Case No. C080530

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MONTEREY COASTKEEPER, ET AL.

Respondents,

v.

STATE WATER RESOURCES CONTROL BOARD,

Appellants.

Appeal from the Superior Court of California,
County of Sacramento
Case No. 34-2012-80001324
Honorable Timothy M. Frawley, Presiding

RESPONSE BRIEF OF MONTEREY COASTKEEPER, ET AL.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rule 8.208, California Rules of Court.

Dated: Jan. 4, 2017 Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

State Regulations

INTRODUCTION

Distilled to its essence, this case challenges the failure of the State Water Resources Control Board ("State Board" or "Board") to comply with the law when it authorized pollution discharges from hundreds of thousands of acres of farmland along the Central Coast of California under a blanket "waiver" of individual permit requirements. There is no dispute about what the law requires when the State Board seeks to use such a waiver – essentially a general permit authorizing discharges from similar sources – in lieu of the individual permits that would otherwise be required. Under the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act'), the Board must demonstrate that the waiver (1) "is consistent with any applicable state or regional water quality control plan"; (2) "is in the public interest"; and (3) includes adequate monitoring requirements for "verifying the adequacy and effectiveness of the waiver's conditions." Cal. Water Code § 13269(a)(1)-(2).

As a threshold matter, the trial court deferred to the State Board's policy judgment that reduction of agricultural pollution to meet local water quality standards contained in the water quality control (or basin) plan could not be achieved immediately, but instead must be accomplished incrementally through a longer term "iterative" implementation process that imposes increasingly more protective management practices with each new five-year waiver. To tether the waiver to the plain language of the statute,

the trial court agreed with the State Board (and Petitioners) that waivers "must include requirements reasonably designed to show measureable progress toward improving water quality over the short-term and achieving water quality standards in a meaningful timeframe." 12 AA 2837. There was, therefore, no disagreement in this case about the applicable legal framework.

Applying this framework, the trial court carefully reviewed the administrative record and exercised its independent judgment, as the law requires, on the facts that were before the State Board when that Board significantly modified a more protective waiver previously issued by the Regional Water Quality Control Board ("Regional Board"). The trial court made three overarching findings based on the administrative record. First, consistent with the Regional Board's documented factual analysis – which was not disputed by the State Board – the court concluded that the prior waiver (issued in 2004) failed to make meaningful progress in improving water quality or attaining water quality standards because it lacked adequate standards and feedback mechanisms necessary to reduce pollution and prevent further degradation of water quality. 12 AA 2838. Second, the trial court found that the "Modified Waiver" issued by the State Board in 2013 "suffers the same defect" because the evidence does not "support a conclusion that the [Modified] Waiver will lead to quantifiable improvements in water quality or even arrest the continued degradation of

the region's waters." 12 AA 2837-38. And third, the court found that the Modified Waiver lacks adequate monitoring and reporting provisions to measure progress and verify compliance with stated objectives or milestones. 12 AA 2843, 2847.[1]

This Court should not disturb the trial court's probing and meticulous review of the administrative record and its resulting factual findings. The trial court did not usurp the agency's role or overstep its authority by failing, as the State Board and the agricultural industry claim, to defer to the agency's "policy choices." Rather, the court properly applied the law, as interpreted by the State Board itself, to the facts contained in the administrative record and concluded that the Modified Waiver does not pass muster, in large part because it does not provide any way for the State to effectively measure progress toward meeting water quality standards or ensure more protective management standards if progress is not occurring. There is no reason for this Court to revisit the trial court's careful analysis, which is amply supported by its thorough and well-articulated written ruling ("Decision").

[1] As explained below, the trial court made several derivative legal conclusions based on these basic factual findings – i.e., failure to comply with California's Nonpoint Source Policy due to the absence of adequate monitoring and reporting requirements, failure to comply with "public interest" requirement of Porter-Cologne Act section 13269(a) due to the absence of evidence that the Modified Waiver will lead to improvements in water quality or arrest continued degradation, etc.

In the final analysis, this case is about the Regional Board's efforts to take the first, small steps toward controlling widespread water pollution from an industry whose discharges have escaped regulation for more than 40 years. The Porter-Cologne Act – which applies here and predates the federal Clean Water Act – does not distinguish between "point" sources from "nonpoint" sources of pollution; rather, it broadly requires permits for any discharge "that could affect the quality of waters of the waters of the state," including agricultural runoff. Cal. Water Code §§ 13260(a), 13263(a), 13264(a). Unfortunately, the State has failed, for decades, to enforce this requirement against agricultural dischargers.

While agricultural pollution plainly differs from other industrial waste, its control is not more difficult. Agricultural pollution starts when pesticides and fertilizers are applied inappropriately or in excess and the polluting chemicals wash from the field in the draining irrigation water ("return flows") or seep into groundwater. Growers typically channel these return flows into discrete drainage ditches that ultimately flow into state waterbodies. Like urban sewer systems, agricultural drainage networks can be monitored to track and ultimately address problematic sources. For this reason, most agricultural discharges are not the kind of "nonpoint sources" to which the State Board alludes in its brief – overland storm flows that randomly pick up oil and other toxic materials from hardened urban surfaces as they flow into storm drains during rain events. The quantity of

polluting chemicals, the application amount, the irrigation method, and drainage ditch systems carrying away the polluted runoff are all under the direct control of the grower.

If properly monitored at the source field, agricultural pollution can be mitigated through reductions in excess fertilizer and pesticide application levels, maintenance of vegetated buffers, containment structures or other erosion control devices, and the use of irrigation systems tailored to local groundwater conditions. Such "best management practices" are not rocket science; they merely need to be implemented to ensure pollution reduction, as the State does for urban industrial discharges.

What makes agricultural discharges challenging for regulators is not the "complexity" of controlling them, as the State Board incorrectly suggests, State Board Opening Brief ("SBO") 21, but the fierce resistance of a previously unregulated industry to the imposition of even modest, incremental steps to bring these pollution sources into compliance with the law. After the Regional Board proposed several initial measures to begin addressing the region's agricultural pollution problem, the industry used its considerable clout to significantly weaken them. Still not satisfied, the industry then administratively appealed the Regional Board order and pressed the State Board to effectively eliminate any remaining measure that could result in progress toward achieving water quality standards in a meaningful timeframe. The trial court properly found that the State

Board's resulting Modified Waiver did not satisfy minimal statutory requirements. If that Decision is jettisoned, as the primary regulatory agency and industry polluters urge, unabated agricultural pollution will continue to contaminate the drinking water of tens of thousands of people and turn the region's streams into toxic stews.

FACTUAL BACKGROUND

The trial court made extensive findings of fact in its Decision based on the uncontroverted evidence in the Administrative Record, including the Regional Board's findings and staff reports, which the State Board did not refute in its administrative process. The following recitation includes both the facts on which the trial court relied and others relevant to this appeal.

I. Clean Water Is Vital to Human and Wildlife Communities on the Central Coast.

Water is the lifeblood of the Central Coast region, which stretches from San Mateo County to Santa Barbara County. RB 9166-67. The Central Coast economy depends, in part, on its famed scenic waterways and bays to support abundant wildlife. Id.; RB 4860, 9166; RB 11. The region's river and streamside habitats support some of the most significant biodiversity of any temperate region in the world – including California sea otter, endangered steelhead, endangered coho salmon, and other imperiled species. RB 8506. Historically they also supported prolific commercial

fisheries, clam beds, and shellfishing and sportfishing grounds important to the State's economy. See RB 9166, 9168.

Water is equally critical to the Central Coast's human communities. RB 4860, 8506. Municipal and domestic wells supply 90 percent of the Region's drinking water, supporting millions of residents. RB 8506; SB 3180. These sources of drinking water are "limited," however, and adequate quality water for many beneficial uses is in "short supply." RB 8467, 9168.

Unfortunately, the Central Coast's multi-billion dollar agricultural industry has severely polluted the Region's waterways and groundwater. RB 2131, 5464, 8466-67. The industry, largely centered in the Salinas Valley and Santa Maria, depends on pumped local groundwater and drainage systems that carry contaminated runoff away from farms. RB 60-61. In the Salinas Valley, thousands of miles of streams and rivers wind through 435,000 acres of converted farmland – once a mosaic of salt ponds, grasslands, and wetlands – collecting agricultural wastewater that percolates into underground aquifers or spills into Monterey Bay. See RB 11, 1152; SB 58. Such fertilizer and pesticide pollution increasingly threatens vital water supplies on which human and wildlife communities depend. Nearly every waterbody in the lower Salinas Valley, for example, is now "impaired" for harmful pollutants associated with agriculture, such

as nutrients, pesticides, and sediment, according to California and the U.S. Environmental Protection Agency. RB 5448-49.

II. Irrigated Agriculture Has Extensively Polluted Both Surface Water and the Groundwater that Many Residents Drink.

The Regional Board has concluded that water pollution from irrigated agriculture "presents a significant threat to human health" and the environment on the Central Coast. RB 8467; see also RB 10, 2130-31, 5450, 5464, 5494-96, 5500, 5502, 8513-14, 8467, 10139-40, 11471; SB 3173, 3215-19, 6139. Entire rural communities depend on groundwater as their only source of drinking water. RB 8513-14. Nitrates from excess fertilizer and pesticides pose the greatest risk to groundwater and surface waterbodies. If agricultural pollution is not adequately addressed, "health impacts are likely to become more severe and widespread." RB 3731.

A. Nitrate Contamination Is Severe and Extensive.

Nitrates are byproducts of nitrogen-based fertilizers that dissolve easily in water and are highly mobile. RB 5467, 5474. Nitrates pose "arguably the most serious and widespread of all pollution problems in the Central Coast Region." Id.; RB 5449, 8466 ("substantial empirical data demonstrate[s] that water quality conditions . . . continue to be severely impaired or polluted by waste discharges from irrigated agricultural operations . . . that impair beneficial uses, including drinking water"). Use of fertilizers in irrigated agriculture accounts for 78 to 96 percent of the

nitrate contamination of the Salinas Valley groundwater. RB 8299, 8466-67; SB 7330-31. Tens of millions of pounds of nitrate – nearly 40 percent of the nitrogen fertilizer applied and roughly equivalent to 2,000 dump truck loads annually – leach into the water supply in the Valley alone. RB 8466, 5484.

EPA has set the drinking water standard at 45 mg/L nitrates (10 mg/L nitrates as nitrogen) to protect people – particularly infants, pregnant women, and the elderly – from diseases like "blue baby syndrome," cancer of the organs, Parkinson's disease, and diabetes. RB 5495-96, 8513, 9199. Over the last 30 to 40 years, a clear pattern of troubling degradation has emerged: Waterbodies that had once met this health-based drinking water standard increasingly exceed it. See RB 8467; SB 3173 (nitrate contamination is "widespread and increasing"). The mean concentration in nearly every Central Coast aquifer and sub-basin studied exceeds the drinking water standard. RB 2131; see also RB 2879, 8512-13 (study finding up to 50 percent of surveyed wells in Monterey County contaminated at average levels nearly double the standard); SB 3173 (57 percent of population used a water system with higher than safe nitrate concentrations at least once between 2006 and 2010). In the Salinas Valley, the mean nitrate concentration increased 50 percent in less than 14 years, from 1993 to 2007. See RB 2879, 17719, 17836; see also SB 3157-

3248, 3329-4802 (detailed assessment of intensifying groundwater nitrate contamination).

Nitrate contamination is also widespread aboveground. Of the 47 nitrogen-impaired waterbodies in the Region, 15 are in the lower Salinas Valley. RB 1154. Of 250 surface water sites evaluated, 30 percent exceed the drinking water standard, in some cases by fivefold or more. RB 197, 479-80, 5451. And approximately 60 percent exceed the applicable aquatic life standard. RB 5450, 11471. Those exceedances mean that nitrate concentrations are directly toxic to salmon and trout and can stimulate algal blooms that consume oxygen and kill aquatic organisms. RB 5450, 10139-40, 11471.

B. Pesticide Toxicity Is Also Widespread.

Pesticides applied to agricultural areas to kill insects, in combination with other chemicals, become toxic to organisms that ingest or otherwise come into contact with them. See, e.g., RB 16924; RB 10092-118. Toxicity measures the harm that water laced with such mixtures causes to the environment and human health. RB 9196. Agricultural pesticide use rates and resulting toxicity in the Central Coast region are "among the highest in the State" and are "directly related to the runoff of pesticides from farming operations. RB 8467, 8300, 2131. Two of the most toxic pesticides, diazinon and chlorpyrifos, have a long history of use in the Salinas Valley, and a 2006 study found that pyrethroid use in the Valley

was higher than in any other region studied. RB 8521-22, 11698, 16874-75, 16929.

This high pesticide use rate is directly related to the region's toxicity problems. The Central Coast region has both the highest percentage of "toxic sites" and the highest percentage of "highly toxic sites" (22 percent of all sites tested) in California. RB 5455, 7746; see also RB 8300 (over 200 samples from the region revealed a 95 percent toxicity rate). In some agricultural drains, nearly every sample taken has shown toxicity. RB 8300. Such toxicity "is lethal to aquatic life, critical to fish and other organisms." RB 2131. Twenty-nine water bodies, the majority located in the lower Salinas Valley, are on the current List of Impaired Waters because they are so toxic that fish and other organisms cannot survive in them.[2] RB 1157, 5452-53. Most of these sites are considered "severely impacted" or "impacted" because the mean survival rate is less than 80 percent. See RB 197, 479-80. Some sites show no vertebrate survival at all.

Like nitrates, pesticides contaminate drinking wells and can harm human health. Pesticides can attack developing brains and lead to

[2] Where a waterbody does not meet water quality standards for one or more pollutant, the State must add that waterbody to the List of Impaired Waters and develop "total maximum daily loads" – essentially a cleanup plan. 33 U.S.C. § 1313(d). The Central Coast region contains hundreds of impaired waters. See http://www.waterboards.ca.gov/water_issues/programs/tmdl/2010state_ir_reports/table_of_contents.shtml#r3.

neurological diseases. RB 5500. One 2009 study, for example, reported that residents who drink from wells near insecticide-sprayed fields were 90 percent more likely to develop Parkinson's disease than those drinking from uncontaminated wells. Id. Rural communities along the Central Coast are on the frontlines for these health risks because most of them rely on private domestic wells. See RB 5500.

C. The Public Bears the Costs of Agricultural Pollution.

Agricultural water pollution not only harms human health and the environment, but has shifted the cost of removing contaminants from a multi-billion dollar agricultural industry to the public, including to municipalities and poor agricultural laborers. RB 2130, 5502, 8299, 8506. For instance, water purveyors are prohibited from providing water exceeding nitrate standards to the public until the nitrate is removed by treatment or reduced through blending, "resulting in significant cost to municipalities and local water agencies," estimated as high as "billions of dollars." RB 2131, 5502, 8514; SB 3215-19, 6139.

The people most affected by this contamination are residents of rural communities who drink from shallow domestic wells in the Salinas Valley. See RB 8506 (40,000 permitted private wells in the Region as of 1990, with this number increasing); SB 3215 (at least 23,000 people who get their drinking water from small water systems in the Valley face higher treatment costs). Many such households, however, may not even be aware

that their tap water is contaminated. RB 2131, 5502. And those who are aware may not be able to afford water treatment, which would raise water bills for low-income households throughout the region. RB 5502, 8514; SB 3215-19, 6139. In some cases, where consumers cannot afford treatment or blending, they are "forced to purchase bottled water in addition to paying for potable water service that is unsafe to drink." RB 5502-03.

Alarmingly, as pollution gets "substantially worse each year," the groundwater for 80 percent of people in the Salinas Valley (and other areas) is predicted to undrinkable by 2050. RB 8467; SB 3173. Moreover, the pressures on water, a vital and dwindling resource in this mostly arid region, are expected to intensify as populations increase and drought conditions persist. See RB 8467, 9168.

REGULATORY BACKGROUND

I. Agricultural Discharges Are Regulated Under the Porter-Cologne Act.

California broadly regulates all agricultural discharges that "could affect" water quality, without consideration of the discharge source. Cal. Water Code § 13260. In adopting this law, the California Legislature found that "the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." Id. § 13000. Activities that may

affect the State's water quality, therefore, "shall be regulated to attain the highest water quality which is reasonable." Id.; Building Indus. Ass'n of San Diego County v. State Water Res. Control Bd., 124 Cal. App. 4th 866, 875 (2004) (upholding waste discharge requirements that mandated compliance with state water quality standards for municipal water).

In contrast to federal law, the Porter-Cologne Act makes no regulatory distinction between "point sources" discharges to navigable water and any other type of discharge activity. See, e.g., Tahoe-Sierra Preservation Council v. v. State Water Resources Control Bd., 210 Cal. App. 3d 1421 (1989) (Porter-Cologne Act waste discharge requirements apply broadly to discharges that are not "point sources" under Clean Water Act); State Board, "Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" ("Nonpoint Source Policy"), RB 9413 (waste discharge requirements apply to "all discharges, point and nonpoint, including agricultural return flows and storm water discharges" that could affect water quality). The federal Clean Water Act, 33 U.S.C. § 1251 et seq., preserves the State's primacy over the regulation of water quality and thus its ability to regulate sources, like agricultural runoff, that the federal law does not.[3] 33 U.S.C. § 1370 (states are free to impose more

[3] Although most irrigation return flow fits the statutory definition of a "point source" because it is discharged through a discrete conveyance such

stringent standards, as necessary, to protect local water quality); PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology, 511 U.S. 700, 704 (1994); TWC Storage, LLC v. State Water Res. Control Bd., 185 Cal. App. 4th 291 (2010) (applying state permit requirements to land discharges that may reach groundwater); Building Industry Ass'n, 124 Cal. App. 4th at 872-75 (explaining interplay between state and federal law).

To fulfill their regulatory responsibilities, each of California's nine regional boards formulates and adopts a water quality control plan, commonly known as a "basin plan." Cal. Water Code §§ 13240, 13241; Building Industry Ass'n, 124 Cal. App. 4th at 875. Basin plans designate "beneficial uses"[4] of state waters in the region and establish water quality objectives to protect those uses, essentially setting the water quality standards for the region. Id. 13050, 13240, 13241. Basin plans are approved by the State Board, which oversees the regional boards. Id. §§ 13140, 13245.5, 13246, 13320. To implement their basin plans, regional boards "prescribe requirements" to any "person discharging waste, or proposing to discharge waste, within any region that could affect the

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as a pipe, ditch, or channel, Congress expressly exempted agricultural return flows from the statute. See 33 U.S.C. § 1362(14).

[4] Beneficial uses to be protected include "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves." Cal. Water Code § 13050(f).

quality of the waters of the state." Id. §§ 13260(a)(1), 13263. These individualized permits, known as "waste discharge requirements," are the most important tool available for protecting water quality because they translate water quality standards into necessary conditions to achieve those standards. Building Industry Ass'n, 124 Cal. App. 4th at 875.

In lieu of an individual permit, regional boards may develop waste discharge requirements for a class of similar pollution sources using a "waiver." Cal. Water Code §§ 13263(i), 13269. A waiver is simply a general permit and does not "waive" the Board's duty to prescribe enforceable requirements needed to achieve the basin plan's water quality objectives. Thus, a regional board may issue a waiver only if it can affirmatively demonstrate that a waiver is (1) "consistent with" the basin plan and (2) "in the public interest." Id. § 13269(a)(2); see California Bill Analysis, S.B. 923 Assem., 9/08/2003 (explaining that these requirements are intended to ensure that conditional waivers "actually protect water quality" due to concerns over irrigated agricultural runoff and its impacts on drinking water). Waivers must also include monitoring requirements "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." Id. § 13269(a)(2). Together, monitoring and reporting provisions must ensure enforceability and accountability, and the results of the monitoring must be made publicly

available. Id. § 13269(a)(2). Waivers last for five years, subject to renewal, and may be "terminated at any time." Id. § 13269(a)(2).

Waivers must be consistent with the Nonpoint Source Policy, which was developed to satisfy federal law and is incorporated into each basin plan. RB 9405-24 ("Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program" (2004) ("Nonpoint Source Policy")). The policy recognizes that management practices can successfully control the generation of nonpoint source discharges, but that management practices alone are not standards. RB 9413. Nonpoint source pollution control must (1) explicitly address nonpoint source pollution in a manner that achieves and maintains water quality objectives; (2) include a description of management practices and program elements expected to be implemented; (3) include a time schedule and quantifiable milestones designed to measure progress toward achieving water quality objectives; (4) include sufficient feedback mechanisms to ensure that the program is achieving its stated purpose, and ascertain whether additional or different actions are required; and (5) state the potential consequences for failure to achieve the program's objectives. RB 9417-20.

Waivers also must be consistent with the State Board's Antidegradation Policy, as incorporated into basin plans. RB 9377-78 ("Resolution No. 68-16: Statement of Policy with Respect to Maintaining High Quality Waters in California" (1968) ("Antidegradation Policy")).

The Antidegradation Policy, designed to protect waters that meet water quality objectives or are better in quality (i.e., high quality water) from degradation, requires the State to achieve '"the highest water quality consistent with maximum benefit to the people of the state."' Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd., 210 Cal. App. 4th 1255, 1279 (2012) ["AGUA"] (quoting the policy).

II. The State Has Unsuccessfully Regulated Agricultural Discharges in the Central Coast Region for More than Three Decades.

The regional boards are the "principal" state agencies with "primary" responsibility for controlling a region's water quality. Water Code § 13001; RB 9165; SB 7329. The Central Coast Regional Board has jurisdiction over are approximately 435,000 acres of irrigated land and 3,000 agricultural operations, concentrated around the Salinas Valley, upper Salinas watershed, the Pajaro Valley, the lower Santa Maria River, the Santa Ynez watershed, and the Santa Barbara coastal area. RB 10; SB 7329. These operations include commercial row, vineyard, field, and tree crop lands and nurseries. RB 60; SB 7335. Discharges from farming operations include polluted surface discharges (irrigation return flows or tailwater), subsurface drainage from tile drains, discharges to groundwater, and storm water runoff, as well as sediment from land disturbance activities. RB 60, 63; SB 7335. These discharges pollute, or threaten the

health of, the region's 17,000 miles of streams and rivers and 4,000 square miles of groundwater basins. SB 7329.

A. The Initial 1983 Waivers Did Not Curb the Primary Sources of Agricultural Pollution.

The Central Coast Regional Board first began regulating irrigated agricultural discharges in 1983 through the issuance of conditional waivers intended primarily to address storm water runoff. RB 9, 11-12. These waivers did not address the main source of pollution from irrigated return flows. After two decades, the Regional Board finally recognized its failure to address the contamination problem: "water quality in agricultural areas has been shown to be impaired by such constituents as pesticides and nutrients, lending further urgency to the need to adopt additional requirements for irrigated operations." RB 9, 61. Prompted by these concerns and the expiration of the original waivers, the Regional Board determined that "additional conditions [were] required to protect water quality" and thus set about developing a new waiver that would more directly address agricultural pollution sources. RB 9-14, 61.

B. The 2004 Waiver Utilized an Unsuccessful Voluntary, Educational Approach to Source Control.

With adoption of a new waiver in 2004 ("2004 Waiver"), the Regional Board adopted a source control approach intended to begin responding to the (1) high levels of nutrients in water bodies and groundwater basins; and (2) persistent toxicity traced to pesticide

application in areas of intensive agriculture. RB 10, 61-62, 72 ("[c]ontrolling pollutants at the source should be the primary approach to water quality protection". This 2004 Waiver operated through education and voluntary practices. See RB 71-72. Farm operators were to develop on-farm management practices "aimed" to efficiently irrigate (i.e., drip irrigation) and effectively manage (i.e., apply fewer) nutrients and pesticides. RB 15, 18, 72-73. Such management practices would be memorialized in farm water quality plans ("farm plans") kept at the operation. RB 71, 73.

The 2004 Waiver relied on a two tier structure. RB 14, 71-72. Once dischargers completed 15 hours of farm water quality education, prepared a farm plan and a biennial implementation checklist, and elected a monitoring program, they were placed in Tier 1. RB 71-72. Tier 2 included all dischargers who did not complete these requirements. Tier 1 had a lower reporting requirement: a one-time management practice checklist update, whereas Tier 2 dischargers were required to provide an annual report to the Regional Board. RB 74.

As for monitoring, the Regional Board developed a program based on "cooperative" monitoring – whereby data were collected at sites on the main stems of rivers and tributaries, not at individual farms. RB 19, 65. Compared to monitoring at the discharge point for individual farms, cooperative monitoring captures water quality information at a more

generalized level, after many discharges have commingled. Cooperative monitoring was therefore not intended to assess individual discharges, but was designed to provide information on receiving water quality and "to detect trends over time." RB 19. Regardless of tier, dischargers could elect to participate in this cooperative monitoring program or perform their own individual monitoring. RB 71-72. The 2004 Waiver did not require any groundwater monitoring. RB 18, 67. And few, if any, enforcement actions were anticipated. RB 17-18.

The 2004 Waiver proved to be a failure. It not only failed to improve water quality, but also failed to halt the continued degradation. RB 2133, 2145, 2149, 3897-98, 3974; SB 17, 61; see also RB 1161 (data indicated nitrate concentrations are "getting worse, not better"). In retrospect, the Regional Board acknowledged that the 2004 Waiver was unsuccessful because it did not include conditions "consistent with typical orders to control waste discharges from industries or activities affecting water quality in a similar level of severity." RB 7743. For instance, farm operators, in writing farm plans, were not required to demonstrate the effectiveness of their management practices; rather, they only needed to describe them. RB 345-389. This was true even for the highest risk operators. RB 71-72, 1129, 1184-90, 8303 (2004 Waiver was inadequate for determining "individual compliance with water quality standards"). Likewise, cooperative monitoring only provided data about general

watershed-scale water quality, not farm discharge sources. RB 19, 64-67; 1129 ("evidence of on-farm improvements and reductions in pollution loading from farms is not required").

C. The Regional Board's 2012 Waiver Was Marginally More Protective of Water Quality.

In anticipation of the 2004 Waiver's expiration the following year, the Regional Board began in 2008 to develop a replacement waiver that would address the shortcomings of the prior waiver. The Regional Board aimed for a new waiver with "specific requirements, time schedules, milestones, and verification monitoring" to "resolve the major water quality issues." RB 606.

With the release of the first draft of the replacement waiver in February 2010, the Regional Board issued a Preliminary Draft Report that included the draft order and several findings. See RB 1123-1297 (with general findings at 1196-1223). The rationale for the new waiver was based on the 2004 Waiver's "lack of discharge monitoring and reporting, the lack of verification of on-farm water quality improvements, and the lack of public transparency regarding on-farm discharges." RB 1204. Based on their review of the data collected in compliance with 2004 waiver, agricultural discharges "continue to result in degradation and pollution of surface water and groundwater, and impairment of beneficial uses, including drinking water and aquatic habitat," and "additional conditions

are necessary to assure protection of water quality and to measure progress towards water quality improvement." RB 1204. The report concluded that the new waiver must require accountability from dischargers and verification of the effectiveness of management practices with "on-farm" data. RB 1128-29. It also concluded that not having the "necessary evidence" of improvements was "unacceptable given the magnitude and scale of the documented water quality impacts and the number of people directly affected." RB 1129.

Unlike the 2004 Waiver, this first draft imposed explicit discharge prohibitions to reduce nutrient, sediment, and pesticide pollution, including prohibiting "excessive use or over-application of fertilizer." RB 1143-44, 1182-89, 1191-92, 1251. It mandated that farm plans not only "identify the management practices that will be implemented to protect and improve water quality," as in 2004, but also include "a schedule for implementation of practices and an evaluation of progress towards achieving water quality improvement." RB 1219. The draft also included a time schedule for compliance, requiring elimination of irrigation runoff within two years or treatment such that water quality standards could be attained by specified deadlines. RB 1147, 1267-71 (requiring compliance with toxicity standards within two years, with turbidity standards within three years, and with nutrient standards within four years).

To verify that management practices would actually reduce pollution, the February 2010 draft required enhanced surface water, groundwater, and compliance monitoring, especially for high risk dischargers in the most severely impaired areas. RB 1142-44, 1182-89, 1191-92, 1251. In light of staff's recognition that "individual on-farm water quality monitoring is critical to . . . protect water quality," RB 1219, the draft waiver included requirements for surface water discharge monitoring at the farm level. RB 1192. To support an "iterative" approach to achieving water quality, the draft also required that any discharge that actually impaired (or had the potential to impair) surface waters be eliminated or altered to meet water quality standards, RB 1144-45, and that farm plans be updated at least annually based on monitoring results. RB 1248, 1255. Staff acknowledged that these conditions would not fully control all discharges for complying with water quality standards, but considered the proposed time schedule a "reasonable" starting point to improve water quality. See RB 1147.

Throughout the process, agricultural representatives opposed the Board's "regulatory" focus, arguing instead to maintain the 2004 Waiver's educational approach. See, e.g., RB 965-66, 969; RB 2492.

In November 2010, in response to industry comments, the Regional Board issued a revised draft ("2010 Draft") that retained much of the earlier draft but introduced three tiers of discharger categories,

corresponding roughly to the size of farm operation, proximity to impaired waters, chemical use, and type of crops grown. RB 3733. Tier 1 dischargers were small farms, generally not using highly toxic chemical and not directly adjacent to impaired waterbodies; Tier 2 dischargers were larger farms that use toxic chemicals or have a potential to contaminate groundwater. RB 3740. Tier 3 dischargers were subject to the most stringent requirements, one of which would have required reducing excess nitrogen. RB 3789-91. Staff remained adamant that any new waiver "must . . . .enable the regulated community and stakeholders to understand when Dischargers are in compliance." RB 3736.

Although this three-tier structure was designed to address grower concerns by targeting only the most high-risk polluters for new requirements, the industry continued to oppose substantive requirements and individual monitoring. RB 4737. In response, the Regional Board circulated a further weakened draft in March 2011, limiting Tier 3 requirements to those dischargers using only two specific pesticides: diazinon and chlorpyrifos. RB 4871. This meant that over 100 high-risk pesticides, including malathion, a pesticide that growers can substitute for diazinon, would be excluded from coverage under Tier 3. RB 1230-32. Under this draft, Tier 3 requirements would have applied to approximately 11 percent of farms and 54 percent of irrigated acreage. RB 4863-64.

While this long Regional Board process continued, researchers at the University of California, Davis published a study on groundwater nitrate contamination in Tulare Lake Basin of the Central Valley and the Salinas Valley on the Central Coast ("U.C. Davis Report"). SB 3157-4802. In this report, which was commissioned by the State Board at the direction of the California Legislature (see Cal. Water Code section 83002.5), 26 scientists analyzed nitrate data from nearly 100,000 well samples; the report traced pollution sources, concluding that nitrogen input from cropland is a major contributor to water pollution, and recommended a suite of pollution reduction methods to begin mitigating nitrate contamination. See SB 3157-76, 3197-3201.

Shortly after publication of the U.C. Davis Report in March 2012, the Regional Board considered and adopted a final draft of the proposed new waiver ("2012 Waiver") in response to growers' objections. RB 8465-8558. This final version eliminated several additional proposed conditions that staff previously determined were necessary, but without repudiating the previous staff findings. RB 8465-8558. For example, despite the admitted, critical need for individual monitoring, the 2012 Waiver allowed groups of dischargers to use self-formulated group monitoring. RB 8468-69; see also RB 8259-60, 8301-02. This change eliminated the agency's ability to identify the worst pollution at a specific farm. The 2012 Waiver also added a provision allowing dischargers to

move to a lower tier through group monitoring, RB 8478-79; see also RB 8260, and significantly reduced the requirements for nitrate management; instead of requiring dischargers to balance the amount of nitrogen applied to the amount needed to grow the crop, the waiver required only that dischargers "report progress towards" reductions or "implement an alternative," unspecified management practice. RB 8493-94; see also RB 8327.

The 2012 Waiver, as compared to the 2004 Waiver, imposed "fewer" requirements on Tier 1 dischargers and "comparable" requirements on Tier 2 dischargers. RB 7756; see also SB 487, 1978. The 2012 Waiver did contain some requirements more stringent than those in the 2004 Waiver, but only for Tier 3 dischargers. These included requirements for nitrogen balance ratios, irrigation and nutrient management plans, water quality buffer plans, individual surface discharge monitoring and reporting, photo monitoring to check maintenance of riparian habitat, total nitrogen reporting, and annual compliance forms. RB 8325-29. These heightened Tier 3 standards were critical for any forward progress. For instance, nitrogen balancing requirements are the only way to determine whether fertilizers that are overapplied could be reduced. See RB 3789-90, 3928-29.

Unfortunately, the number of farm operations subject Tier 3 standards was significantly reduced by changes from earlier versions. By

the time of adoption, of the 435,000 acres and 3,000 operations, staff estimated that only a meager 3 percent of farms and 14 percent of irrigated acreage would be covered by Tier 3. RB 7779. In contrast, earlier proposals would have included 11 percent of farms and 54 percent of irrigated acreage in Tier 3. RB 4863-64. As a result, the 2012 Waiver not only failed to significantly advance the degree of regulation from 2004, but also fell well short of the degree of regulation imposed on other industries. RB 7744 (Figure 1).

D. The State Board's 2013 Modified Waiver Eliminated All Remaining Conditions that May Have Achieved Measurable Progress.

In April 2012, the agricultural industry (including Appellant-Intervenors here) filed four separate administrative petitions with the State Board, appealing the Regional Board's 2012 Waiver, pursuant to Water Code section 13320; a coalition of environmental, environmental justice, and commercial and sports fishing groups (collectively "Coastkeeper") filed a separate petition. SB 1-1646, 5636. The Regional Board, which had declined to consider the U.C. Davis Report in adopting the 2012 Waiver, requested its consideration in the State Board proceeding. RB8131; SB 7163 n.2.

In July 2012, anticipating a lengthy and contentious process and expecting that it would be unable to resolve petitions raising over forty issues by the regulatory deadline, the State Board decided to review the

2012 Waiver on its own motion, as allowed by Water Code section 13320(a). SB 5636-37, 7166. In September 2012, acting on requests from dischargers, including Intervenors, the State Board stayed implementation of several provisions of the 2012 Waiver. Among them was Provision 44(g), which required verification that the practices set forth in farm plans were working to reduce pollution. RB 5382-84.

Despite four years of protracted proceedings at the Regional Board and as many draft proposals, each one weaker than the last, the State Board undertook yet another year of proceedings in response to dozens of industry complaints. In June and August 2013, the State Board proposed new drafts that successively weakened the 2012 Waiver's pollution reduction and monitoring requirements. As it now stands, the Modified Waiver – the final version issued on September 24, 2013 – bears little semblance to the plan the Regional Board set forth in 2008 to fix the failures of the 2004 Waiver and the 2012 Waiver, reverting in large part to the approach reflected in the failed 2004 Waiver. SB 7162-7234 (redlined version showing the changes from the 2012 version).[5]

[5] The State Board's modifications to the 2012 Waiver – and thus the Modified Waiver itself (Water Quality Order No. WQ 2013-0101, SB 7162-7234) – are more clearly reflected in clean and redline versions showing the changes from the 2012 Waiver, found at SB 7235-7531. We cite to the redline version of the 2012 Waiver (SB 7329-69) where comparisons matter.

In adopting the Modified Waiver, the State Board retained the findings from the more stringent previous drafts, including the following:

1. Nitrate pollution of drinking water supplies is a critical problem throughout the Region. SB 7330; RB 1210, 8299-300.
2. The most serious water quality degradation in the Region is caused by fertilizer and pesticide use, impairing beneficial uses, including drinking water and aquatic habitat values. SB 7330; RB 1206-11, 8299-300.
3. Agricultural use rate of pesticides and the resulting toxicity are among the highest in the State. SB 7331; RB 1208, 8300.
4. This impairment is an urgent problem, given its impact on public health and limited sources of drinking water supplies and proximity of the Region's agricultural lands to critical habitat for species of concern. SB 7331-32; RB 1199-1200, 8300.

Despite these findings, the Modified Waiver, like the ineffectual 2004 Waiver, does actually not impose any standards to evaluate compliance with this prohibition. Compare SB 7347 (Modified Waiver) with RB 72 (2004 Waiver). The Modified Waiver also continues the requirement for farm plans begun under the 2004 Waiver. Compare SB 7350-51 with RB 71, RB 334-92, RB 393-400. Farm plans must contain information similar to that required under the 2004 Waiver, including a map, identification of places where irrigation water leaves the farm, a description of the chemicals applied, and a "description of the method and schedule for assessing the effectiveness of each management practice, treatment, and control measure." Compare SB 7190, 7350-51 with RB 334-392. In other words, as was true under the 2004 Waiver, farm plans

required by the Modified Waiver merely describe a grower's chosen management practices.[6]

While retaining requirements that largely continue on-the-ground practices already implemented through the 2004 Waiver, the Modified Waiver contains no new meaningful measures that could support compliance with Water Code section 13269. To the contrary, the Modified Waiver assures that water quality standards will not be achieved. Most egregiously, the Modified Waiver includes new Provision 83.5, effectively providing a legal "off-ramp" from any compliance obligation by any grower. Provision 83.5 provides that (1) a grower's obligations not to cause or contribute to any water quality exceedance (Provision 22), to comply with the basin plan (Provision 23), to properly manage farm containment structures (Provision 33), and to effectively control discharges of toxics, sediments, and nutrients (Provisions 80-83) are satisfied merely by implementing unspecified "management practices" of the grower's

[6] The Modified Waiver also requires growers who have not already done so to install and maintain backflow prevention devices and to properly cap abandoned wells to prevent pollution from entering drinking water supplies; and for those who use containment structures to minimize pollution, they are to be properly maintained. SB 7348. These are common sense, standard farm practices that most growers in the region have long ago implemented. E.g., RB 421 (as of 2006, close to 90% of dischargers where the practice was applicable (690 out of 793) said they implement wellhead protection and backflow devices, and the rate would increase to 94% within three years); see also RB 398, 409. As such, they do not provide evidence that the Modified Waiver will improve water quality.

choosing, and (2) "to the extent" that such "implemented management practices" prove ineffective in preventing discharges that cause or contribute to water quality standard exceedances, the discharge need only "implement improved management practices." SB 7362. The Modified Waiver contains no definition of, or standard for, "improved management practices," leaving those decisions entirely to the polluter. Moreover, a discharger who makes a "conscientious effort" under this provision is protected from legal consequences. SB 6204-05, 6414-15, 7186. In short, this single provision effectively shields all discharges from any enforceable standard.

Thus, even though the Modified Waiver requires Tier 2 and 3 dischargers to report the pollution reduction outcomes of management practices, SB 7449, 7510, these efforts are not required in any way to be tied to any particular improvements or quantitative outcomes. And Tier 1 dischargers are not even required to report such outcomes. Similarly, even though the Modified Waiver generally requires proper handling of chemicals, erosion control, and maintenance of riparian vegetation, SB 7349, none of these requirements are tied to making meaningful improvements measured against any standard. Even for Tier 3 dischargers required to abide by irrigation and nutrient management plans, the waiver lacks a standard for certification. SB 7358-59. Nor is it clear that these certifications represent an improvement over management practices that,

under the 2004 Waiver, were also professionally recommended or vetted. RB 71, 393-400.

Moreover, the State Board refused to reinstate the nitrogen balancing requirements critical to nitrate pollution reduction. SB 5685-86, 7205-06. The Board did so even though nitrogen balancing requirements would have reduced the nearly 40 percent of the nitrogen fertilizer leaching into the water supply in the Salinas Valley alone, RB 8466, 5484; even though the Boards have the sole authority to require control of nitrate pollution, RB 1128; and despite finding that "the practice of recording and budgeting of nitrogen application is a relatively low-cost, standard industry practice that is widely recommended by agronomists and crop specialists and already utilized by many growers in the Central Coast region." SB 5685-86, 7205-06. The State Board even refused to add to the 2013 Waiver (and deleted from earlier versions) the requirement for a *calculation* of excess nitrogen applied as well as the requirement for reporting to the Board crop nitrogen uptake values. SB 5685-86, 7210.

As to monitoring, Tiers 2 and 3 are subject to more stringent monitoring than under the 2004 Waiver. SB 7357. But even then, the Modified Waiver requires surface discharge monitoring from only Tier 3 dischargers and only in the case of discharges from "outfalls" (pipes and ditches), not runoff. SB 7513.

Finally, Tier 3 dischargers may transfer to a lower tier through

participating in an alternative third party project determined to have a "reasonable chance of improving water quality and/or reducing pollutant loading," or by switching to pesticides other than diazinon or chlorpyrifos. SB 7342-46. Indeed, dischargers, who have already been switching out of these two pesticides are replacing them with pyrethroids, which are more toxic, and neonicotinoids, which persist in the environment longer. Thus, as of May 2015, roughly 49 farm operations (out of 3,000 covered by the waiver), comprising 4.6 percent of the total irrigated acreage in the Region, were in Tier 3.

THE TRIAL COURT DECISION

The trial court issued its ruling on submitted matter on August 10, 2015 and entered final judgment on September 25, 2015. 12 AA 2806-49, 2851-54. In its lengthy and thorough decision, the trial court (1) reviewed the records from the administrative proceedings before the Regional and State Boards, including the numerous findings from them; (2) compared the 2004 Waiver, the 2012 Waiver, and the Modified Waiver, relying on extensive analysis prepared by Regional Board staff; (3) analyzed the Modified Waiver as a whole, examining the interrelatedness of its provisions; and (4) made several findings of fact and conclusions of law.

As a threshold matter, the trial court correctly held that Coastkeeper exhausted its administrative remedies. 12 AA 2830. The court described the State Board's long and complicated administrative process, including

multiple Regional Board drafts prior to the adoption of the 2012 Waiver, five State Board petitions challenging the 2012 Waiver, and the State Board's evolving three draft waivers culminating in the 2013 Modified Waiver. 12 AA 2822, 2826-30. The trial court explained that the lawfulness of the Modified Waiver could not be determined by analyzing any individual provision; rather, the waiver must be viewed as a whole to determine whether it satisfied the statutory requirements of the Porter-Cologne Act. 12 AA 2841 n. 12; see also id. at 2841. The court found the purpose of the exhaustion doctrine is satisfied if the issue is properly raised during the administrative process, regardless of who raised the issue. 12 AA 2826 (citing Evans v. City of San Jose, 128 Cal.App.4th, 1123, 1137 (2005)).

After carefully reviewing the evidentiary record, the trial court found that "there is little to support a conclusion that the [Modified] Waiver will lead to quantifiable improvements in water quality or even arrest the continued degradation of the region's waters." 12 AA 2837. In so concluding, the court evaluated the record to identify the similarities and difference between the 2004 Waiver, 2012 Waiver, and the Modified Waiver. 12 AA 2814-23, 2836, 2838, 2840. Specifically, the trial court relied on the Regional Board's findings that the 2004 Waiver did not prevent the continued degradation of water quality from agricultural discharges and did "not include conditions that allowed for determining

individual compliance with water quality standards or the level of effectiveness of actions taken to protect water quality, such as individual discharge monitoring or evaluation of water quality improvements." 12 AA 2817 (citing RB 8299), 2819 (citing RB 8303). After reviewing the Modified Waiver as a whole, the court concluded that, like the ineffective 2004 Waiver, the Modified Waiver "lacks adequate standards and feedback mechanisms to assess the effectiveness of implemented management practices in reducing pollution or and preventing further degradation of water quality." 12 AA 2819 (citing RB 8303), 2837, 2838.

The trial court provided several examples of how the Modified Waiver was flawed. Since the Modified Waiver only requires a small percent of growers to conduct individual monitoring, the trial court determined that the Regional Board is unable to identify the source of exceedances and assess the effectiveness of implemented management practices for the vast majority of growers. 12 AA 2836 (citing RB 7779), 2840. Similarly, monitoring required for drinking water may indicate drinking water quality, but would not verify the effectiveness of implemented management practices, as the law requires. 12 AA 2841-42 n. 15. Additionally, although acknowledging that individual monitoring is not required for all dischargers, the court highlighted the State Board's own recognition of the limitations of cooperative monitoring and its failure to incorporate proposed solutions for these limitations. 12 AA 2846 (citing

SB 7198-99). The court also pointed out that the requirement for Tier 3 dischargers to submit a report evaluating nitrate loading reductions is a one-time requirement applying to less than three percent of growers. 12 AA 2937 n.9.

In addition to these shortcomings, the court identified that the Modified Waiver lacked meaningful standards and did not set any benchmarks. If monitoring or inspections determine that management practices are not effective, the Modified Waiver merely requires a discharger to make a "conscientious effort" to identify and implement an "improved management practice." 12 AA 2839. Further, the Modified Waiver does not define "improved" or include standards to verify that the "improved" practice is effective. 12 AA 2839. Therefore, a discharger is in compliance with the waiver by implementing a new management practice that the discharger merely believes will improve previous management practices. 12 AA 2839-40. The court correctly concluded that such a condition is not an enforceable standard. 12 AA 2840.

The trial court also reviewed factual findings made by Regional Board staff. "Regional Board staff found the 2012 Waiver imposed 'fewer' requirements on Tier 1 dischargers, and 'comparable' requirement on Tier 2 dischargers, as compared to the 2004 Waiver." 12 AA 2835 (citing RB 7756; SB 487, 1978). Staff's conclusion was the product of extensive analysis of the provisions of the 2004 Waiver as compared to the draft

waivers and the 2012 Waiver. See, e.g., RB 1141-42, 4854, 4875-75, 4862, 4869, 4883-84, 4896, 7108, 7739-62; SB 1975-2011. The court came to the same conclusion as the Regional Board staff, after carefully examining provisions of the 2004 and 2012 Waivers. 12 AA 2814-15, 2820, 2838. The trial court therefore correctly found that "[a]lthough the State Board concluded that the Modified Waiver is 'more stringent' than the 2004 Waiver, this conclusion was based primarily on the Tier 3 requirements." 12 AA 2835.

The court explained that this conclusion was problematic because Tier 3 dischargers represent only about 3 percent of growers and only about 14 percent of irrigated acreage in the region. 12 AA 2840. Thus, for at least 97 percent of growers and 86 percent of irrigated acreage, the Modified Waiver did not require a monitoring method capable of identifying the source of exceedances or assessing the effectiveness of implemented management practices. 12 AA 2836, 2840. Moreover, the Modified Waiver allowed further attrition from Tier 3 as Tier 3 dischargers move to lower tiers by participating in a third party project/program determined to have a "reasonable chance of improving water quality and/or

reducing pollutant loading" or by switching to pesticides other than diazinon or chlorpryifos. 12 AA 2836 (citing SB 7343, 7346), 2840.[7]

The court also made several legal conclusions. In assessing the individual provisions that Coastkeeper used as illustrations of the Modified Waiver's noncompliance with Water Code section 13269, the court deferred to the State Board's expertise. In evaluating Coastkeeper's assertion that certain provisions in the 2010 Draft were necessary to achieve water quality standards, the court ultimately refused to tell the State Board which elements to include in the Modified Waiver, reasoning that the State Board acted within its discretion. 12 AA 2833-34, 2836-37, 2841, 2846. Specifically, the court refused to disturb the State Board's determinations regarding individual and cooperative monitoring requirements for the different tiers, frequency and methodology for groundwater monitoring, farm plan reporting requirements, pesticide controls, vegetation/riparian buffer requirements, tile drain monitoring, and replacing nitrogen balancing ratios with total nitrogen reporting. AA 2841.

Instead, the court analyzed the Modified Waiver as a whole to make several proper legal conclusions. 12 AA 2838-41, 2839 n.9, 2840 n.10, 11, 2841 n.12, 2843, 2844, 2846-47. First, the court held that, although

[7] As of December 2016, Tier 3 has shrunk down to just 0.5% of the total ranches and 4.7% of the total acreage. Declaration of Steven Shimek in Support of Response Brief.

immediate compliance with water quality standards is not possible, the "Modified Waiver is not consistent with the basin plan because it lacks specific, enforceable measures and feedback mechanism needed to meet the basin plan's water quality objectives." 12 AA 2837. Second, the court determined that the Modified Waiver did not comply with the monitoring requirements established in Water Code section 13269 because the cooperative surface receiving water monitoring approach adopted by the State Board was inadequate to verify the effectiveness of implemented management practices. 12 AA 2846. Third, the court held that the Modified Waiver did not comply with the Nonpoint Source Policy because there was no means to verify the effectiveness of management practices and "implementing management practices [alone] is not a substitute for actual compliance with water quality standards." 12 AA 2839. The Modified Waiver also failed to incorporate other key elements of the Policy, including time schedules designed to measure progress toward reaching quantifiable milestones and a description of the actions to be taken if management practices are found to be ineffective. 12 AA 2843. Lastly, because the Modified Waiver's requirements will not indicate whether water quality is improving or not, the court held that it was not in the public interest. 12 AA 2847.

Based on these factual findings and legal conclusions, the trial court granted Coastkeeper's petition for writ of mandate.

ISSUES PRESENTED

The trial court considered one central issue that is now on review by this court: whether the Modified Waiver, as a whole, is consistent with the basin plan and in the public interest. The trial court concluded, based on substantial evidence, that the Modified Waiver is inconsistent with the basin plan because it does not include requirements reasonably designed to show measurable progress toward improving water quality in a meaningful timeframe. In reaching this conclusion, the trial court made three key factual findings, which this Court reviews for substantial evidence:

1. The Modified Waiver does not have sufficiently specific, enforceable standards necessary to meet the basin plan's water quality objectives.

2. The Modified Waiver does not contain sufficient feedback mechanisms and monitoring provisions to enable the Board to effectively enforce the Modified Waiver.

3. The Modified Waiver's tier structure does not subject enough growers to requirements that are more stringent than the 2004 Waiver to show measureable progress.

The trial court arrived at these conclusions by examining the Modified Waiver's functionality as a whole. 12 AA 2841 n.12 (noting "the court realizes that these are issues that cannot be decided in a vacuum; they must be considered in the context of the Waiver as a whole").

Fundamentally, the trial court recognized the presumption in favor of the State Board's findings and thus deferred to the State Board's legal interpretations and policy determinations. The trial court deferred to the

State Board's "iterative" method of reaching compliance with water quality standards. 12 AA 2832; 12 AA 2839. It likewise deferred to the State Board's use of cooperative monitoring so long as section 13269's verification requirements could be met. 12 AA 2846. Thus, rather than interfering with the State Board's policy choices, the trial court presumed that the State Board's intended approach could meet the legal standards.

But upon weighing the evidence, the trial court found that the Modified Waiver simply does not comply with these legal standards because it does not assure pollution reduction. The court found that the Modified Waiver added a small and diminishing Tier 3, vague standards like "improved" management practices, and cooperative monitoring without sufficient verification mechanisms. 12 AA 2840. Consistent with its deference to the State Board's expertise and policy considerations, the trial court remanded the matter to the agency to decide how to comply with basin plan. 12 AA 2841. Ultimately, the trial court required the State Board to comply with its own iterative approach by issuing a waiver that will lead to quantifiable improvements in water quality in the region.[8] On appeal, this Court must determine only whether the trial court's conclusions are supported by substantial evidence.

[8] While expressing concerns about the State Board's compliance with several other legal requirements (i.e., the Antidegradation Policy and the California Environmental Quality Act), the court did not rule directly on these claims, but merely required the Board to consider during remand.

STANDARD OF REVIEW

I. The Trial Court Exercises Its Independent Judgment When Reviewing the State Board's Adoption of the Modified Waiver.

It is undisputed that the trial court exercises "independent judgment" in determining whether the State Board prejudicially abused its discretion in adopting the Modified Waiver. Cal. Code Civ. Proc. § 1094.5(b); Cal. Water Code § 13330(e). Under this standard, abuse of discretion is established where the "weight of the evidence" does not support the agency's findings. Cal. Code Civ. Proc. § 1094.5(c). The trial court must reweigh the evidence and make its own decision as to whether the administrative findings should be sustained. Vaill v. Edmonds, 4 Cal. App. 4th 247, 257-263 (1991) (affirming trial court's application of independent judgment in vacating agency order).

In its seminal case on this issue, the California Supreme Court reaffirmed that review is fully independent. Fukuda v. City of Angels, 20 Cal. 4th 805 (1999). While the trial court begins by presuming that the agency's factual findings are correct and that the agency fulfilled its official duty, the presumption is only "a starting point for review" which "may be overcome," like any presumption. Id. at 818. Because the trial court has a duty to exercise independent judgment, it "is free to substitute its own findings after first giving due respect to the agency's findings." Id. Importantly, independent judgment review requires careful scrutiny of an

administrative decision. Bixby v. Pierno, 4 Cal. 3d 130, 143 (1971). In essence, the trial court's review is "a kind of limited trial de novo, using the existing administrative record." Int'l Bhd. of Elec. Workers v. Aubry, 42 Cal. App. 4th 861, 868 (1996).

II. The Appellate Court Reviews the Trial Court's Ruling Under the Substantial Evidence Standard.

After a trial court reviews an administrative decision applying its independent judgment, the appellate court must answer one question – "whether the trial court's (not the administrative agency's) findings are supported by substantial evidence." Vaill, 4 Cal. App. 4th at 258 (applying the substantial evidence standard and affirming the trial court's independent judgment); Lake Madrone Water Dist. v. State Water Res. Control Bd., 209 Cal. App. 3d 163, 168 (1989) (same). In answering this question, the appellate court must resolve all evidentiary conflicts in favor of the trial court's judgment and accept the conclusions of the trial court when multiple inferences can be reasonably drawn from the facts. Vaill, 4 Cal. App. 4th at 258. Because "the trial court [has] power to weigh the evidence, [the appellate court] must conclusively presume that the trial court performed its duty, gave full weight to the presumption of validity of the board's finding, but nevertheless found against the board on this count." Fukuda, 20 Cal. 4th at 812 (quoting Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 88 (1939)) (internal quotation marks omitted).

The substantial evidence standard governs this appeal. Appellants nevertheless argue that this Court should depart from the general presumption that the trial court performed its duty because the trial court, they argue, improperly weighed the evidence and failed to defer to the State Board's policymaking role. SBO 29; Intervenors Opening Brief ("IO") 27-28. The trial court did neither, as more fully addressed below. To justify this departure, Appellants cite a case where the trial court wholly failed to consider a highly relevant witness interview, ignored "a vast amount of other record evidence," and issued a decision with a "fatal absence of detail," San Diego Unified Sch. Dist. v. Comm'n on Prof'l Competence, 214 Cal. App. 4th 1120, 1145, 1149-50 (2013), and another where the trial court expressly concluded that no presumption of correctness applied to the agency's findings, Fukuda, 20 Cal. 4th at 810, 817.

In contrast here, the trial court scrupulously scoured the entire record, correctly recited the evidence, and provided a thorough and well-reasoned explanation of its findings. The trial court expressly identified the proper standard of review and presumed the correctness of the findings from the Regional and State Boards. The trial court also deferred to the State Board's "iterative" approach for complying with the basin plan, 12 AA 2832; 12 AA 2839 and selection of cooperative monitoring. 12 AA 2846. But upon properly reweighing the evidence, the trial court made its own determination that the Modified Waiver did not address the

shortcomings of the ineffective 2004 Waiver and therefore could not ensure meaningful progress in reducing pollution. See 12 AA 2837-41; see Vaill, 4 Cal. App. 4th at 257.

Intervenors take a different tack to avoid the substantial evidence standard, mischaracterizing the dispute as a legal one. But the dispute on this appeal is a factual one and thus subject to the substantial evidence standard. Pure legal questions that receive do novo review arise only where the issues "relate to the selection of a rule." Crocker Nat'l Bank v. City & Cty. of San Francisco, 49 Cal. 3d 881, 888 (1989). Here the parties do not dispute the applicable rule. All parties agree that the Porter-Cologne Act mandates that a conditional waiver must be consistent with the basin plan and the public interest – and that an iterative, tiered, cooperative monitoring approach potentially can be a legal means to achieve the required consistency. SBO 49; IO 49.

Because the legal standards are undisputed, only factual issues are before this Court. See Crocker Nat'l Bank, 49 Cal. 3d at 888 (substantial evidence standard applies even to mixed issues of law and fact where the inquiry is "predominately factual"). For example, this Court must consider the trial court's finding that the Modified Waiver, like the 2004 Waiver, lacks adequate standards and feedback mechanisms to ensure eventual compliance with the basin plan. In reviewing such a factual finding, this Court applies the substantial evidence standard. See Lake Madrone Water

Dist. v. State Water Res. Control Bd., 209 Cal. App. 3d 163, 165, 168, 171 (1989) (applying the substantial evidence standard to review trial court's determinations that sediment released from dam met the definition of "waste," that the dam operator constituted a "discharger" under the Porter Cologne Act, and that the State Board could regulate the operation of a dam); Surfrider Found. v. California Reg'l Water Quality Control Bd., San Diego Region, 211 Cal. App. 4th 557, 571 (2012) (applying same to review of the adequacy of site, design and technology measures in a Minimization Plan); AGUA, 210 Cal. App. 4th at 1267 (applying same to review the sufficiency of the Regional Board's general waste discharge order's monitoring system to halt groundwater degradation).

Accordingly, this Court should review the trial court's decision under the substantial evidence standard. In any event, even on de novo review, the evidence shows that the Modified Waiver does not comply with the law.

ARGUMENT

I. Substantial Evidence Supports the Trial Court's Finding that Coastkeeper's Issues Were Administratively Exhausted.

Appellants' exhaustion arguments lack merit. In the proceedings below, the State Board originally conceded that Coastkeeper had properly exhausted each of its claims, with the exception of the California

Environmental Quality Act ("CEQA") claim.[9] 7 AA 2022 ("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"), 7 AA 2026-27 (explaining that Coastkeeper, in exhausting the non-CEQA claims, "understood how to raise issues to the State Board during the administrative process and thereby exhaust administrative remedies"). At merits briefing, however, the State Board reversed course and, without any analysis of the applicable law or facts, asserted in a series of one-line statements scattered throughout its opposition brief that Coastkeeper failed to exhaust as to specific provisions of the waiver (pesticide controls, vegetation buffers, tile drains, tiering, and individual surface water monitoring). See 11 AA 2585, 2595, 2597, 2606.

In response to these belated arguments, the trial court thoroughly evaluated the various issues raised at each step in the administrative process and properly concluded that Coastkeeper adequately exhausted its claims before the State Board. 12 AA 2826-2830. Far from "glossing over the

[9] In its writ petition, Coastkeeper raised claims for violation of Water Code section 13269(a)(1) and section 13269(a)(2), violation of California's Antidegradation Policy, improper exclusion of relevant scientific evidence, and violation of CEQA. The State Board's arguments related to exhaustion of the Antidegradation Policy and CEQA claims are addressed in their respective sections below.

chronology of the issues raised" as the State Board suggests, SBO 42-43, the trial court cited ample evidence to support its conclusion that, "[i]n light of the long and complicated history behind the Board's adoption of the Modified Waiver, the court is persuaded that the issues raised by [Coastkeeper] have been fully exhausted." 12 AA 2830.

The State Board now devotes several pages of its opening brief to exhaustion, SBO 42-49, focusing on the same five specific aspects of the waiver (pesticide controls, tile drains, vegetation buffers, tiering, and individual surface water monitoring requirements) that the trial court methodically addressed. The State Board's argument turns on a mischaracterization of what happened in this case. Unlike the CEQA cases on which the Board relies, Coastkeeper did not, and does not here, contend that these five specific aspects of the Modified Waiver, individually or collectively, render it unlawful. Rather, Coastkeeper challenged the failure of the Modified Waiver to comply with Water Code section 13269(a)'s provisions requiring consistency with the basin plan and the public interest (First Cause of Action) and mandating effective verification monitoring (Second Cause of Action). The only relevant question before the trial court in reviewing these claims was whether the Modified Waiver as a whole would ensure measurable progress toward achieving basin plan water quality objectives.

The State Board's exhaustion arguments do not make any sense in this context. The record demonstrates that over the course of the Boards' administrative processes, Coastkeeper grew increasingly concerned that the proposed waiver would not effectively control agricultural pollution or meet Water Code requirements. As the proposed waiver was weakened time and again, Coastkeeper raised issues like vegetative buffers, pesticide controls, and individual surface monitoring, among others, only to show that there were many areas of potential improvement that the Boards could consider including in the waiver to meet the requirements of Water Code section 13269. None of these items, or any others, are expressly required by the statute, and their inclusion or exclusion does not render a waiver either legal or illegal, as the trial court recognized. See 12 AA 2841 n.12. Because the trial court did not rely on the five specific issues discussed in the State Board's brief to find the Modified Waiver inadequate, the point of the Board's lengthy exhaustion argument is not entirely clear. If the Board means to say that Coastkeeper was barred from mentioning these issues in its trial brief or that the trial court could not properly read that brief, it provides no legal authority for that proposition.

In any event, the State Board's exhaustion argument is built on a false narrative that Coastkeeper wholeheartedly endorsed the State Board's draft waivers until abruptly changing course at the last moment with its September 17 comments, leaving the State Board blindsided. SBO 46. But

in fact, Coastkeeper's comments were timely made at each opportunity for public comment, in response to new language inserted by the State Board, alerting the Board to all of these issues beginning with the first draft. During the July 2013 comment period on the State Board's first draft, prepared "on its motion," Coastkeeper raised every issue identified by the State Board. SB 5835-40, 6000-6003, 6079. For instance, Coastkeeper opposed reliance on receiving water monitoring data in lieu of individual discharge monitoring for Tier 3 because "in-stream receiving water monitoring simply does not provide the information necessary to verify whether growers discharging to impaired waters are in compliance with water quality standards . . . [I]ndividual monitoring must remain an explicit requirement for Tier 3." SB 5836-37. Coastkeeper also flagged that pesticide-switching would shrink an already small Tier 3 and allow continued toxicity problems. SB 6000 ("despite all these water bodies being listed as toxic, only one single grower along Rincon Creek ended up in Tier 3. And if this grower does what most expect will happen and simply switches pesticides, he, too, will fall off the list. So will we solve the toxicity problems in our area with this waiver? Probably not.").

And perhaps most relevant to Coastkeeper's lawsuit, the most stringent source control provisions, including pesticide controls, that would have applied to the shrinking Tier 3 became unenforceable through the State Board's revisions. Pressured by objections to making dischargers

"vulnerable to enforcement," the State Board weakened the enforceability of waiver provisions 82 and 84-87 that would have required Tier 3 growers to "effectively control" pesticides, among other pollutants. SB 5688. Specifically, the State Board revised provision 82 so that compliance with these provisions could be met even if management practices were ineffective, so long as the discharger "engaged in good faith in an iterative process of proposing and implement more stringent practices." SB 5688-89. Coastkeeper protested, explaining that, by equating good faith efforts with compliance, the revision would "reduce the enforceability" of the waiver's most important Tier 3 obligations because "how do you define good-faith effort?" SB 6002-3.

To put a finer point on it, by July 23, 2013, Coastkeeper had already alerted the State Board to all of the issues in question, asking that the Board:

- Clarify the new "good faith" standard in provision 82 to make the waiver's most stringent Tier 3 source control provisions, including pesticide controls, enforceable (SB 6002-3);
- Address pesticide controls to ensure that dischargers cannot switch to another pesticide and worsen toxicity (SB 6000);
- Address pesticide controls to ensure that Tier 3 dischargers cannot opt out of Tier 3 by switching pesticides (SB 6000);
- Address individual surface water monitoring provisions to ensure that, especially for Tier 3, individual tailwater discharges, and not receiving water bodies, are monitored (SB 5837);
- Retain buffer plans and tile drain monitoring (SB 5835, 6079).

Again during the comment period on the State Board's second draft, Coastkeeper, calling it a "sharp disappointment," warned that "the time for continued weakening of proposed provisions has come to an end." SB 6303. Coastkeeper's continuing and overarching concern was that the most stringent provisions for Tier 3 were being undone, this time by the State Board's new provision (then labeled 87A and ultimately 83.5) allowing mere modification of management practices to satisfy compliance. As Coastkeeper explained, requiring modified management practices "is not nearly explicit enough to ensure that iterative implementation is increasingly effective to control discharges. Rather, Provision 87A would in effect equate implementation of iterative management practices, be they effective or not, with achievement of water quality standards. In practice, this provision would remove the Central Coast Water Board's discretion to conduct enforcement even in cases of an egregious discharge or recalcitrance so long as the discharger in question could identify *any* modification of BMP [Best Management Practice] implementation." SB 6305.

As the record reflects, Coastkeeper fully alerted the State Board to these issues in comments on the second draft, pressing the State Board to:

- Strengthen provision 87A so that the most stringent Tier 3 source control provisions, including pesticide controls, are enforceable (SB 6305);

- Broaden toxicity controls because pesticide-specific controls will not reduce toxicity (SB 6306);

- Address pesticide-switching out of Tier 3 (SB 6306, 6523 ("Tier 3 enrollees is less than they originally expected, and we suspect that's because some growers may be switching pesticides or splitting parcels to avoid Tier 3"));

- Broaden applicability of individual discharge monitoring because it is critical and only applies to Tier 3 dischargers that represent less than 3% of the region (SB 6303, 6523);

- Require vegetation buffers because buffer plans alone are insufficient and retain tile drain monitoring (SB 6303, 6594).

All of these comments precede the third draft and Coastkeeper's Sept 17, 2013 comment letter.

With the third draft's wave of new revisions, Coastkeeper could no longer limit its comments to particular aspects of the waiver because the waiver as a whole had regressed so much. This draft, Coastkeeper explained, "does not create a path forward to clean up polluted waters, and is not in the public interest [… .] It is impossible to comment on this latest version without comment on the efficacy of the Order as a whole." SB 6731. Coastkeeper observed that this draft was no better than the 2004 Waiver – that is, it "does no more than require enrollment, submission of reports, monitoring of discharges, and development of plans, and completely fails to set limits on discharges of toxic waste and groundwater-polluting nitrates." SB 6733.

Again Coastkeeper raised concerns related to the enforceability of the most stringent Tier 3 provisions after the State Board added provision "87.5" (since renumbered as Provision 83.5 in the final Modified Waiver) which changed "modified" to "improved," so that compliance could be met with "improved" management practices. Coastkeeper warned: "This new provision essentially states that any simple change in practices – whether reasoned or effective or not – brings the discharger into compliance with the Order. We request this provision be entirely removed from the Order." SB 6742. As reflected in the record, Coastkeeper also raised many of the same issues again, requesting that the Board:

- Delete the new provision 87.5 because requiring "improved" management practices is unenforceable (SB 6742);
- Broaden toxicity controls because pesticide-specific controls will not reduce toxicity (SB 6733);
- Address pesticide-switching problem that has rendered Tier 3 so small that the waiver is no longer effective to control toxic discharges and few discharges will be monitored (SB 6733-34);
- Require vegetation buffers (SB 6739).

The State Board frames this process as one that narrowed the issues. SBO 44. While its revisions may have addressed and continuously narrowed the issues for the agricultural industry, each revision only increased Coastkeeper's concerns, and those increased concerns were fully reflected in specific comments on each draft. Through these comments, the

State Board was made fully aware – from the outset and continuing throughout the administrative process – of every one of these issues.

II. Substantial Evidence Supports the Trial Court's Finding that the 2013 Modified Waiver Violates Water Code Section 13269.

The trial court correctly concluded that the Modified Waiver does not ensure compliance with the Basin Plan and is not in the public interest because it is not "reasonably designed to show measurable progress toward improving water quality over the short-term and achieving water quality standards in a meaningful timeframe." 12 AA 2837. The court thus concluded that Coastkeeper met its burden of showing that the weight of the evidence fails to support the legality of the Modified Waiver.

In reaching this result, the trial court conducted an independent review of the extensive administrative record, properly giving the agency's factual findings a presumption of correctness. 12 AA 2824. This Court must, therefore, "conclusively presume that the trial court performed its duty, gave full weight to the presumption of validity of the board's findings, but nevertheless found against the board." Fukuda v. City of Angels, 20 Cal. 4th at 812.

A. The Trial Court Properly Found that the Modified Waiver Does Not Comply with the Basin Plan.

The trial court correctly held that the State Board failed to support its conclusion that the Modified Waiver is consistent with the Basin Plan, as required by Water Code section 13269(a)(1). 12 AA 2831-44. In making

this finding, the trial court found, based on examining the terms of the Modified Waiver itself, that the waiver lacks "sufficiently specific, enforceable measures and feedback mechanisms." Id. at 2838. Appellants' arguments that the trial court failed to look to the record evidence or to properly defer to the Board are meritless.

1. The Trial Court's Finding that the Modified Waiver Lacks Enforceable Measures and Feedback Mechanisms Needed to Meet the Basin Plan's Water Quality Objectives Is Supported by the Evidence.

The Basin Plan establishes water quality objectives to protect beneficial uses, including for drinking, recreation, and agriculture; includes an implementation plan to achieve water quality objectives; and incorporates the Nonpoint Source Policy and the Antidegradation Policy. RB 9165, 9193-94; see Water Code §§ 13240-42, 13050(j). Specifically, the basin plan sets water quality objectives for nitrates, toxicity, pesticides, and sediments. RB 5450, 9197, 9199, 9357 (nitrates); RB 9196 (toxicity); RB 9196 (pesticides); RB 9195. These standards require that nitrate concentrations do not exceed drinking water standards and that pesticide, toxicity, and sediment loadings not harm beneficial uses.[10] Any waiver

[10] As to nitrates, water must comply with the drinking water standard of 45 mg/L as nitrate and shall not exceed concentrations that cause aquatic growths to "cause nuisance or adversely affect beneficial uses." RB 5450, 9197, 9199, 9357. Regional Board staff has also estimated that a standard of 1 mg/L is necessary to protect aquatic life. RB 5450. As to toxicity, "all waters shall be maintained free of toxic substances in concentrations which

approved by the Boards must be "consistent" with these standards. Cal. Water Code § 13269(a)(1).

The trial court concluded that the Modified Waiver failed to include "sufficiently specific, enforceable measures and feedback mechanisms needed to meet the Basin Plan's water quality objectives." 12 AA 2837. In making this finding, the trial court expressly deferred to the State Board's policy and technical judgment – with which Coastkeeper agreed – that immediate compliance with the Basin Plan is not "viable or desirable." 12 AA 2837 (noting Coastkeeper's position). The court, however, properly recognized that the State Board's discretion is not unbounded; even an iterative interim approach must ensure reasonable progress toward the final goal. Thus, notwithstanding its deference to the long-term, "iterative" approach chosen by the Boards, the trial court found that the Modified Waiver fails to ensure that implemented management practices – and their iterations – will make "measurable progress toward attaining water quality standard" or achieve "quantifiable reductions in pollutant discharges." 12 AA 2840. Supposed assurances of progress, critical to an interim plan that is part of an "iterative" process, are inadequate because the Modified

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are toxic to, or which produces detrimental physiological responses in human, plant, animal, or aquatic life." RB 9196. Pesticides shall not reach concentrations that adversely affect beneficial uses. Id. As to sediment, loading and discharge rates shall not cause a nuisance or adversely affect beneficial uses. RB 9195.

Waiver "does not define what constitutes 'improved' management practices, or include any additional monitoring or standards by which to verify the 'improved' management practices are effectively reducing pollution." Id.; see also id. at 2840 & nn.10-11.

The trial court was correct. The Modified Waiver generally requires that dischargers "effectively control individual waste discharges" of various pollutants – such as pesticides and toxic substances (Provision 80), sediment and turbidity (Provision 81), nutrients (Provision 82), and nitrates (Provision 83) – without setting any standards for these pollution discharges. Moreover, if a grower's existing management practices do not effectively control discharges, the waiver requires only that the discharger make a "conscientious effort" to identify "improved" management practices – without defining what "improved" means or how it will be measured or enforced. In effect, the Modified Waiver tells dischargers: "If what you are implementing does not work, try something else."[11]

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[11] This long-term "iterative" approach of the Modified Waiver is set forth in Provision 83.5 of the Modified Waiver:

> To comply with [the waiver and effectively control various pollutants], Dischargers must (1) implement management practices that prevent or reduce discharges of waste that are causing or contributing to exceedances of water quality standards; and (2) to the extent practice effectiveness evaluation or reporting, monitoring data, or inspections indicate that the implemented management practices have not been effective in preventing the discharge from causing or contributing to exceedances of water quality standards, the Discharger must implement improved management practices.

Given the indisputable record evidence of severe water quality impairments and mounting public harms, the State Board's legal obligation was to ensure that the waiver would actually achieve quantifiable pollution reductions on a meaningful timeframe. As the trial court noted, there is no single suite of measures that would comply with Water Code section 13269; the Board has wide discretion to craft waiver conditions that will put the region on a trajectory toward meeting Basin Plan water quality objectives. 12 AA 2840-41. But the State Board does not have discretion to lawfully do what it ultimately did here – give the agricultural industry carte blanche to come up with its own unenforceable pollution reduction strategies.

In the face of the trial court's thorough analysis, the State Board now argues for the first time that the term "improved" is "necessarily vague, as it is an impossible regulatory task to evaluate how much improvement may be required in any given scenario," and thus the Regional Board should be given sole discretion to determine whether an improvement has been made. SBO 70. But, as AGUA held, such open-ended enforcement discretion does not ensure improvements to water quality. 210 Cal. App. 4th at 1276-77 (enforcement provisions deficient because there were "no mandatory standards governing the exercise of the Executive Officer's discretion").

SB 7187, 7362 (redlined version).

Further, as the trial court explained, discretion without benchmarks is insufficient under the Water Code. The Modified Waiver "assumes that any perceived improvement is enough, as long as the improvement practice was implemented in good faith, . . . [and thus it] is difficult for the court to see how this is an enforceable standard." 12 AA 2840 (emphasis added); id. at 2839 (Provision 83.5 is "highly unlikely to work"); see also SB 7186 (Provision 87.5 [83.5 in the later version] guarantees that the "[Regional] Board will not take enforcement action against a discharger that is implementing and improving management practices").

The trial court properly found that the State Board failed to demonstrate that the Modified Waiver will result in measurable progress. 12 AA 2837.[12] None of Appellants' new arguments change that clearly correct conclusion. For this reason alone, the Court should affirm the trial court's findings and uphold the Decision.

[12] Cf. Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 698 (9th Cir. 2004) (as to air pollution reduction plans, distinguishing between establishing general "targets" and actual requirements to meet them); Hall v. EPA, 273 F.3d 1146, 1159 (9th Cir. 2001) (under a similar scheme under the Clean Air Act, which requires regional plans akin to the basin plan to achieve the national ambient air quality standards, similar to water quality objectives, agency "must determine the extent of pollution reductions that are required and determine whether the emissions reductions effected by the proposed revisions will be adequate to the task"); NRDC v. Kempthorne, 506 F. Supp. 2d 322, 370-73 (E.D. Cal. 2007) (compliance is impossible to ascertain without identification of specific reductions).

2. In Reaching Its Decision, the Trial Court Did Not Commit Evidentiary or Other Legal Error.

As demonstrated above, the State Board is wrong that the trial court "failed to consider the Modified Waiver on its own terms and to weigh the evidence to determine if, in fact, it lacks specific, enforceable measures." SBO 50. The trial court made its findings after thoroughly analyzing the Modified Waiver and how its various provisions work together, including the monitoring provisions. 12 AA 2838-40, 2843, 2846 & nn.14-15. The State Board nevertheless claims that the trial court committed legal errors that warrant reversal. SBO 33-42. As discussed below, the Board is incorrect.

a. The Trial Court Properly Compared the Modified Waiver Against the 2004 Waiver and Determined that It Is Only Marginally, if at All, More Stringent.

Having carefully analyzed the terms of the Modified Waiver itself, the trial court compared these terms to the failed 2004 Waiver to confirm that "there is little to support a conclusion that the Waiver will led to quantifiable improvements in water quality or even arrest the continued degradation of the region's waters." 12 AA 2837. The trial court logically concluded that, "[f]or the most part, the Modified Waiver continues the approach adopted by the 2004 Waiver[;] it is unreasonable for the Board to keep doing the same things it has been doing and expect different results." Id. at 12 AA 2838, 2840. There was no legal error in the trial court using

the failed 2004 Waiver as a benchmark against which to compare the supposedly improved 2013 iteration.

Properly exercising independent judgment review, the trial court made several findings comparing the two waivers. See, e.g., RB 1161, 2133, 2145, 2149, 3897-98, 3974. These findings are based on substantial evidence contained in the record, not "assumed, with little evidentiary support," as the State Board claims. See SBO 36, 37. First, the 2004 Waiver, which focused on enrollment, education, and water quality assessment, ultimately failed and allowed water quality to worsen. 12 AA 2838 (citing RB 1141, 2132-33, 2145, 2149, 2151, 3767, 3897-98, 3974; SB 17, 61). Second, several provisions in the Modified Waiver are in fact very similar to those of the 2004 Waiver. SB 1976, 1979-87, 1989-98 (Regional Board Assistant Executive Officer observing that backflow prevention devices, maintenance of containment structures, development and implementation of a Farm Plan, and preparation of an Annual Compliance Form are similar to requirements under the 2004 Waiver). Third, the 2004 Waiver was unsuccessful because it lacked adequate standards and feedback mechanisms to determine whether implemented management practices were working to reduce pollution. 12 AA 2838 (citing RB 2132 (with the 2004 approach, "Water Boards could not measure and account for success in terms of reducing pollutant loading or achieving compliance with water quality objectives"), 2151 (the 2004

Waiver "did not emphasize compliance with water quality standards and did not include monitoring to measure and assure restoration of water quality and protection of beneficial uses")); see also RB 1128-29, 7743.

Finally, the record supports the trial court's finding that any increased stringency of the Modified Waiver over the 2004 Waiver "was based primarily on the Tier 3 requirements." 12 AA 2835-36 (citing RB 7756, Regional Board staff analysis concluding that compared to the 2004 Waiver, the 2012 Waiver, which covered more farms in Tier 3 than the Modified Waiver, imposed fewer requirements on Tier 1 and comparable requirements on Tier 2); see also RB 1141-42, 4854, 4875, 4862, 4869, 4883-84, 4896, 7108, 7739-62, 7759-62 and SB 1975-2011 (extensive analysis from Regional Board staff and Assistant Executive Officer of similarities between the 2004 and 2012 Waivers); SB 487 (email from the State Board to the public, including Kari Fisher, counsel for some of the Intervenors stating the same), 1978 (estimated number of farms and acreage for the 2012 Waiver). Yet, as the trial court explained, Tier 3 comprises only "3% of farms and 14% of irrigated acreage" – a small number that could further shrink as Tier 3 dischargers transfer out. 12 AA 2836, 2840 (citing RB 4863-64, 7756, 7779, SB 487, 1978, 7343, 7346). Thus, only an insignificant fraction of dischargers and irrigated lands are subject to more stringent requirements than under the failed 2004 Waiver.

While no one disagrees that the Modified Waiver allows growers to avoid Tier 3's more stringent requirements, Intervenors claim that the trial court "nonsensical[ly]" decided that the ability to switch to lower tiers was problematic. IO at 112. They argue that a switch, when it occurs because a discharger is no longer using chlorpyrifos or diazinon, is actually a good thing, simplistically assuming that the switching dischargers are using no other pesticides. IO 112. However, dischargers do not replace chlorpyrifos or diazinon with nothing; they tend to use more toxic (pyrethroids) and more persistent (neonicotinoids) alternatives. SB 6306, 6733. In any event, as dischargers defect to lower tiers, those requirements that are more stringent than the 2004 Waiver no longer apply either, including individual monitoring, mandatory buffer zones, and Irrigation and Nutrient Management Plan requirements. Thus, the trial court had substantial evidence for its conclusion that defection to the lower tiers is problematic for achieving Basin Plan compliance. Cerberonics, Inc. v. Unemployment Ins. Appeals Bd., 152 Cal. App. 3d 172, 176 (1984) (on appeal, all reasonable inferences should be made to uphold the trial court's findings).

As demonstrated, substantial evidence anchors the trial court's findings that the Modified Waiver is only marginally more stringent, if at all, than the 2004 Waiver. Rather than accept at face value the State Board's conclusion that the Modified Waiver is more stringent than the

2004 Waiver, the trial court properly exercised its independent judgment and reweighed the extensive record evidence to reach its conclusions.

b. The Trial Court's Findings Did Not Turn on Comparisons of the Modified Waiver to the 2010 Draft.

Appellants' next argument – that the trial court erred in pervasively relying on the more stringent 2010 Draft to find that the Modified Waiver is deficient, SBO 50; IO 109-10 – is factually and legally wrong. The trial court did not rely on any measures in the 2010 Draft to find the Modified Waiver illegal.[13] Rather, the court acknowledged Appellants' contention that "it is irrelevant whether the final Waiver is more or less protective of water quality than previous drafts," 12 AA 2836, and explicitly declined to order the State Board to include specific elements from the 2010 Draft in the Modified Waiver. E.g., 12 AA 2841 (trial court "not persuaded that an adequate Waiver necessarily must include nitrogen balancing ratios," etc.). Thus, the trial did not use the 2010 Draft as a baseline for evaluating the Modified Waiver; it merely described the five-year history of progressive weakening for each subsequent draft waiver as part of its thorough and meticulous review of the record.

[13] Significantly, the State Board fails to cite to a single instance in which the trial court's analysis relies on the 2010 Draft. See SBO 33-36; 53-54, 59. The single instance to which the State Board cites is contained in the court's recitation of facts. Id. at 38 n.3.

As a legal matter, there is no support for Appellants' apparent argument that the trial court should not have referred in its Decision to the 2010 Draft. The developmental history of the waiver, including the 2010 Draft, is legally relevant to the issue of administrative exhaustion and is citable evidence in the record of the agency's evolving considerations during the lengthy administrative process. See City of Rancho Cucamonga v. Reg'l Water Quality Control Bd.-Santa Ana Region, 135 Cal. App. 4th 1377, 1386–88 (2006), as modified (Feb. 27, 2006) ("[a]n agency may . . . rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence") (emphasis added); Cal. Youth Auth. v. State Pers. Bd., 104 Cal. App. 4th 575, 586 (2002) ("[i]n assessing whether substantial evidence exists, we consider all evidence presented, including that which fairly detracts from the evidence supporting the Board's determination");Surfside Colony, Ltd. v. California Coastal Com., 226 Cal. App. 3d 1260, 1263 (1991), reh'g denied and opinion modified (Feb. 14, 1991). Nothing prohibits a trial court from examining and considering this history. This Court should, therefore, reject the argument that the trial court improperly or unduly relied on the 2010 Draft.

c. The Decision Did Not Turn on the Lack of Specific Provisions in the Modified Waiver Addressing Nitrogen Balancing and Specific Management Practices.

The State Board's final clear error contention fairs no better. The State Board selectively quotes the Decision, repeatedly claiming that the trial court found the Modified Waiver inadequate because it failed to include specific provisions on nitrogen balancing ratios, assessment of practice effectiveness, pesticide controls, and other specific management practices. E.g., SBO 41 (arguing that trial court's "decision amounts to a directive for the State Board to continue to include provisions from the 2012 Waiver"); IO 62--70. This argument is patently false. The trial court concluded precisely the opposite:

> The court is not persuaded that an adequate Waiver necessarily must include nitrogen balancing ratios, broader farm plan reporting, more rigorous pesticide controls, mandatory vegetation/riparian buffers, and/or more comprehensive tile drain monitoring. The court simply concludes that the Modified Waiver, as currently structured, lacks sufficient measures to meet the Basin Plan's water quality objectives and, as a result, the Waiver is not consistent with the Basin Plan.

12 AA 2841. The court did not find that any particular term or condition is required by section 13269, only that the Board has a legal obligation to demonstrate that its waiver includes adequate measures to satisfy basin plan standards – something it did not do here.

In conjuring this argument, Appellants conflate the trial court's discussion of Coastkeeper's arguments with the court's own conclusions in the Decision, in an apparent attempt to mislead this Court. For example, the Board complains that "the trial court erroneously ruled that the Modified Waiver has 'not a single enforceable standard' for reducing nitrogen use." SBO 55. The trial court did not make a finding to this effect. Rather, as the full quote from the Decision reveals, the court was merely summarizing Coastkeeper's arguments: "Petitioners contend . . . there is not a single enforceable standard in the Modified Waiver that will require agricultural dischargers to use less nitrogen." 12 AA 2833. The trial court never concluded that the Modified Waiver lacks "a single enforceable standard" or that the absence of any particular provision renders the waiver unlawful. Rather, the State Board's attempt to create reversible error here is based on the selective, non-contextualized use of partial quotes from the Decision to make it appear that the trial court concluded things that it did not.[14] Again, the trial court held that an

[14] Compare SBO 58 (farm plans) with 12 AA 2833; compare SBO 59 (pesticides) with 12 AA 2834; compare SBO 60 (vegetation buffers) with 12 AA 2834; compare SBO 61 (tile drains) with 12 AA 2834; compare SBO 62 (tiering) with 12 AA 2834.

Nitrogen balancing (SBO 55-57): The Board jettisoned the nitrogen balancing requirement (that is, reduction through determining the amount applied and the amount needed for crop). In support of this deletion, the Board itself cited to no sources. SB 7210. The record that the Board cites now to this Court, and also cited in the trial court briefings, is comprised of

adequate waiver under Water Code section 13269 need not include specific requirements that the parties briefed (including nitrogen balancing, farm plan requirements, pesticide controls, vegetation buffers, tile drains, and tiering), but that a waiver should be judged as a whole. 12 AA 2841. There was no error in that ruling.

B. The Trial Court Properly Found that Modified Waiver Does Not Require Adequate Monitoring to Verify that Management Practices Are Effectively Controlling Pollution.

Section 13269(a)(2) mandates that conditional waivers include monitoring requirements "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 differently, monitoring provisions "shall include sufficient feedback mechanism" to ascertain "whether the program is achieving its stated purpose(s)." RB 9419 (Nonpoint Source Policy).

The trial court correctly found that the Modified Waiver does not contain adequate provisions to identify dischargers causing or contributing to exceedances and therefore cannot verify the effectiveness of

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notes of meetings that show only that there is a range in the nitrogen amount that crop use – not that there is uncertainly or that uptake values are unavailable. 11 AA 2649-50. In the meantime, the State Board also found that "that the practice of recording and budgeting of nitrogen application is a relatively low-cost, standard industry practice that is widely recommended by agronomists and crop specialists and already utilized by many growers in the Central Coast region." SB 7205.

implemented management practices. 12 AA 2839-40. These findings are supported by substantial evidence in the record, including the State Board's own findings. This Court should therefore uphold the trial court's findings.

1. The Trial Court's Finding that the Modified Waiver Contains No Mechanism to Identify and Address the Vast Majority of Problem Dischargers Is Supported by Substantial Evidence.

The Modified Waiver relies on the iterative implementation of management practices to meet water quality objectives. Accordingly, monitoring requirements must be adequate to verify the effectiveness of implemented management practices. Further, as discussed, the Modified Waiver must contain adequate standards and enforcement mechanisms to ensure that improved management practices will be implemented when monitoring reveals that existing management practices are not effective.

AGUA, in which this Court struck down a similarly deficient monitoring program for a conditional waiver, is instructive. There, the monitoring program was limited in size, frequency, and scope of chemicals tested, and was unable to identify pollution in a timely fashion. 210 Cal. App. 4th at 1275. The monitoring program failed to pinpoint actual sources of pollution, making it impossible to determine whether the waiver there was improving water quality. Id. at 1275-78.

Similarly here, the monitoring requirements that would verify the effectiveness of management practices – i.e., individual monitoring – apply

to an extremely small and fleeting group: only Tier 3 growers with irrigation water or storm water discharges to surface water from an "outfall" (locations where irrigation water and storm water exit a farm or otherwise leave the control of the discharger, after being conveyed by discrete structures or features that transport water, such as pipes, ditches, containment structures, or tile drains). 12 AA 2840 & n. 11; SB 7513-15; see AGUA, 210 Cal.App.4th at 1274 (monitoring "must be sufficient to alert the Regional Board if a dairy is degrading the groundwater"). The record contains substantial evidence that individual discharge monitoring was essential for verifying whether management practices are working. See, e.g., RB 4850, 5153; SB 7390-91, 7435-36, 7496-97, 7513-15. The record likewise contains substantial evidence that Tier 3 dischargers are few. The subset of Tier 3 group required to perform individual monitoring is comprised of about 66 of the 110 Tier 3 dischargers, a sliver of the roughly 3,000 dischargers in the region. SB 2009. Further, the terms of the Modified Waiver explicitly allow this small fraction of dischargers to move to a lower, less stringent tier. 12 AA 2840; RB 4854, 7755, 7779, 8481. Accordingly, the trial court correctly found this scheme to be inadequate. See 12 AA 2839, 2840, 2846.

The trial court also correctly concluded that receiving water monitoring, as implemented here, fails to identify problem discharges: "[B]ecause receiving water monitoring data, submitted in most cases by a

cooperative monitoring group, does not identify the individual dischargers that are 'causing or contributing' to the exceedance[,] … neither the Board, nor the cooperative monitoring group, nor (in many cases) the grower, can identify where the pollution is coming from or whether the grower's management practices are effectively reducing pollution and degradation." 12 AA 2839; see also 9 AA 2317 (Intervenors conceding in their trial court brief that "[t]he majority of farmers [subject to the Modified Waiver] have selected to comply through participation in cooperative monitoring program"). The court's finding is support by extensive record evidence that explains the importance of identifying problem discharges, for verifying whether management practices are in fact reducing pollution. See, e.g., RB 1219, 3743-45, 4850, 4895, 5153-54; SB 7199.

Additionally, receiving water monitoring data resulting from cooperative monitoring describe pollution concentrations only in areas downstream (sometimes far downstream) from the actual sources. See SB 7390-91, 7435-36, 7496-97; SB 7513-15. For the entire region, nearly 11,274 square miles from San Mateo to Santa Barbara, RB 9166-67, there are only 48 receiving monitoring sites (one every 235 square miles). See SB 7403. Many dischargers are miles and miles away from the closest monitoring site, and much of their pollution disperses into and contaminates the environment before reaching one. Thus, the Board would

be hard put to identify where pollution is coming from or how to abate it. See 12 AA 2838-39; see also RB 1128-29, 3749-50, 3762, 4850.

Appellants in fact concede that cooperative surface water monitoring required under the Modified Waiver is insufficient to identify and address polluted discharges. In its brief, the State Board admits that "the baseline for surface receiving water monitoring does not automatically identify the individual discharger that may be causing an exceedance." SBO 67, n.19; see IO 79. Indeed, the State Board found that the Modified Waiver's cooperative monitoring approach lacks the "comprehensive process necessary to identify and address problem dischargers." SB 7199; see also RB 4850, 5153-54.

Despite the overwhelming record evidence and the State's concessions, Appellants variously claim that problem dischargers can be identified even without sufficient monitoring. First, the State Board opaquely states that cooperative surface receiving water monitoring points to "the general location of a problem so that the Regional Board can work with all dischargers in the area," which in many cases requires "improvement in practices implemented by all growers in a watershed, not just follow up with individual 'bad actors.'" SBO 67-68 n.19; see also IO 79 (claiming feasibility of "generally extrapolate[ing]" monitoring results). Appellants cite no evidence to support the efficacy or even feasibility of

this approach. AGUA correctly rejected such a vague enforcement approach. 210 Cal. App. 4th at 1277.

The State Board similarly argues that "in cases where a problem stems from the deficient practices of an individual discharger, the Regional Board has regulatory tools to track down the contribution of an individual discharger" and may conduct additional follow up monitoring as allowed by Water Code section 13267. SBO 67-68 n.19. The Boards' findings belie this claim. The State Board itself admitted that "[a]lthough the [2012 Waiver's] surface receiving water monitoring contemplates that the Executive Officer may approve additional monitoring sites to 'better assess the pollutant loading from individual sources' or may require toxicity evaluation 'to identify the individual discharges causing the toxicity,' it does not establish the type of comprehensive process necessary to identify and address problem discharges." SB 7199 (footnotes omitted). The Regional Board, too, found that, without the individual discharge monitoring requirements in the 2012 Waiver, "[t]here is no way for the Water Board or the public to identify and follow-up [sic] on sources of pollution without discharge monitoring from farms using the chemicals causing the pollution." SB 2002. As discussed, even if the cooperative monitoring program were adequate to isolate individual dischargers, which it is not, the Modified Waiver still lacks the necessary enforceable standards.

Fundamentally, these monitoring approaches suffer from the problem that the trial court identified – that receiving water monitoring would not indicate whether implemented management practices are effectively reducing pollution. See 12 AA 2840, 2846; see also RB 4850, 7743; see also RB 19, 62, 65-66; SB 2004, 2008-09; see also SB 2009 (individual monitoring and reporting requirements "improved on the 2004 Order … which only included cooperative surface water monitoring"); RB 7334; SB 8303 (Regional and State Board findings that the failed 2004 Waiver "did not include conditions that allowed for determining individual compliance with water quality standards or the level of effectiveness of actions taken to protect water quality, such as individual discharge monitoring or evaluation of water quality improvements"). As the trial court correctly found, the "limitations of the cooperative surface receiving water monitoring in identifying the source of exceedances was the impetus behind the inclusion of the individual surface water discharge monitoring for Tier 3 dischargers in [the Modified Waiver]." 12 AA 2846.

Regarding groundwater monitoring, the trial court correctly found that it was insufficient for verifying the effectiveness of implemented management practices. 12 AA 2842, 2846-47 n. 15. That is, while individual groundwater monitoring may disclose the condition of the water – whether the pollution is increasing or decreasing – it does not provide information about why a particular result is occurring or whether any

implemented practices will contribute to improvement in water quality. The State Board conceded this problem, acknowledging that the "primary" focus of the Modified Waiver's groundwater monitoring provisions was not for compliance purposes (i.e., connecting monitoring to effectiveness of management practices). See SB 7191. Notably, as the State Board explained, nitrate levels being detected through individual groundwater monitoring may not be related at all to implemented management practices, instead reflecting historic practices. SB 7191; see also AGUA, 210 Cal. App. 4th 1275 (monitoring that "does not provide either an accurate or a timely indication" of water degradation insufficient). The court therefore correctly found that groundwater monitoring is not adequate for determining whether implemented management practices are effective. 12 AA 2846-47 n.15.

2. Non-Ambient Water Quality Monitoring Cannot Substitute for Monitoring to Measure Water Quality Improvements.

Despite the fundamental flaws in the Modified Waiver's monitoring requirements, Appellants argue that the trial court failed to consider that non-ambient water quality monitoring, such as visual inspections, total nitrogen application reporting, and photo monitoring would be done in addition to ambient water quality monitoring (i.e., surface and groundwater monitoring). SB 69, 77; IO 72-75, 119-120. These monitoring provisions, as with water quality monitoring, fail because the Modified Waiver lacks

benchmarks and feedback mechanisms. See AGUA, 210 Cal.App.4th at 1278 (finding the requirements for further monitoring deficient because there was no enforcement mechanism to ensure contamination would be stopped).

The State Board also argues that management practice effectiveness can be verified through farm plan requirements coupled with the requirements for Annual Compliance Form reporting. SBO 58-59. This argument mischaracterizes the trial court's finding. Contrary to the Board's assertion, the trial court did not conclude that the Modified Waiver "eliminated the requirement of Farm Plans to describe and report the results of methods used to verify the effectiveness of management practices, treatment/controls measures, and farming practices." SBO 58. Instead, fully aware of the interplay between Provision 44(g) and the Annual Compliance Form requirements, the trial court stated that Tier 2 and Tier 3 dischargers were required to report in their Annual Compliance Forms the results of assessing the effectiveness of management practices. Compare 12 AA 2841 n.12 with SBO 58. But the court properly found that Modified Waiver lacks the feedback mechanisms – i.e., the next step to translate these assessments into effective and quantifiable pollution reductions.

3. The Trial Court's Factual Findings Related to Monitoring Were Not Contradictory.

Appellants also argue that the trial court contradicted itself by finding that requiring only surface receiving water monitoring for most dischargers (other than a subset of Tier 3 dischargers) was sufficient but contradicted itself by finding that the Modified Waiver "does not contain adequate monitoring provisions to verify that management practices are effectively controlling pollution." 12 AA 2846-47; SBO 66-67; IO 118. Contrary to Appellants' position, the trial court's findings are consistent.

The trial court found that, while cooperative monitoring is theoretically permissible, it must be designed to adequately verify management practice effectiveness in practice as designed here. See 12 AA 2838-39. Indeed, as the trial court highlighted, the State Board itself acknowledged the shortcomings of the cooperative monitoring program and suggested possible solutions to correct these defects, but then declined to do anything about it. 12 AA 2846 (citing SB 7198-99); 12 AA 2846-47 ("The Board acknowledged the limitations of the representative monitoring approach … but failed to include the necessary changes) (emphasis added). The trial court thus accepted cooperative monitoring as potentially sufficient for verification monitoring if the source of the exceedance could be identified when necessary. See 12 AA 2846. The trial court's factual findings related to monitoring are clearly consistent.

Grasping at straws, the State Board argues, finally, that the trial court was "confused" to require some "undefined" and additional "verification monitoring." SB Br. at 68. In no way did the trial court manufacture a requirement nonexistent in the Water Code itself or the Basin Plan. "Verification monitoring" is a term that the Regional Board itself used, and it simply means a type of confirmation and feedback measure (e.g., reporting, inspection, monitoring, etc.) that verifies the adequacy and effectiveness of the waiver's conditions, as required by the Porter Cologne Act and the Nonpoint Source Policy. See, e.g., RB 1141, 2133, 2151, 9419; Water Code § 13269; RB 9417-20 (NPS Policy).

Because the trial court's careful evaluation of the waiver's compliance with Water Code section 13269(b)(1)'s verification monitoring mandate is well-reasoned and supported by substantial evidence, this Court should affirm the Decision.

C. The 2013 Modified Waiver Is Not Consistent with the Nonpoint Source Policy.

The Nonpoint Source Policy sets out the required elements for any nonpoint source pollution control program, including the Modified Waiver. RB 9417. As a threshold requirement, the Regional Board can only endorse a program if "there is high likelihood" the program will achieve water quality objectives. RB 9417 (emphasis added). The trial court properly found, based on a lack of evidence that the Modified Waiver

would attain water quality objectives, that the waiver did not comply with Nonpoint Source Policy. 12 AA 2843.

1. The Nonpoint Source Policy Provides a Template for Programs to Control Nonpoint Source Pollution and Achieve Water Quality Objectives.

By requiring all programs to have the Nonpoint Source Policy's five key elements, the State Board demonstrated its knowledge of what is necessary to control nonpoint source pollution. RB 9417. Twelve years ago, when the State Board adopted the Policy, the State Board recognized that "[m]uch is known about the [management practices] that most effectively prevent and control polluted runoff." RB 9422. Further, the State Board already knew then that a successful management practices program "typically requires: . . . (2) monitoring to assure that practices are properly applied and are effective in attaining and maintaining water quality standards; (3) immediate mitigation of a problem where the practices are not effective; and (4) improvement of [management practice] implementation or implementation of additional [management practices] when needed to resolve a deficiency." RB 9413; see also 12 AA 2842. Yet for the Modified Waiver, the State Board failed to follow its own "template," RB 9421, by not including adequate feedback mechanisms to determine a grower's compliance, enforceable standards to immediately mitigate ineffective practices and implement new management practices, or improvements on the ineffective 2004 Waiver.

2. The Nonpoint Source Policy's Iterative Approach Requires Continuous Improvement and Adaptation When Programs Prove Ineffective.

To support its version of an "iterative" approach, the State Board argues that "in the earlier stages" the Board may use implementation assessments to measure progress and that the Policy's methodology recognizes that the Board will have to make adjustments over time to comply with water quality objectives. SBO 65 (quoting RB 9418; RB9419) (internal quotation marks omitted). The Nonpoint Source Policy, however, forbids reliance on ineffective practices, stating "[management practice] implementation never may be a substitute for meeting water quality requirements." RB 9417-18. And the Policy specifically prohibits polluters from continuing to utilize previously non-effective management practices. RB 9418 (requiring that "justification for the use of a particular category or type of [management practice] must show that the [management practice] has been successfully used in comparable circumstances."). The only iterative steps authorized by the Nonpoint Source Policy are steps "to adjust and improve the plan." RB 9417.

The true purpose of the iterative approach is to ensure that polluters are continuously making progress towards achieving water quality goals. See RB 9417. Under the Nonpoint Source Policy, the time schedule for meeting water quality objectives "may not be longer than that which is reasonably necessary." RB 9419. To ensure that polluters continue to

improve management practices, the Policy requires verification monitoring "to determine whether the program is on time and on track in achieving its goals." RB 9420. Recognizing the urgency necessary to comply with the Porter-Cologne Act, the Policy further instructs the Regional Board to have "[a] rigorous dedication to periodic evaluation of all aspects of the program and an adaptive management approach." RB 9422. Twelve years after the 2004 Waiver (and more than three decades since the Regional Board's original irrigated agriculture waivers), we are no longer in the early stages of the program. To comply with the Nonpoint Source Policy's iterative approach at this point, the Modified Waiver must make progress towards achieving water quality objectives.

3. The Modified Waiver Does Not Include the Nonpoint Source Policy's Five Key Elements.

The Policy mandates that Modified Waiver include five "key elements":

> (1) address nonpoint source pollution in a manner that achieves and maintains water quality objectives;
>
> (2) include a description of management practices, program elements expected to be implemented, and verification process;
>
> (3) include a time schedule and quantifiable milestones designed to measure progress toward achieving water quality objectives;
>
> (4) include sufficient feedback mechanisms to ensure that the program is achieving its stated purpose, and ascertain whether additional or different actions are required; and

(5) state the potential consequences for failure to achieve the program's objectives.

RB 9417-20. As the trial court found, the Modified Waiver does not satisfy the key elements of the Policy. 12 AA 2843.

Key Element #1

The trial court concluded that the Modified Waiver failed to provide sufficient measures to improve water quality and thus does not satisfy the first key element. Moreover, the tier designations fail "to ensure that all the significant sources of the [nonpoint source] discharges of concern are addressed," as the Policy requires. RB 9418. The trial court also found that the Modified Waiver's tier structure is a "fundamental problem" because "[t]he vast majority of growers . . . will be subject to requirements equal to, or less stringent than, the 2004 Waiver." 12 AA 2840.

Key Element #2

Without management practices that have a "high likelihood" of meeting water quality requirements, the Modified Waiver cannot meet the second key element. RB 9418. This element also mandates that a previously used management practice can only be implemented if it "has been successfully used in comparable circumstances." RB 9418. The Modified Waiver fails to incorporate Element #2 because it contains much of the same structure as the ineffective 2004 Waiver. See 12 AA 2838 (citing RB 2133, 2145, 2149; see also RB 3767, 3897-98, 3874; SB 17, 61).

Not only is it "unreasonable for the Board to keep doing the same things it has been doing and expect different results," but the Nonpoint Source Policy forbids it. 12 AA 2840.

Key Element #3

The Modified Waiver also violates the third key element by failing to include "specific time schedules designed to measure progress toward reaching quantifiable milestones." 12 AA 2843. Intervenors admonish the trial court for expecting the waiver to have "a step-by-step time schedule" and a monitoring program to measure compliance with the schedule. IO 114-15. But the Policy requires just that. Read together, the third and fourth key elements require "a specific time schedule, and corresponding quantifiable milestones," as well as a description of "the measures, protocols, and associated frequencies that will be used to verify the degree to which the [management practices] . . . are achieving the program's objectives." RB 9419. The trial court correctly found that Modified Waived lacks those provisions. 12 AA 2843.

Key Element #4

The fourth key element explicitly requires "feedback mechanisms," so the Regional Board can determine if "additional or different [management practices] or [management practice] implementation measures must be used." RB 9419. As discussed above in the discussion of Water Code section 13269(a)(2), and as the trial court found, the

Modified Waiver does not verify compliance with requirements. 12 AA 2838-40.

Key Element #5

Lastly, the Modified Waiver violates the fifth key element by not including "a description of the action(s) to be taken if verification/feedback mechanisms indicate or demonstrate management practices are failing to achieve the stated objectives." 12 AA 2843. The Policy instructs that "this element should be written with the objective of creating clear expectations and reinforcing the obligations" of the participants. RB 9420. In addition to failing to create clear expectations for growers, the Modified Waiver's vague "improved" management practices standard also "guarantees that that the Regional Board will not take enforcement action against a discharger as long as the discharger believes it is implementing 'improved' management practices, even if the 'improved' management practices remain completely ineffective at controlling discharges of waste." 12 AA 2840.

Ultimately, the State Board did not meet any of the Nonpoint Source Policy's five requirements. Most importantly, the trial court could not find evidence that the Modified Waiver will achieve water quality objectives, let alone that it has a "high likelihood" of doing so. 12 AA 2843.

D. The 2013 Modified Waiver Is Not Consistent with the Anti-Degradation Policy.

California's Antidegradation Policy, which is incorporated into the basin plan, prohibits the Boards from allowing an activity that will result in the degradation of high quality waters absent specific findings. RB 9377-78; State Water Res. Control Bd., Admin. Procedures Update 90-004: Antidegradation Policy Implementation for NPDES Permitting 2 (July 2, 1990) ("APU-90-004") (cited in AGUA, 210 Cal. App. 4th at 1270). The trial court correctly found that the State Board failed to perform an antidegradation analysis consistent with the Policy. See 12 AA 2844. All of Appellants' arguments that the trial court erred fall short.

1. California's Antidegradation Policy Imposes Specific Obligations on the Water Boards.

In 1968, the State Board adopted the State Antidegradation Policy, Resolution 68-16. RB 9377. The Policy incorporates the federal antidegradation policy, which applies to surface waters, and more inclusively extends its coverage to groundwater. APU-90-004 at 2, 4, 37 (Guidance Memorandum at 3). Antidegradation policies focus on maintaining and preserving high quality waters from degradation, as a supplement to requirements for cleaning up already degraded waters. See Sandra Zellmer & Robert L. Glicksman, Improving Water Quality Antidegradation Policies, J. of Energy & Env'tal L. 1-2 (Winter 2013); APU-90-004 at 43 (Guidance Memorandum at 9). To that end, California's

Antidegradation Policy prohibits the water boards from authorizing any activity which will result in the degradation of high quality waters absent specific findings. AGUA, 210 Cal. App. 4th at 1270.

The first step when undertaking an antidegradation analysis is to determine whether there are existing high quality waters that may be affected by a permitted discharge. Id. at 1278. This process requires the Regional Board to compare baseline water quality – the highest water quality achieved since 1968 – to water quality objectives for receiving waters affected by the discharge. Id. at 1270. "High quality waters" are defined as those waters whose quality has exceeded water quality objectives at any time since 1968. Id. If "baseline water quality" is better than water quality objectives and the permitted activity will result in a discharge of waste, the Policy is triggered, and water quality must be maintained in the absence of additional findings by the Board. AGUA, 210 Cal. App. 4th at 1270 (citing APU90-004).

Once the Policy is triggered, degradation of the receiving water by the discharge is presumed. AGUA, 210 Cal. App. 4th at 1272. Thus, in the absence of evidence to the contrary, the Board may only authorize a discharge to high quality waters if it makes the specific findings set forth in the policy.

2. Coastkeeper Exhausted Its Administrative Remedies as to Its Antidegradation Claim.

Coastkeeper exhausted its administrative remedies with respect to its claim that the Modified Waiver fails to comply with the Antidegradation Policy. To satisfy the requirement of exhaustion, a party need not "identify[ ] the precise legal inadequacy" at issue, nor use any "magic words" to flag its objection. State Water Res. Control Bd. Cases, 136 Cal. App. 4th 674, 795 (2006); Save Our Residential Env't v. City of W. Hollywood, 9 Cal. App. 4th 1745, 1750 (1992). Rather, all that is necessary is that the party fairly apprise the agency of the substance of the issue. Save Our Residential Env't, 9 Cal. App. 4th at 1750. Here, Coastkeeper and other parties have been clear from the outset of the administrative process that continued degradation of the Region's waters was of paramount concern.

First, beginning with the Regional Board's first draft waiver in February 2010, comments from Coastkeeper and other parties focused on the inadequacy of the 2004 Waiver in preventing degradation, as well as the need for a new waiver capable of preventing further degradation and restoring water quality. Commenters "urge[d] that the Board take timely action to prevent further degradation of the Region's water[.]" RB 1548; See also RB 1798-99, 2989-2990; see also RB 1328, 4607 (2010 and 2011 Coastkeeper comment letters emphasizing the need for the Board to comply

with its mandate "to protect the quality of waters in the state from degradation"). These letters explicitly cited to the Board's need to comply with Water Code section 13000." RB 1328, 4607. The Policy, to be sure, effectuates the intent of the Legislature reflected in Water Code section 13000, that "the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation."

Second, the Regional Board was fully aware that compliance with the Policy was an applicable legal requirement when adopting conditional waivers. See RB 695 (Regional Board briefing on the Policy); see also RB 69, 101, 111 (Regional Board's 2004 Waiver citing to the Policy and comment response document discussing compliance with the Policy), RB 15 (Regional Board staff report for the 2004 Waiver stating, "[t]he goal and purpose of the conditional waiver program is to achieve and maintain water quality objectives . . . , including antidegradation where applicable"). Furthermore, the Regional Board made findings purportedly to satisfy the Policy. RB 8509; see also RB 2141-43 (Regional Board staff report acknowledging that the Board had received 886 comments "urging" it to "take timely action to prevent further degradation" and that it was reviewing suggestions for meeting the statutory requirements, including the Policy). The Regional Board unquestionably was apprised that it needed to adhere to the Antidegradation Policy.

As to the State Board, Coastkeeper similarly explained in its petition for review that the new waiver must correct "ongoing water quality degradation," 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, 13. In its July 16 comment letter on the State Board's first draft waiver, which was the first opportunity to comment, Coastkeeper explicitly stated that the State board failed to perform the required antidegradation analysis and include the necessary findings. SB 5817-21, 5838. The July letter also presented the first opportunity to comment on the waiver since publication of this court's November 2012 decision in AGUA, the first case to extensively address the required antidegradation analysis in the context of conditional waivers. Id.

The State Board was thus on notice of the antidegradation issue months before issuing the Modified Waiver. While the State Board argues Coastkeeper's July 16 comment letter "deprived the State Board [and others] of the opportunity to fully consider" the issue in an "orderly and timely manner," the Board went on to publish two additional draft orders in the two months following Coastkeeper's comments, and explicitly considered compliance with the Antidegradation Policy, albeit in a limited way, in its second draft order. SB 6245-47. As the State Board's discussion of the issue reflects, the agency was fully apprised of the requirement to comply with the Antidegradation Policy, including the most

up-to-date interpretation of the Policy as set forth in AGUA. SB 6245-47 (State Board's August 20, 2013 draft acknowledging "important mandate to carry out an appropriate antidegradation analysis" consistent with AGUA).

The trial court therefore properly concluded that comments submitted by Coastkeeper, among others, raised a wide range of issues, "including that the Waiver fails to comply with the anti-degradation requirements." 12 AA 2829.[15]

3. The Trial Court Properly Required Findings Consistent with AGUA.

Once high quality waters are known to exist, which is undisputed here, the State Antidegradation Policy applies to any activity that will result in a discharge of waste into such waters. AGUA, 210 Cal. App. 4th at 1272. The Antidegradation Policy presumes that the quality of receiving waters will be degraded by a discharge of waste unless the Board shows otherwise. AGUA, 210 Cal. App. 4th at 1272. Thus, unless shown that the

[15] The State Board is responsible for the Modified Waiver in its entirety, and limiting the antidegradation analysis to the provisions it changed is inappropriate given the interdependence of the individual provisions of the waiver. Even if the Court accepts Appellants' exhaustion arguments and limits its inquiry to the changes made by the State Board to the 2012 Waiver, the analysis still did not comply with the Policy. As discussed, the changes were substantial: the State Board relieved discharges of the duty to report progress towards "reducing or eliminating the discharge of wastes" in the annual compliance forms; and inserted Provision 87.5. SB 6899-6092, 7187, 7215-16, 7350-51, 7359-60. All of these changes will allow continued degradation, and the Board did not perform an antidegradation analysis directed in AGUA.

Modified Waiver will not further degrade water quality, findings consistent with AGUA were required.

Here, as the trial court correctly stated, "there is little to support a conclusion that the Waiver will . . . arrest the continued degradation of the region's waters." 12 AA 2837; see also RB 3767, 4602, 5464, 8510. While the inability to prevent further degradation alone does not render the Modified Waiver inconsistent with the Policy, it does mean the Boards failed to rebut the presumption that permitted discharges will lead to further degradation and must make the required findings, which the State Board failed to do.[16]

Although Appellants seek to distinguish AGUA from this case, their arguments ignore the primary import of that decision: the steps of analysis required under the Antidegradation Policy. Beginning with the first step in the antidegradation analysis, the Boards failed to include any information in the waiver about baseline water quality levels or an explicit determination that high quality waters exist in the Central Coast region. 12 AA 2844. The State Board asserts in its opening brief (and for the first time in this litigation) that the required finding of the existence of high quality waters

[16] Intervenors seem to confuse this issue, asserting in one part of their brief that the Modified Waiver does "not authorize further degradation of groundwater," IO 97, but in another, asserting that there are express findings to allow degradation, IO 94.

was implicit in the Board's analysis.[17] SBO 75-76. But such a thing as an implicit conclusion cannot be allowed where the principal focus of the Policy is to ensure that a finding as to high quality waters is made so that such waters can be specially protected. The Boards cannot simply imply the existence of high quality waters and thereby conclude that the Modified Waiver complies with the Antidegradation Policy; it must connect the facts to its conclusions. See Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles, 11 Cal. 3d 506, 515 (1974); AGUA, 210 Cal. App. 4th at 1281 (Board "must ensure that sufficient evidence is analyzed to support its decision and that the evidence is summarized in an appropriate finding").

The remaining analysis (after identifying high quality waters into which discharges will occur) is also missing, including analysis of the appropriate balancing of maximum benefit to the people of California, the effect on present and anticipated beneficial uses, prescribed water quality objectives, and use of best practicable treatment or control of discharges. See AGUA, 210 Cal. App. 4th at 1278. The Modified Waiver states that dischargers degrading water quality will be subject to "best practicable treatment or control," but includes no more than a boilerplate statement that dischargers must "maintain the highest water quality consistent with the maximum benefit to the people," with no discussion of how that would be

[17]Appellants failed to raise this point in the trial court, and it is therefore forfeited. People v. McCullough, 56 Cal. 4th 589, 593 (2013).

accomplished or of economic or social cost. RB 8509, SB 7279; see SBO 72, 75; IO 97-98.[18] But this Court found such conclusory boilerplate declarations insufficient. 210 Cal. App. 4th at 1271. As here, the order in AGUA "prohibit[ed] further degradation of groundwater," without more. The trial court's order did not, as Intervenors suggest, second-guess the reasonable discretion of the State Board; nor did the court rely on Coastkeeper's disagreement with the Board as a justification for deciding that the Modified Waiver failed to comply with the Antidegradation Policy. IO 123.

This Court should affirm the trial court's Decision that the Board must apply the Antidegradation Policy in the manner directed by AGUA in its next iteration of the waiver.

E. The Modified Waiver Is Not in the Public Interest Because It Will Not Lead to Quantifiable Improvements in Water Quality.

[18] Here, the Regional Board sidestepped substantive findings specific to the protection the region's high quality waters through boilerplate assertions in Finding 21:

> The Order will result in improved water quality throughout the region. Dischargers must comply with all applicable provisions of the Basin Plan, including water quality objectives, and implement best management practices to prevent pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State. The conditions of this waiver will protect high quality waters and restore waters that have already experienced some degradation.

RB 8509. The remainder of Findings 21 and 22 merely restate the Antidegradation Policy and announce compliance. RB 8509.

Under the Porter-Cologne Act, the Regional and State Boards can only issue a waiver when it is "in the public interest." Water Code § 13269(a)(1). The Legislature specifically clarified this requirement in 2003 to ensure that waivers "actually protect water quality." California Bill Analysis, S.B. 923 Assem., 9/08/2003; California Bill Analysis, S.B. 923 Assem., 7/16/2003 (noting the previous waiver process "provide[d] too great an opportunity for waivers to . . . negatively impact water quality"). So after finding that "there is no evidence [that the Modified Waiver] will lead to quantifiable improvements in water quality or arrest the continued degradation of the Central Coast Region's waters," the trial court was left with only one conclusion – the Modified Waiver is not in the public interest. 12 AA 2847.

Without sufficient water quality protections that safeguard the "health, safety and welfare of the people of the state," a waiver is not in the public interest. Water Code § 13000. The Regional Board's public interest findings in connection with the 2012 Waiver relied on protections that, the trial court found, the State Board's Modified Waiver no longer contains. In its public interest findings, the Regional Board found that the 2012 Waiver: (1) "requires compliance with water quality standards," (2) "includes conditions that are intended to eliminate, reduce and prevent pollution and nuisance and protect the beneficial uses," and (3) "contains more specific and more stringent conditions for protection of water quality compared to

the 2004 Agricultural Order." RB 8511. After substantially weakening the waiver with the adoption of the 2013 Modified Waiver, the State Board simply explained that an iterative approach to Basin Plan compliance is "consistent with the public interest in addressing a water quality issue that has few immediate and easy solutions." SB 7186, 7216 & nn.64, 112. Because the trial court could not find sufficient evidence that Modified Waiver would improve water quality, the Boards now lack a justification for why the Modified Waiver furthers the public interest.

Of course, the public interest is ultimately about people – in this case, the millions of people who rely on the region's wells for drinking water and use the region's waters for fishing, recreation and ecological services. See RB 1128-29 (recognizing these interests as the driving force behind a new waiver). Supporting that view, in 2012 the Legislature enacted the Human Right to Water Law, which declares that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption." Water Code § 106.3(a); see also RB 3736 ("Among the highest priorities [of the Board] is to ensure that agricultural dischargers do not continue to impair Central Coast communities' and residents' access to safe and reliable drinking water."). As the trial court found, the Modified Waiver's weak provisions will only allow conditions to worsen, which leaves vulnerable communities and future generations to bear the heaviest costs. See RB 5502-04, 8514 and SB 3215, 6139.

All parties recognize that the Central Coast is "one of the most productive and profitable agricultural regions in the nation" and that agriculture drives much of the region's economy. RB 1126-27, 8506. But as the Regional Board admonished in 2010, "[n]o industry or individual has a legal right to pollute and degrade water quality, while everyone has a legal right to clean water." RB 3737. "Resolving agricultural water quality issues," the Board conceded, "will also require changes in farming practices, will impose increasing costs to individual farmers and the agricultural industry . . ., and may impact the local economy." Id.; see also RB 8505. Those changes must come from the Boards, who have primary authority to regulate discharges of pollutants to waters of the State. RB 1128, 3735. Unfortunately, in preparing the Modified Waiver, the State Board lost sight of the Regional Board's words, their own role, and the public interest.

III. The Trial Court Properly Directed the State Board, on Remand, to Reconsider Inclusion of the U.C. Davis Report and Supplemental Review under CEQA.

A. On Remand, the State Board Must Reconsider Whether to Admit the U.C. Davis Report into the Record.

At the time of final publication, in March 2012, the U.C. Davis Report concluded that 96 percent of nitrate contamination in the Region was traceable to croplands, SB 3171; and the Report represented the most comprehensive evaluation to date of nitrate contamination in the region,

including extensive analysis of the sources of nitrate contamination and known reduction strategies. SB 3157-4802. Among the Report's many novel components was a new database comprised of all available nitrate data for the Central Coast region, including 16,709 individual samples taken in the Salinas Valley.[19] SB 4013, 4113, 4074-76. Additionally, the Report detailed more than 50 recommended practices for decreasing nitrate leaching, an evaluation of a variety of crop-specific management practices, and a new agro-economic model displaying the marginal cost associated with modest reductions in nitrate fertilizer application and increased management practice implementation. SB 3833-75, 3884, 3965-66. As the State Board acknowledged, the Report proved highly significant for better "understanding the impact of nitrate on drinking water and potential solutions to that issue." SB 7163.

Even so, the trial court rejected Coastkeeper's argument that the State Board abused its discretion under Water Code section 13320(b) by refusing to consider the most current, highly relevant, and unique information available on groundwater contamination in the Salinas Valley. 12 AA 2848. The trial court added, however, that "on remand the Board is

[19] The Report identified 4,634 Salinas Valley residents currently at risk of drinking water contaminated with nitrates in excess of the drinking water standard. SB 4602. Another 120,000 Salinas Valley residents pay higher rates because their drinking water providers must blend or treat their water to lower nitrates levels below the drinking water standard. Id.

directed to reconsider whether the Report should be admitted into the record." Id.

The State Board now argues that "[t]he trial court erred by not deferring to the State Board's procedural discretion to conduct its administrative review of the 2012 waiver." SBO 81-82. But the trial court did precisely that – defer to the State Board's discretion. The court did not order the State Board to consider the Report on remand; the court simply directed the State Board to reconsider whether to admit the Report when formulating a new waiver. The trial court's direction was entirely proper, given that the Report was prepared for State Board, contains highly relevant information on nitrate contamination in the region, and provides significant information, as the State Board itself has acknowledged. SB 7163. Thus, this Court should affirm the trial court's common sense decision that did no more than direct the State Board to reconsider the issue when adopting the next waiver.

B. On Remand, the State Board Must Reconsider Supplemental CEQA Review.

CEQA's provision for environmental review is "the heart of CEQA" because it ensures that "the agency has, in fact, analyzed and considered the ecological implications of its actions." Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 392 (1988) (internal quotation and citation omitted). This review "protects not only the environment but

also informed self-government." Id. To comply with CEQA's mandate, an agency must monitor sources of new information and assess the impacts of changes to a proposed project. See Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Ass'n, 42 Cal. 3d 929, 939 (1986); Eller Media Co. v. Cmty. Redevelopment Agency, 108 Cal. App. 4th 25, 43 (2003).

When making changes to a program covered by an existing environmental impact report ("EIR"), the acting agency "must determine whether the previous environmental document retains any relevance in light of the proposed changes and, if so, whether major revisions to the previous environmental document are nevertheless required." Friends of the Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist., 1 Cal. 5th 937, 944 (2016). Failure to make this determination constitutes a violation of CEQA. City of San Jose v. Great Oaks Water Co., 192 Cal. App. 3d 1005, 1017 (1987) (holding that the City of San Jose violated CEQA "by failing to make a determination whether a subsequent or supplemental EIR was required by the redesign of the project, or whether an addendum to the final EIR would suffice"). Further, an agency should provide "an opportunity for public hearings and comments prior to this determination." City of San Jose v. Great Oaks Water Co., 192 Cal. App. 3d 1005, 1017 (1987); see also Melom v. City of Madera, 183 Cal. App. 4th 41, 58 (2010) (finding that the City Council complied with CEQA by offering the opportunity for public comment before approving an addendum to an EIR through a

resolution).

Based on an agency's determination about the necessity of additional environmental review, the agency can: (1) prepare a supplemental environmental review of the changes, 14 Cal. Code Regs. § 15162(a)(1), or (2) issue an explanation, typically in an addendum, why the changes do not necessitate further environmental review. 14 Cal. Code Regs. § 15164(e).

After making the substantial changes that resulted in the Modified Waiver, the State Board did not fulfill its duty to make a determination regarding further CEQA review. Instead, the State Board's Order made no independent CEQA findings and only summarized the previous CEQA process. SB 007244-46. Recognizing this failure, the trial court required the State Board "to consider what, if any, supplemental review may be required to comply with CEQA in connection with the Waiver." 12 AA 2849. The court made this determination given the possibility "that some additional environmental review was required to address the changes to the Waiver. 12 AA 2849. This decision reflected both the trial court's earlier determination that the State Board's changes resulted in an unlawful Modified Waiver and the State Board's ongoing duty to evaluate if additional CEQA review is necessary. The trial court's remedy also showed deference to the State Board, by allowing the Board to make the ultimate determination of whether supplemental review or an addendum is necessary to comply with CEQA.

The trial court properly chose not to rule on the State Board's demurrer in light of the State Board's duty to determine if changes it makes to the waiver trigger the need for additional CEQA review. Friends of the Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist., 1 Cal. 5th 937, 944 (2016); City of San Jose v. Great Oaks Water Co., 192 Cal. App. 3d 1005, 1017 (1987). Because of this duty, no exhaustion is required. If this were a case in which the State Board prepared a supplemental EIR or addendum and Coastkeeper challenged that action, the State Board would have discharged its legal duty. Then, Coastkeeper would have had to exhaust its CEQA claim by raising objections to the State Board. In this case, however, Coastkeeper is challenging the State Board's failure to explicitly decide whether or not to conduct supplemental environmental review of the Board's changes to the 2012 Waiver. In the present case, not only did the State Board fail to conduct any additional CEQA analysis, but it failed to affirmatively determine that such analysis was unnecessary. As a result, there was no analysis or determination to which Coastkeeper could specifically object. See Santa Teresa Citizen Action Grp. v. City of San Jose, 114 Cal. App. 4th 689, 702 (2003) (holding section 21177's exhaustion requirement did not apply when the city did not give notice that it was adopting an initial study for a new water pipeline because "there was no clearly defined administrative procedure for petitioners to resolve their concerns").

There is no basis for this Court to conclude that the trial court erred in directing the State Board to consider on remand whether supplemental CEQA review is necessary.

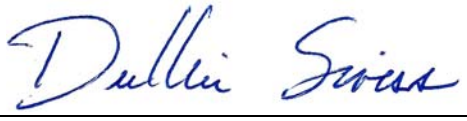
CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision.

Dated: Jan. 4, 2017

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 

Deborah A. Sivas

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c), I certify that the text of this brief consists of 23,644 not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

Deborah A. Sivas

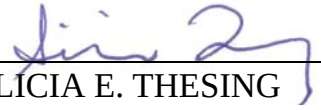
PROOF OF SERVICE

ALICIA E. THESING declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610. On January 4, 2017, I served the foregoing RESPONSE BRIEF OF MONTEREY COASTKEEPER, ET AL. by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Stanford, California, addressed as follows:

Clerk
Superior Court of California
County of Sacramento
720 9th Street
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed January 4, 2017 at Stanford, California.



ALICIA E. THESING