier 1" waters, meanwhile, must "be maintained or improved to a level that achieves the objectives." APU-90-004 at 4. As Petitioners' opening brief makes clear, the Modified Waiver allows continued degradation of high quality and Tier 1 waters without the required findings, in violation of the Antidegradation Policy. *See* Pet. Op. Br. at 28, 36-43.[17]

Respondents counter in three ways. First, they argue that Petitioners are limited to challenging the changes made by the State Board to the 2012 Waiver because Petitioners did not raise antidegradation before the Regional Board. SB Opp. Br. at 43; Int. Br. at 37. Second, Respondents argue that the Modified Waiver is consistent with the Antidegradation Policy because the Waiver will prevent degradation. SB Opp. Br. at 43-44; Int. Opp. Br. at 38-39. They rely on the conclusory findings made by Regional Board for the 2012 Waiver, RB 8509, and by the State Board for its changes to the 2012 Waiver, SB 7230; *see also* SB Opp. Br. at 44 (asserting that no additional State Board findings were necessary). Third, Intervenors alone argue that, even if the Modified Waiver allows degradation, the State Board made the necessary findings under the Antidegradation Policy. Int. Opp. Br. at 40-43 (citing SB 7279). All three arguments fall short.

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[16] *Available at* http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf (last visited April 2, 2015).

[17] The State Policy "incorporate[s] the federal antidegradation policy [40 C.F.R. § 131.12] in situations where the federal antidegradation policy is applicable." APU-90-004 at 2. Intervenors argue that the federal policy should not apply here because "[t]he State Board and Regional Board have taken action pursuant to state law—not federal law." Int. Opp. Br. at 49. Intervenors' argument is incorrect; the federal policy applies in any circumstance in which the State policy is less protective of surface waters (the federal policy does not apply to groundwater).

1. Petitioners Exhausted Their Antidegradation Claims with Respect to the Modified Waiver *and* the 2012 Waiver.

Petitioners and other members of the public were clear from the very beginning of the Regional Board process that the continued "degradation" of the Central Coast Region's waters was their chief concern. *See, e.g.*, RB 1789-99, 2655, 2973, 2989-90, 4578, 4581, 4601-14; *see also* RB 4602 ("The November Draft Order does not, however, contain adequate mechanisms to address the degraded state of our central coast waterways, which in some ways are worse than they were in 2004. . . . The February Draft Order does comply with state and federal laws and is adequate to protect water quality."); RB 1328, 4607 (2010 and 2011 comment letters discussing waiver's need to comply with Water Code § 13000, which requires "protect[ing] the quality of waters in the State from degradation"). The Regional Board knew that compliance with the State Antidegradation Policy was an issue. *See, e.g.*, RB 695 (Regional Board briefing on the Antidegradation Policy); *see also* RB 101, 111, 235 (Regional Board's discussion of antidegradation during 2004 Waiver process). Then, in their petition for review of the 2012 Waiver to the State Board, Petitioners explained that a new conditional waiver needed to correct "ongoing water quality degradation in the Central Coast," and that the 2012 Waiver "allows agricultural discharges to continue degrading both surface water and groundwater quality to the detriment of public health and the ecosystem." SB 1, 12.

The State Board and Intervenors seem to fault Petitioners for not specifically citing the State Antidegradation Policy. But everyone who was part of the Regional Board process understood that the degradation of the Central Coast's waters was the central issue in crafting a new waiver. Moreover, it was not until November 2012—nine months after the Regional Board issued the 2012 Waiver, and five months after Petitioners filed their petition with the State Board—that the Court of Appeal published its decision in *AGUA*, which was the first case to articulate how the State Antidegradation Policy applies to conditional waivers. It is unreasonable to expect Petitioners to have articulated their concerns according to a court decision that had not yet been published.[18]

[18] Following *AGUA*'s publication in November 2012, Petitioners and other parties renewed and elaborated on their antidegradation concerns at their first opportunity—in comments on the State Board's first draft order. *See* SB 5817-18, 5821, 5838.

Finally, Respondents' exhaustion arguments rely on a strained effort to separate the Modified Waiver from the 2012 Waiver. They, like the State Board during the administrative process, try to limit the Court's focus to "[t]he incremental changes made . . . by the State Water Board," which, according to the Board, "will not independently lead to any increases in volume or severity of the discharges already authorized by the [2012 Waiver] or any lowering of water quality." SB 7230; *see also* SB Opp. Br. at 43-44, 46; Int. Opp. Br. at 37. This is a shell game. The real question is whether the Modified Waiver, which is comprised of the 2012 Waiver and the State Board's changes and is the final permit governing discharges from irrigated agricultural for at least the next five years, will prevent further degradation and restore degraded waters. For the reasons discussed below, the answer to that question is "no."

2. The Modified Waiver Will Not Prevent Further Degradation.

Neither the State Board nor Intervenors dispute that high quality waters exist in the Central Coast Region. *See* Pet. Op. Br. at 38-39 (discussing waters with quality levels that exceed water quality objectives). Nor do Respondents dispute that the Region contains impaired Tier 1 waters. *See id.* at 42. And Respondents do not dispute that water quality continues to degrade in these and other waters as a result of irrigated agriculture across the Central Coast Region. *See id.* at 5-11, 42.[19]

Thus, whether the Modified Waiver complies with the Antidegradation Policy turns solely on whether it will prevent the continued degradation of high quality and Tier 1 waters. It will not, for four reasons. First, the Modified Waiver does not actually prohibit waste discharges. For example, the State Board substituted nitrogen balancing with reporting requirements, SB 7215-16, 7359-60, and required dischargers to describe their management practices rather than report the *results* of their practices, RB 8485-86; SB 7350-51. The litany of measures to which Respondents point, *see* SB Opp.

[19] The State Board implies that historic practices are responsible for the Region's water contamination. *See, e.g.*, SB Opp. Br. at 1, 26, 28 (referring to "decades of previously unregulated agricultural practices"). While historic practices have *contributed* to current conditions, it is *current* practices that will determine future water quality. *See* SB 2255 (explaining that although "nitrate in drinking water today is a legacy contaminant, . . . years and decades from now the nitrate in drinking water will be from today's discharges"); RB 5503 (reducing additional nitrate loading now is critical to stopping and ultimately reversing the threat); RB 8516 (recent study showing that nitrate levels remain elevated even in areas with high recharge rates and young groundwater ages, meaning that the rate of nitrate loading is not decreasing and current levels of nitrate pollution cannot be attributed only to legacy nitrate pollution).

Br. at 33 n.23; Int. Opp. Br. at 41, are either minor (*e.g.*, backflow prevention devices) or deeply flawed (*e.g.*, nitrate reporting, groundwater monitoring, vegetation buffers), and none of them requires any actual reductions in discharges. In the absence of specific prohibitions, waste discharges will continue, and such discharges are presumed to lead to degradation. *See supra* pp. 12-23 (discussing why absence of specific prohibitions and business-as-usual will allow waste dischargers to continue); *AGUA*, 210 Cal. App. 4th at 1272.

Second, the Modified Waiver's monitoring and enforcement provisions are insufficient to detect and halt degradation. The Waiver's surface water and groundwater monitoring provisions are woefully inadequate for the reasons discussed above—*i.e.*, minimal discharge monitoring; cooperative monitoring in lieu of individual monitoring; existing data and statistical projections in lieu of groundwater sampling; and feeble compliance monitoring. *See supra* pp. 26-32.

Third, the Waiver's chief enforcement measure is Provision 87.5, which requires dischargers to adopt "improved" practices where existing ones are not working. SB 7187. But identifying inadequate practices is impossible without adequate monitoring data. Even with such data, the State Board admits that "most dischargers" will simply "implement known and available management practices." SB 7186. And as long as dischargers name the practices they choose, they comply with the Waiver, regardless of whether the practices stop degradation. These are precisely the sort of deficiencies that, under *AGUA*, violate the Antidegradation Policy. *See* 210 Cal. App. 4th at 1260-61 (Regional Board's antidegradation finding depended on the agency's ability to detect degradation before it occurred).[20]

Third, the Modified Waiver is only marginally better than the 2004 Waiver, which failed to stop the degradation of high quality and Tier 1 waters. *See* RB 3767, 5464, 8510. Indeed, agricultural pollution has *increased* in the Central Coast Region since 2004. *See* Pet. Op. Br. at 5-11; *see also* RB 3767, 4602, 5464, 8510. As the Regional Board admitted, earlier, *more stringent* drafts of the Modified Waiver contained "fewer" requirements for Tier 1 dischargers, and "comparable" requirements for Tier 2 dischargers, relative to the 2004 Waiver. RB 4854, 7779. These dischargers

[20] The State Board attempts to distinguish *AGUA* on the ground that, in that case, the Regional Board presented no evidence in defense of the monitoring provision, which the court found to be inadequate as a matter of law. SB Opp. Br. at 45; *AGUA*, 210 Cal. App. 4th at 1275. But the State Board's argument is only about the quantity of proof. While Modified Waiver may not be inadequate as a matter of law (because the Board uses the record to defend it), a preponderance of evidence shows that it is inadequate for the reasons *AGUA* articulates.

make up 97 percent of dischargers and 86 percent of irrigated acreage. RB 4854, 7760, 7779. The assertion that the Modified Waiver will succeed in preventing degradation where the 2004 Waiver failed thus rests upon the fact that, at most, three percent of dischargers are subject to slightly more stringent requirements. The State Board's incessant plea that cleaning up agricultural pollution is hard and takes time does not justify adopting a waiver that advances the ball by the most marginal of degrees. Worse, the Board's plea echoes the same hollow pronouncement made in the 2004 Waiver: "time will be required to find the most effective combination of practices to improve water quality." RB 62; *see also* SB 7186, SB 7216 n.112 (describing the iterative process). Petitioners do not expect clean water by the end of the year, but it is foolish—and more importantly, unlawful—to do virtually the same thing and expect meaningfully different results.

In short, the Modified Waiver will not alter the trend of increasing pollution in the Central Coast Region, in direct violation of the Antidegradation Policy. *Cf. AGUA*, 210 Cal. App. 4th at 1272-73 ("[A]s the Order itself recognizes, the groundwater quality has degraded, and [waste dischargers] are partly responsible. To the extent that the Order allows historic practices to continue without change, degradation will continue."). The State and Regional Boards' finding that the Modified Waiver complies with the State Antidegradation Policy because it will not lead to degradation is not supported by the weight of the evidence.[21]

3. The Regional and State Boards Did Not Make Findings Allowing Further Degradation.

The State Antidegradation Policy prohibits any decreases in the quality of high quality waters unless the State expressly finds that any degradation will: (1) "be consistent with maximum benefit to the people of the State," (2) "not unreasonably affect present and anticipated beneficial use of such

[21] If the Court accepts Respondents' exhaustion arguments, and thereby limits its inquiry to the changes made by the State Board to the 2012 Waiver, those changes still do not comply with the Antidegradation Policy. As discussed above, the State Board deleted nitrogen balancing ratios; required Farm Plans to include only a "description of the method and schedule for assessing the effectiveness," rather than the results, of management practices; relieved dischargers of the duty to report progress toward "reducing or eliminating the discharge of wastes" in their annual compliance forms; and inserted the Provision 87.5 escape valve. SB 6899-6902, 7187, 7215-16, 7350-51, 7359-60. All of these changes will allow continued degradation. And apart from the nitrogen balancing change, *see* SB 7230, neither the State Board Order nor its opposition brief analyzes how the Board's revisions to the 2012 Waiver affect its antidegradation analysis.

water[,]" and (3) "not result in water quality less than that prescribed in the policies." RB 9377; *see also Topanga Ass'n for a Scenic Cmty.*, 11 Cal. 3d at 515.

Intervenors are incorrect that the State and/or Regional Boards made these findings. To find that the Modified Waiver allows degradation consistent with the Antidegradation Policy, the Boards would have had to conclude that the Waiver allows degradation. As discussed above, the Boards have taken precisely the opposite position in the Waiver and in this litigation. *See, e.g.*, SB 7230 (State Board concluding that its changes would not "lead to any . . . lowering of water quality"); SB 7279 (same); SB Opp. Br. at 43-44.

Even if Intervenors were correct that the Regional and/or State Boards did make degradation findings, those findings would not satisfy the Antidegradation Policy. The Boards' findings boil down to an assertion that no degradation will occur under the Modified Waiver. *See* RB 8509, 8527; SB 7230, 7234, 7279. That circular reasoning cannot serve as a finding that degradation will be of "maximum benefit to the people of the State." *See AGUA*, 210 Cal. App. 4th at 1280 (rejecting this circular reasoning). Intervenors point to the Modified Waiver's measures and their supposed benefits, but they are nothing like the specific findings the Antidegradation Policy requires. *See* St. Water Res. Control Bd., Guidance Memorandum, 4-5 (Feb. 16, 1995) (listing factors to be weighed, including economic and social costs); APU-90-004 at 5 (directing Boards to analyze "financial impact" and "socioeconomic impacts"); *AGUA*, 210 Cal. App. 4th at 1282 (explaining that, to identify best practicable treatment or control, a discharger must evaluate performance data from their existing treatment or control measures and compare those results and controls to other existing proven technologies).

D. The State Board Unreasonably Excluded the U.C. Davis Report.

The U.C. Davis Report is the most comprehensive study to date on groundwater nitrate contamination in the Salinas Valley. *See* SB 3157-4802; *see also* Pet. Op. Br. at 43-44. The Report's foundation is a new database that includes all available nitrate data ("16,709 individual samples taken at 1,890 wells in the [Salinas Valley]"), including "data that have never before been part of a thorough regional water quality evaluation." SB 4013, 4113, 4074-76; *see also* RB 7745 (Regional Board staff

observing that the U.C. Davis Report authors were collecting "some of the most recent data and analyses on groundwater pollution").

Using this database, the U.C. Davis Report's authors also developed a new "maximum net benefit modeling approach" to evaluate the feasibility of regulatory solutions to nitrate contamination, including "source reduction, groundwater remediation, drinking water treatment, and . . . drinking water supply alternatives." SB 3337; *see also* SB 3180-97, 3200, 3337. The new approach allowed the scientists to systematically model the "advantages, disadvantages, and potential effectiveness," as well as the economic costs, of each nitrate reduction strategy and to tailor the analysis to Salinas Valley farmers. SB 3337. As a result, the U.C. Davis Report provides policy makers with the first estimates of the marginal cost of nitrate reduction in the Salinas Valley. SB 3910. These two aspects of the U.C. Davis Report—the database and the new cost-benefit analysis of known nitrate reduction strategies—are not available anywhere else in the record. Despite the U.C. Davis Report's unique information, the State Board refused to honor the Regional Board's request to admit it into the record. SB 7163 n.2; *see also* SB 2235-2326 (main body of Report attached to Regional Board's comments).

The State Board and Intervenors do not dispute that the Board's decision to exclude the U.C. Davis Report violated Government Code section 11513, which provides that "any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Cal. Gov't Code § 11513(c). That violation is by itself grounds for holding that the Board unreasonably excluded the U.C. Davis Report.

The State Board does argue that its decision to exclude the U.C. Davis Report was reasonable under Water Code section 13320 because the Report was cumulative of a PowerPoint presentation to the Regional Board by Dr. Thomas Harter (the U.C. Davis Report's primary author) and other record documents. SB Opp. Brief at 47-48 & n.31.

The State Board is mistaken. First, Dr. Harter's 53-slide PowerPoint presentation was simply a "Salinas and Tulare Basin Groundwater Study Update," hardly equivalent to the 2,567-page U.C. Davis Report itself. RB 7166. The presentation contains no studies or findings—unsurprising since, at the time the presentation was given, the first draft of the U.C. Davis Report had not been completed. RB 7169. Second, other record documents may show the "links between agricultural discharges and

groundwater contamination," but the U.C. Davis Report shows that irrigated agriculture is the primary cause of more of that contamination than anyone previously thought—96 percent of nitrate contamination in the Salinas Valley and other areas. SB 3185; *see also* SB 4602 (identifying 4,634 Salinas Valley residents at risk of drinking water with nitrate levels above the maximum contaminant level). Third, there are "studies on nutrients and management practices that reflect a range of available practices," but the U.C. Davis Report is the first study to apply a new "maximum net benefit modeling approach" to the strategies that older studies only "theorized to improve crop nitrogen use efficiency." SB 3180-97. This new approach permitted a cost-benefit analysis of each strategy and identified the most promising options. SB 3204-06, 3231-32.

The State Board also contends that excluding the U.C. Davis Report was reasonable because admitting it would have slowed down the administrative process. SB Opp. Brief at 47-48. As an initial matter, this contention appears nowhere in the record and must be rejected as a post-hoc rationalization by counsel. *See Motor Vehicle Mfrs. Ass'n of U.S.,* 463 U.S. at 50; *S. Cal. Edison Co. v. Pub. Util. Comm'n*, 85 Cal. App. 4th at 1111.

The State Board is also wrong. Because the U.C. Davis Report is the most comprehensive assessment of groundwater nitrate contamination and reduction strategies to date, the Report would have allowed the State Board to more efficiently evaluate that contamination and options for addressing it. The State Board claims that admitting the Report would have required allowing other parties to respond, SB Opp. Br. at 47, but that is not true. The Board's regulations provide that, where "the state board . . . approves a request to present additional evidence, the proponent must submit the evidence in writing and must also provide it to the petitioner, the discharger (if not the petitioner) and the regional board." 23 Cal. Code Regs. § 2050.6. The regulations do not require the State Board to give anyone an opportunity to review and respond to the additional evidence. Even if they did, however, affording time to consider seminal new information would have been justified, and would not have added appreciable delay to what was already a five-year administrative process.

Finally, Intervenors contend that the Regional Board's request that the State Board consider the U.C. Davis Report violated section 2050.6, and that admitting the Report would have prejudiced them. Int. Opp. Br. at 43-45. Intervenors' regulatory argument is another post-hoc rationalization by counsel;

the State Board did not reject the Regional Board's request for failing to conform to its regulations. In any event, the Regional Board's request is not in the administrative record, so it is pure speculation to guess whether the request was "provided . . . as soon as the evidence bec[a]me[ ] available" or "include[d] a detailed statement of the nature of the evidence and of the facts to be proved." 23 Cal. Code Regs. § 2050.6. As for the risk of prejudice, there was none; the State Board could have admitted the U.C. Davis Report, and Intervenors could have responded to it, during any one of the three comment periods or three hearings the Board provided. Finally, Intervenors' assertion of prejudice is curious; the U.C. Davis Report contains the only predictions of the cost to Salinas Valley farmers of each unit of additional nitrate prevented from leaching into groundwater—something Intervenors claim to care deeply about. *See* SB 3204-06, 3232-33, 3907-35; Int. Opp. Br. at 1-3, 20 n.9.

E. The State Board Was Required to Conduct Supplemental CEQA Review of the Modified Waiver.

1. The State Board Made Substantial Changes to the 2012 Waiver that Require Further Review.

CEQA requires supplemental review of a proposed agency project where the agency makes "substantial changes" to the project that will lead to new significant effects. Cal. Pub. Res. Code § 21166; 14 Cal. Code Regs. § 15162(a)(1). Among many such changes by the State Board to the 2012 Waiver are the Board's revisions of Provisions 11, 33, and 44(g) and its addition of Provision 87.5. SB 7329-69; *see also* Pet. Op. Br. at 46-48.[22]

As originally written in the 2012 Waiver, Provisions 11, 33, 44(g), and 87 provided for: (1) accurate, committee-reviewed, third-party monitoring of discharges; (2) immediate improvement of ineffective containment structures; (3) a description of methods and results in each polluter's Farm Plan; and (4) the enforcement of standards by requiring farms to use management practices whose effectiveness could be demonstrated. In the Modified Waiver, the State Board eliminated the monitoring and enforcement requirements of Provisions 11, 33, and 44(g) and, through Provision 87.5,

[22] The State Board argues that Petitioners failed to exhaust their remedies with respect to their CEQA claim. SB Opp. Br. at 48-49. Petitioners have already responded to this argument. *See generally* Petitioners' Opposition to Demurrer (explaining that (1) exhaustion was not required because the State Board has an independent, ongoing duty to monitor the need for further environmental review, and it was apparent that further review of the Modified Waiver was needed, and (2) even if exhaustion was required, Petitioners and other commenters sufficiently apprised the State Board of their CEQA concerns).

gave dischargers discretion to implement whatever practices they want with no means for verifying their effectiveness. These and the other significant changes discussed in Petitioners' briefs made it impossible to meaningfully assess progress towards, or enforce, water quality objectives.

The State Board's alterations are similar to the changes at issue in *Laurel Heights Improvement Association v. Regents of University of California*, 47 Cal. 3d 376 (1988), and *American Canyon Community United for Responsible Growth v. City of American Canyon*, 145 Cal. App. 4th 1062, 1083 (2006). In *Laurel Heights* the court held that unreviewed changes in a development's size and number of occupants amounted to "a change in the scope or nature of the proposed initial project and its environmental effects." 47 Cal. 3d at 398. In *American Canyon*, the court required supplemental environmental review for a proposed "6.5 percent increase in the square footage" of a project. 145 Cal. App. 4th at 1075, 1083. Similar to both these cases, here the State Board changed the fundamental nature of the 2012 Waiver when the Board weakened key reporting, management, and enforcement requirements and, for the first time, allowed dischargers discretion to evade what few standards were set forth in the Waiver. Because the State Board's changes to these and other Provisions will cause a substantial increase in the discharge of pollutants into Salinas Valley groundwater relative to the 2012 Waiver, the Regional Board's EIR is no longer adequate, and the State Board must conduct supplemental environmental review.[23]

2. The U.C. Davis Report Is New Information Requiring Further Review.

Supplemental CEQA review is required where "[n]ew information, which was not known . . . at the time the [EIR] was certified as complete, becomes available." Cal. Pub. Res. Code § 21166; *see also* 14 Cal. Code Regs. § 15162(a)(1) (further review required for "new information of substantial importance").

[23] To be more specific, the Regional Board's EIR states that the 2012 Waiver "requires more specific and measurable tracking and evaluation of effectiveness of practices and more comprehensive water quality monitoring (e.g., individual discharges and groundwater) than the 2004 [Waiver] to assure compliance with Water Code section 13269 and consistency with the State Water Board's Nonpoint Source Policy." RB 8822. Thus, the Regional Board concluded, the 2012 Waiver would have limited new significant impacts when compared to the 2004 Waiver. RB 8816-18. Because the measures the Regional Board relied on to reach this conclusion are precisely the measures the State Board gutted in the Modified Waiver, the Regional Board's EIR is no longer adequate, and the State Board must conduct supplemental environmental review.

1 The U.C. Davis Report was such new information. As discussed above, the Report shows that
2 the environmental effects examined in the 2012 Waiver's initial EIR will be substantially more severe
3 than anticipated. For example, the U.C. Davis Report reveals that 96 percent of nitrate contamination
4 in the region is traceable to nitrogen fertilizer applied to irrigated croplands. SB 3171. The Report also
5 reveals that 10,365 people in the Salinas Valley draw their water from unmonitored domestic wells and
6 that, among this population, 1,294 people live in areas at high risk for nitrate contamination. SB 4590.
7 And the U.C. Davis Report applies a new "maximum net benefit modeling approach" to nitrate
8 reduction solutions that, for the first time, provides a cost-benefit analysis of each nitrate reduction
9 solution and tailors the analysis to Salinas Valley farmers. SB 3180-97.
10 This case is like *Security Environmental Systems v. South Coast Air Quality Management*
11 *District*, 229 Cal. App. 3d 110 (1991), in which the court found that supplemental review was required
12 for new testing reports that raised "the possibility of substantially increased health risk" and because of
13 "the availability of new emission control technology which may lessen that risk." *Id.* at 125. Like the
14 new testing reports, the U.C. Davis Report reveals that nitrate contamination of groundwater is more
15 severe than was understood when the Regional Board prepared the 2012 Waiver EIR. *See* RB 8864
16 (explaining that the EIR relied on staff reports regarding "the existing impacts to groundwater,
17 including nitrate contamination"). And like the new emission control technology, the U.C. Davis
18 Report's new modeling approach could have helped the State Board evaluate the most effective options
19 for abating that contamination. Supplemental environmental review was therefore required.
20 The State Board argues that, even if the Modified Waiver is less specific or less stringent than
21 the 2012 Waiver, it is still more specific and more stringent than the 2004 Waiver. *See* SB Opp. Brief
22 at 49-50. Thus, in the State Board's view, the Modified Waiver will not affect the environment beyond
23 the current baseline and no subsequent environmental review is required. *See id.* This argument is a
24 red herring. Regardless of how the Modified Waiver compares to the 2004 Waiver, subsequent
25 environmental review is required because there are changes in the Modified Waiver that were not
26 addressed in the Regional Board's subsequent EIR or Addendum to the Final Subsequent EIR.
27 Moreover, it cannot be correct that the State Board was not required to conduct supplemental review
28 merely because, in the Board's view, the 2012 Waiver and the Modified Waiver will be better than the

2004 Waiver. *Id.* at 49-50. If that line of reasoning were correct, no CEQA review would have been required even for the 2012 Waiver.

The State Board relatedly claims that no review was required because the Modified Waiver improves upon the 2012 Waiver's provisions. SB Opp. Brief at 49. For all the reasons discussed above and in Petitioners' opening brief, the Modified Waiver will be worse, not better, than the 2012 Waiver at improving water quality. In any event, CEQA requires review even of impacts that might turn out to be beneficial. *See Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 206 (1976) ("When the [environmental] impact may be either adverse or beneficial, it is particularly appropriate to apply CEQA which is carefully conceived for the purpose of increasing the likelihood that the environmental effects will be beneficial rather than adverse."); *Cnty. Sanitation Dist. No. 2 of Los Angeles Cnty. v. Cnty. of Kern*, 127 Cal. App. 4th 1544, 1580 (2005) ("[F]or projects that may cause both beneficial and adverse significant impacts on the environment, preparation of an EIR is required because the consideration of feasible alternatives and mitigation measures might result in changes to the project that decrease its adverse impacts on California's environment.").

The State Board significantly changed the 2012 Waiver in ways that will yield significant effects not studied in the Regional Board's EIR. The State Board was also presented with new significant information that might have changed the Board's decision or the Modified Waiver's effects had the Board considered that information. The Board was required to conduct supplemental CEQA review.[24]

[24] The Court should deny Intervenors' request for judicial notice of six State Board administrative decisions. "The general rule is that a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, 188 Cal. App. 3d 872, 881 (1987). Code of Civil Procedure section 1094.5(e) contains limited exceptions to this rule. *See* Cal. Code Civ. Prov. § 1094.5(e); *W. States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578 (1995) (exception for evidence that could not have been presented to the agency); *San Joaquin Cnty. Local Agency Formation Comm'n v. Superior Court*, 162 Cal. App. 4th 159, 169 (2008) (identifying possible additional exceptions for procedural unfairness, agency misconduct, and so on). Intervenors do not argue that any of these exceptions apply here, nor could they, since Intervenors merely cite the six State Board administrative decisions for settled (and often inapplicable) legal principles.

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CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, Petitioners respectfully request that the Court issue a writ of mandate pursuant to the conditions set forth in Petitioners' opening brief and Proposed Order.

Date: April __2__, 2015

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