

APPELLATE COURT DECISION ON STATE BOARD MODIFIED ORDER

In March 2012, the Central Coast Water Board adopted Order No. R3-2012-0011, known as Ag Order 2.0, which was subsequently petitioned to the State Board. The State Board made several modifications to Ag Order 2.0.¹ Several petitioners sought judicial review of the State Board order modifying Ag Order 2.0. The trial court that heard the petition issued its decision, which was adverse to the State Board, in 2015. The State Board appealed the decision to the 3rd District Court of Appeal. On September 18, 2018, the Court of Appeal filed its decision in *Monterey Coastkeeper v. State Water Resources Control Board*.² The petition to State Board and the lawsuit addressed several issues, including whether Ag Order 2.0 and the order as modified by the State Board complied with the Non-Point Source (NPS) Policy, which is discussed in this attachment.

During the petition proceedings, among several revisions, the State Board modified Ag Order 2.0 by adding provision 83.5. Provision 83.5 established the framework by which dischargers' compliance with the receiving water limitations of the Order would be determined. Provision 83.5 states, "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 discharges from causing or contributing to exceedances of water quality standards, the Discharger must implement improved management practices." This provision established an "iterative approach" of requiring improved management practices until discharges no longer cause or contribute to exceedances of water quality standards.

The trial court found that the modified waiver did not comply with the NPS Policy because it lacked "specific time schedules designed to measure progress toward reaching quantifiable milestones."

The appellate court upheld this aspect of the trial court decision. The court stated that "the NPS Policy *expressly* requires time schedules and quantifiable milestones; the purpose is to assure that the water quality objectives are eventually met...Rather than establishing time schedules and milestones, [the State Board's modified order] requires only vague and indefinite improvement--'a conscientious effort.' Without specific time schedules and quantifiable milestones, there is not a 'high likelihood' the program will succeed in achieving its objectives, as required by NPS Policy."

The *Coastkeeper* decision clarifies that an order regulating nonpoint source discharges consistent with the NPS Policy must require compliance with water quality objectives (i.e. the discharge may not cause or contribute to exceedance of water quality objectives in the receiving water) in accordance with a defined time schedule, and must incorporate quantifiable milestones to mark progress toward achievement of the water quality requirements.

¹ State Board Order WQ-2013-0101, available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2013/wqo2013_0101.pdf

² 28 Cal. App. 5th 342 (2018)

The *Coastkeeper* decision does not provide guidance on what constitutes a quantifiable milestone. In the staff option for Ag Order 4.0, staff has proposed numeric limits and targets, time schedules, and monitoring and reporting to meet the requirements of the NPS Policy and has incorporated them into the conceptual options tables.