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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

*In the Matter of Review of Waste Discharge
Requirements General Order No. R5-2012-0116
For Growers Within the Eastern San Joaquin
River Watershed That Are Members of the Third-
Party Group*

SWRCB/OCC File Nos. A-2239(a)-(c)

EAST SAN JOAQUIN WATER
QUALITY COALITION'S RESPONSE
TO STATE WATER RESOURCES
CONTROL BOARD'S SECOND DRAFT
ORDER

On October 10, 2017, the State Water Resources Control Board (State Board) released a second staff-proposed order (Second Draft Order) in the matter of *Own Motion Review of Waste Discharge Requirements General Order No. R5-2012-0116¹ for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group, Central Valley Regional Water Quality Control Board*. The Second Draft Order and Draft Appendix A were developed in response to (1) petitions (Asociación de Gente unida por el Agua (AGUA), Fairmead Community and Friends, and Planada en Accion Petition for Review (Petition)) filed by various parties including Asociación de Gente unida por el Agua, the California Sportfishing Protection Alliance

¹ General Order No. R5-2012-0116 as adopted by the Central Valley Water Board will be referred to hereafter as the "ESJ General Order." The State Board's Second Draft Order consists of two parts: (1) the draft order, which consists of the State Board's proposed written order; and, (2) Appendix A: Modified Eastern San Joaquin Agricultural General WDRs [Second Staff-Proposed Draft Order Released October 10, 2017], which consists of proposed changes to the ESJ General Order as adopted by the Central Valley Water Board. For the sake of clarity, we will refer to the second staff-proposed order as the "Second Draft Order" and staff-proposed changes to the ESJ General Order as "Draft Appendix A." All citations to the Second Draft Order are to the redline version.


1 (CSPA), and a joint petition filed by the San Joaquin County Resource Conservation District,
2 California Farm Bureau Federation and Southern San Joaquin Water Quality Coalition
3 (collectively "Agricultural Petitioners"), and (2) the State Board's action to take the matter up on
4 Own Motion Review.²

5 The East San Joaquin Water Quality Coalition (ESJ Coalition) is the third party approved
6 by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) to
7 assist in administering the requirements set forth in the General Order, and as such, is the real
8 party in interest on behalf of its more than 3,400 members. The ESJ Coalition was formed in
9 2003 to assist in administering the surface water program, and was approved to be the third-party
10 under the General Order on January 11, 2013. The ESJ Coalition boundaries extend from the
11 crest of the Sierra Nevada mountain range to the east, the Stanislaus River Watershed to the
12 north, the San Joaquin River to the west, and the San Joaquin River Basin boundary to the south.
13 Just over 700,000 acres of irrigated farmland located in Madera, Merced, Stanislaus, Tuolumne
14 and Mariposa counties are covered under the General Order, and 3,416 landowner/operators
15 receive assistance from the ESJ Coalition to meet the requirements contained therein.

16 On behalf of its 3,416 members, the ESJ Coalition submits the attached response to the
17 Second Draft Order and Draft Appendix A. Also attached is a word version of the Second Draft
18 Order with comments and recommended changes provided in track change mode.

20 SOMACH SIMMONS & DUNN
21 A Professional Corporation

22
23 DATED: December 22, 2017

24 By: 
25 Theresa A. Dunham
26 Attorneys for Real Party in Interest East San
27 Joaquin Water Quality Coalition

28 ² See Wat. Code, § 13320(a) and title 23, section 2050.5(c).

1 **I. INTRODUCTION**

2 Over the last 14 years, the East San Joaquin Water Quality Coalition (ESJ Coalition) has
3 worked tirelessly to assist its irrigated agricultural landowner/operators with 705,490 acres –
4 currently 3,416 members – to comply with water quality requirements adopted by the Central
5 Valley Regional Water Quality Control Board (Central Valley Water Board). For the first 9 to 10
6 years, the ESJ Coalition focused on working with its members to improve surface water quality
7 within the coalition boundary areas, and to comply with what was then referred to as the
8 Conditional Waiver for Irrigated Agriculture. These intensive surface water-related efforts,
9 which included monitoring, coalition-wide outreach and individual grower contact to assess
10 management practices, have resulted in significant water quality improvements in area surface
11 waters.

12 Beginning in early 2013, after adoption of the Waste Discharge Requirements General
13 Order for Growers within the Eastern San Joaquin River Watershed that are Members of the
14 Third Party Group (Order R5-2012-0116) (referred to hereafter as “ESJ General Order”)³, the ESJ
15 Coalition greatly expanded its efforts to address member impacts to groundwaters within the
16 coalition’s boundaries. For example, in compliance with the ESJ General Order, the ESJ
17 Coalition has prepared a comprehensive Groundwater Assessment Report and Groundwater
18 Quality Management Plan, and has conducted extensive outreach to its members on issues related
19 to groundwater quality in the region. The ESJ Coalition has also, in cooperation with other third
20 parties approved by the Central Valley Water Board (referred to hereinafter as “third parties” or
21 “coalitions”), developed a Farm Evaluation template, Sediment and Erosion Control Plan
22 template, nitrogen management plan and nitrogen summary reporting templates, and recently
23 submitted a Management Practices Evaluation Program Workplan. The ESJ Coalition has also
24 collected and aggregated over three years of Farm Evaluation data and information, and prepared
25 and submitted two annual Nitrogen Summary Reports.

26
27 ³ Order No. R5-2012-0116 has been amended several times since its original adoption on December 7, 2012. The
28 term “ESJ General Order” as used here refers to the original order and all of its subsequent amendments. All
references and citations to the ESJ General Order are to Order R5-2012-0116-R3, which is the final amended version.

1 Although challenging, the ESJ Coalition has worked tirelessly to implement the General
2 Order as adopted, and has worked closely with the Central Valley Water Board and others to
3 adjust the program as determined appropriate based on lessons learned over the past 13 years.
4 Further, the ESJ Coalition is an active participant in the Central Valley Salinity Alternatives
5 Long-Term Sustainability (CV-SALTS) initiative. Through CV-SALTS, the ESJ Coalition has
6 worked cooperatively with the Central Valley Water Board, representatives from the
7 Environmental Justice community, municipalities, others in agriculture, and many other
8 stakeholders to develop a valley-wide Salt and Nitrate Management Plan (SNMP). The Central
9 Valley SNMP was submitted to the Central Valley Water Board in January of 2017, and
10 amendments to incorporate portions of the SNMP into the Central Valley's Water Quality Control
11 Plans are in progress.

12 Further, since June of 2016, representatives for the ESJ Coalition have participated in
13 extensive discussions with representatives from the Environment Justice community. Based on
14 these ongoing discussions, consensus was reached among those participating in the discussions on
15 several key issues, including field level reporting, protection of grower identification,
16 vulnerability designations, and groundwater protection targets. A summary of these agreements,
17 and how such agreements impact the Second Draft Order are discussed in Section II.

18 Overall, the ESJ Coalition appreciates the changes made between the first staff-proposed
19 order and the Second Draft Order. However, not all of the consensus agreement points have been
20 captured accurately in the Second Draft Order. To address those concerns, ESJ Coalition
21 provides comments and makes suggested revisions to the Second Draft Order. (See ESJ
22 Revisions to the Second Draft Order attached hereto as Attachment 1.) The ESJ Coalition also
23 joins the San Joaquin County and Delta Coalition in its proposed changes to Draft Appendix A.
24 Further, some portions of the Second Draft Order need additional clarification, and ESJ Coalition
25 provides suggested edits to certain portions of the Second Draft Order for this purpose.

26 For the ESJ Coalition, the most significant remaining concerns pertain to characterization
27 of the Surface Water Monitoring program and timelines for implementation. The ESJ Coalition
28 disagrees with statements in the Second Draft Order that suggest that the surface water

1 monitoring program is not sufficient. Contrary to such statements, there is significant and
2 substantial evidence in the record to support the efficacy of the surface water monitoring
3 program. Conversely, the Second Draft Order fails to support its findings by citing to no
4 evidence in the record that would otherwise show that the surface water monitoring program does
5 not meet its intended purposes. With respect to timelines for implementation, this can easily be
6 resolved without unduly delaying implementation of key new provisions of the Second Draft
7 Order.

8 **II. SUMMARY OF CONSENSUS POINTS BETWEEN ENVIRONMENTAL** 9 **JUSTICE AND AGRICULTURAL COALITION REPRESENTATIVES**

10 As conveyed during the course of several meetings with State Board member D'Adamo,
11 State Board staff, and representatives from the Environmental Justice community and certain
12 agricultural coalition representatives, draft points of agreement (referred to hereafter as "Points of
13 Agreement") were reached on several key issues that pertain directly to the State Board's review
14 of the ESJ General Order.⁴ Most importantly, the Points of Agreement came to the State Board as
15 a package. In other words, e.g., the ESJ Coalition is willing to agree to field-level and location-
16 specific reporting as long as grower names and farm locations remain anonymous. Should the
17 State Board remove the anonymous protections, the ESJ Coalition would not support field-level
18 reporting to the Central Valley Water Board. Many of these Points of Agreement have been
19 incorporated into the Second Draft Order. However, a few of the points of agreement were either
20 not captured, or not captured accurately. Thus, to maintain the integrity of the agreement reached
21 amongst the participants to these discussions, additional revisions to the Second Draft Order and
22 Draft Appendix A are necessary. These additional revisions are summarized here.

23
24 ⁴ As noted on the Draft Points of Agreement that was submitted and noticed with the May 2, 2017 Ex Parte
25 notification filing, the representatives involved in these discussions did not presume to speak for other Environmental
26 Justice or agricultural entities that were *not* part of the discussions. (See, Draft Points of Agreement, footnote 1,
27 ["The items identified were reached through joint discussions with multiple irrigated agricultural coalitions as well as
28 Environmental Justice representatives. The items represented are not intended to imply that all agricultural coalitions
and/or agricultural entities support the agreements in whole or part contained in this table, nor does it mean that all
environmental justice organizations support the agreements in whole or part. Moreover, the discussions represented
here are not meant to apply to the General Order for Rice Growers in the Sacramento Valley as the Rice General
Order is unique in its applicability to its members."].)

1 **C. Sample Field-Level Nitrogen Data Reported Via Anonymous Assessor Parcel**
2 **Number (APN) Identification Should Include Name of DWR Groundwater**
3 **Basin in Which the APN Is Located.**

4 Although not part of the Points of Agreement, during the course of discussion, agricultural
5 coalition participants taking part in the discussions came to a general agreement that broad area
6 identification for data reported by APN anonymously would be acceptable. Table 3 to the Second
7 Draft Order provides an example of how anonymous APN data would be reported from the ESJ
8 Coalition to the Central Valley Water Board. To this table, an additional column could easily be
9 added that identifies the DWR Groundwater Basin/Subbasin from Bulletin 118, in which the APN
10 is located. No other identifiable location information, however, would be provided. In other
11 words, specific information with respect to community, township or area would not be provided,
12 other than DWR Groundwater Basin/Subbasin information.

13 **III. EXISTING SURFACE WATER MONITORING PROGRAM IS ROBUST AND**
14 **MEETS INTENT AND PURPOSE OF APPLICABLE STATE BOARD POLICIES**

15 The Second Draft Order opines that “receiving water monitoring is generally preferable to
16 field-specific surface water discharge monitoring in irrigated lands regulatory programs for the
17 reasons articulated by us in Order WQ-2013-0101 and by the Agricultural Expert Panel.”
18 (Second Draft Order, p. 58.) We agree. Unfortunately, the Second Draft Order does not end with
19 this statement. Rather, the Second Draft Order continues forward and alleges that the ESJ’s
20 surface water monitoring program does not appear to have sufficient spatial density or
21 distribution “to reasonably identify exceedances throughout the watershed.” (Second Draft
22 Order, p. 59.) The Second Draft Order’s findings in this regard are not supported by the
23 substantial evidence in the record, which consists of years of sampling various locations,
24 monitoring results data, and alterations to the monitoring program based on actual empirical data
25 and information.

26 The conclusion in the Second Draft Order appears to be based on one simple fact: sample
27 results from core monitoring sites are not the same as samples from representative sites. (Second
28 Draft Order, p. 59.) To reach this conclusion, the Second Draft Order claims to have carefully

1 reviewed the surface water monitoring framework. (Second Draft Order, p. 58.) However, actual
2 review of data and information regarding evolution of ESJ's surface water program over time
3 shows exactly how and why ESJ's surface water monitoring program is robust and consistent
4 with state policy, including the State's Nonpoint Source Policy.

5 In light of the Second Draft Order's criticisms and findings, the ESJ Coalition engaged a
6 national expert in surface water field and modeling studies to review the efficacy of the ESJ
7 surface water monitoring with regard to temporal and spatial sampling density, ability to capture
8 exceedances of water quality trigger limits, and ability to provide data to evaluate the
9 effectiveness of the management actions and implementation measures. (See ESJ Coalition's
10 Request for Supplemental Evidence, Exhibit 1, submitted December 22, 2017 (Exhibit 1).) This
11 expert, Dr. Susan Paulsen with E^xponent, along with her colleague Melanie Edwards, an
12 accredited statistician, reviewed the ESJ's existing surface water monitoring program and data
13 gathered by the Coalition since 2004. In summary, their review finds as follows:

- 14 • Core and represented monitoring sites within the six zones delineated by the
15 Coalition provide sufficient spatial coverage.
- 16 • The monitoring program has produced data that identify changes in water quality
17 over time. These data confirm that management practices on irrigated lands have
18 improved water quality.
- 19 • Naturally occurring constituents and those constituents with multiple sources show
20 higher variability than constituents that originate primarily from agricultural
21 sources. Data gathered by the monitoring program indicate that non-agricultural
22 sources are likely important causes of water quality exceedances.
- 23 • The Coalition's monitoring program uses a structured framework to incorporate
24 data on chemical use, relative risk, exposure, and chemical behavior in the
25 environment in order to tailor monitoring and implementation measures and to
26 maximize the likelihood that water quality problems will be identified.'

27 (See, Exhibit 1, p. xi.)
28

1 Further, the ESJ monitoring program clearly meets the mandates of the state's Nonpoint
2 Source Policy. As noted in the Second Draft Order, "[t]he Nonpoint Source Policy does not
3 require any particular framework and does not necessarily even require comprehensive ambient
4 monitoring. But the nonpoint source implementation program must 'include sufficient feedback
5 mechanisms so that the [regional water board], dischargers, and the public can determine whether
6 the program is achieving its stated purposes(s), or whether additional or different [management
7 practices] or other actions are required.'" (Second Draft Order, p. 58.) Contrary to the statement
8 in the Second Draft Order that "[t]he representative monitoring of the General WDRs does not
9 appear to meet that mandate[]", the ESJ surface water monitoring program is clearly designed and
10 implemented in a manner that meets the mandate. Specifically, the monitoring program is
11 designed to answer six questions that are included in the ESJ General Order:

12 1. Are receiving waters to which irrigated lands discharge meeting applicable water
13 quality objectives and Basin Plan provisions?

14 2. Are irrigated agricultural operations causing or contributing to identified water
15 quality problems?⁵ If so, what are the specific factors or practices causing or contributing to the
16 identified problems?

17 3. Are water quality conditions changing over time (e.g., degrading or improving as
18 new management practices are implemented)?

19 4. Are irrigated agricultural operations of Members in compliance with the
20 provisions of the Order?

21 5. Are implemented management practices effective in meeting applicable receiving
22 water limitations?

23 6. Are the applicable surface water quality management plans effective in addressing
24 identified water quality problems?

25 (See Draft Appendix A, Attachment A, p. 11.) A monitoring program that answers these
26 questions meets the intents and purposes of the Nonpoint Source Policy and by definition

27 _____
28 ⁵ Defined in Attachment E to the ESJ General Order as: "Exceedance of an applicable water quality objective or a trend of degradation that may threaten applicable Basin Plan beneficial uses."

1 includes sufficient feedback mechanisms. The ESJ surface water monitoring program does
2 answer these questions. (See, e.g., Exhibit 1, pp. 23-67.) Moreover, each year in its Annual
3 Monitoring Report (AMR), the ESJ Coalition addresses these questions in detail. Notably, to
4 date the Central Valley Water Board has approved the ESJ Coalition's AMRs every year without
5 comment on these questions – meaning that the surface water monitoring design is appropriate to
6 provide sufficient feedback to the Central Valley Water Board to determine if the program is
7 achieving its stated purpose(s), or if other actions are required.

8 **A. Summary of ESJ Surface Water Monitoring Program.**

9 **1. Establishment of Six Zones.**

10 The ESJ Coalition area is divided into six zones to focus monitoring efforts. Zones were
11 delineated using a statistical procedure (hierarchical cluster analysis) using several variables
12 including soils, climate, and cropping. The agricultural land within zones has very homogeneous
13 cropping leading to very similar grower behavior, similar pest outbreaks, and similar applications.

14 **2. Monitoring Site Selection.**

15 With respect to monitoring site selection, each zone contains two core sites⁶ and several
16 represented sites. To select core and represented sites, all waterbodies within the zone were
17 identified as candidates for monitoring. No surface waters were eliminated from consideration
18 including irrigation district conveyance canals. These canals only rarely contain discharge from
19 fields, but could receive spray drift from adjacent fields, and as a result, all conveyance canals
20 were considered as candidates for monitoring. All sites were evaluated based on the following
21 factors:

- 22
- 23 • Driving access – all sites must be reachable by passable road because monitoring involves
 - 24 the use of a significant amount of equipment and significant weight in sample bottles that
 - 25 must be carried to and from the vehicle to the water.
 - 26 • Safety – the accessible sites must allow safe parking and be safe for samplers with respect
 - 27 to access and exposure during sample collection, and interference from other individuals.

28 ⁶ With the exception of Zone 1 and Zone 6 which have so few available surface waters that they contain only a single core site.

- 1 • Monitoring of only or mostly agricultural discharge – need to minimize the potential for
- 2 monitoring the discharge of urban use pesticides and urban-generated toxicity.
- 3 • Reliable flow – many streams that appear on maps no longer exist, or contain flow so
- 4 rarely that they are essentially dry washes.

5 The monitoring site evaluation process also included review of GIS shapefiles to delineate

6 the upstream watershed, and all potential sites were scouted in-person to determine if/where

7 access was available and if the sites were safe to monitor. All potential monitoring site locations

8 that met the criteria were then included originally in the monitoring program. Throughout the

9 history of the program, however, some sites originally selected for inclusion in the monitoring

10 program were abandoned later due to one or more of the following reasons: personal safety

11 issues, lack of discharge (agricultural drainage was re-routed and does not discharge to receiving

12 water), or lack of agricultural discharge (agricultural land converted to urban).

13 Based on this evaluation, as well as practical knowledge gained from monitoring

14 throughout the ESJ Coalition area for many years, the ESJ Coalition, working with the Central

15 Valley Water Board, established the “core” and “represented” monitoring program, which was

16 adopted by the Central Valley Water Board in the ESJ General Order’s companion Monitoring

17 and Reporting Program Order (ESJ MRP Order). (See Draft Appendix A, Attachment B, pp. 4-

18 12.) Table 1 of the ESJ MRP Order contains the list of sites that effectively evaluate the impact

19 of agricultural discharges on receiving waters in addition to being able to determine changes in

20 water quality conditions over time. (Draft Appendix A, pp. 5-7.) Further, the list of Represented

21 Sites is not exhaustive and the Executive Officer may require additional monitoring if it is seen as

22 necessary to meet the requirements of the Order. This flexibility allows the monitoring design to

23 be adaptive based on water quality data and information.

24 3. Monitoring Scheme.

25 Monitoring occurs at a core site for two years, and all required constituents are monitored

26 every month. All other monitoring sites within that zone are designated as represented sites.

27 With the advent of the Pesticide Evaluation Protocol process for the 2018 Water Year,

28 pesticide use in the upstream watershed from each site is evaluated to determine the pesticides

1 that will be sampled. Pesticides with the greatest use and the greatest potential to cause toxicity
2 to aquatic organisms are selected for monitoring. After two years of monitoring, sampling is
3 changed to the secondary core monitoring site in the zone. All remaining monitoring locations
4 become represented sites.

5 If water quality is good, no monitoring occurs at represented sites. If an exceedance
6 occurs at a core site, all represented sites within the zone are monitored the following year for the
7 constituents causing the exceedance. Also, monitoring for that constituent (or constituents) for
8 which there was an exceedance continues at the core site for two more years, meaning that even
9 after changing to a new core location, monitoring at the first core location continues for a total of
10 three years. If an exceedance occurs at a core site during the two years of monitoring, outreach
11 starts immediately after the growing season in which the exceedance occurred. Generally, the
12 outreach involves presentations at the three sets of annual meetings that are held during the year.
13 Site-specific monitoring results are also listed in the member Annual Report which is distributed
14 by mail to each member and/or provided at member annual meetings in the year following the
15 sampling event. If the exceedance triggers a Management Plan, then monitoring continues as
16 prescribed in the ESJ's approved Surface Water Quality Management Plan until improved water
17 quality is demonstrated. Monitoring continues during months when the exceedance is likely to
18 occur again (e.g. month of the previous exceedance and months when the specific pesticide found
19 as an exceedance is applied to crops in the watershed). Further, under the Surface Water Quality
20 Management Plan, the outreach changes to focus on individual growers located in the watershed
21 where the exceedance was located and includes other represented areas where water samples
22 cannot be collected. Outreach to individual growers entails one-on-one meetings with the
23 growers to review management practices, recommend new practices, and track management
24 practice implementation.

25 **B. Response to Findings in the Second Draft Order.**

26 Overall, the Second Draft Order criticizes and finds that the ESJ surface water monitoring
27 program needs to be expanded because of the following:

- 28
 - Insufficient spatial density (e.g., enough monitoring locations are sampled);

- 1 • Insufficient temporal density (e.g., monthly sampling does not capture a sufficiently large
- 2 sample of potential discharges); and,
- 3 • Core sites are not representative of represented sites because monitoring results indicate
- 4 that there are “mismatches” between core and represented sites.

5 The accompanying text in the Second Draft Order states that the current Core-Represented

6 Site monitoring program “may be effective in monitoring for a narrower set of purposes, such as

7 determining the effectiveness of a certain set of management practices, but does not appear to be

8 comprehensive enough to identify problem areas throughout the watershed. We recognize that

9 water quality monitoring at core and represented sites is supplemented by additional, potentially

10 upstream, monitoring under an SQMP, when triggered. But the problem is that an SQMP may

11 not be triggered until an exceedance is detected at a core or represented site, and water quality

12 exceedances upstream or in adjacent portion of the watershed to that of the core and represented

13 sites may go undetected in the interim.” (Second Draft Order, p. 59.)

14 State Board staff developed these conclusions through a review of ESJ monitoring results

15 in CEDEN and a review of Annual Monitoring Reports, and also based on statements made by

16 the State Board’s Agricultural Expert Panel in its September 2014 Final Report. Notably, no

17 member of the Agricultural Expert Panel had any expertise in surface water monitoring design or

18 implementation. In short, the Second Draft Order’s conclusions imply that the surface water

19 monitoring program is not sufficient to detect water quality problems. In response, the question

20 then becomes “What is considered sufficient monitoring to detect problems?”

21 Monitoring is a continuum that ranges from a single site monitored annually to continual

22 monitoring at dozens of sites. The question regarding what is sufficient monitoring was

23 addressed in the Monitoring Design Guidance for the Central Valley Irrigated Lands Regulatory

24 Program (November 2007). Using technical expertise from across the State, guidance for the

25 irrigated lands program was developed to help define what a sufficient monitoring program

26 should look like. In short, the 2007 Guidance suggests that sufficient monitoring effort is

27 sampling that allows the six questions identified above to be adequately addressed. As stated

28 above, the ESJ surface water monitoring program adequately and appropriately addresses these

1 questions. We respond here to specific findings and recommendations made in the Second Draft
2 Order.

3 **I. An Expert Panel to Inform Irrigated Lands Programs Statewide Is**
4 **Unnecessary.**

5 Rather than making specific recommendations for improving the monitoring program to
6 address the perceived shortcomings discussed in the Second Draft Order, State Board staff
7 recommend convening another Expert Panel to “make recommendations on a framework for
8 surface receiving water monitoring to inform irrigated lands programs statewide.” An Expert
9 Panel for this purpose is unnecessary. First, there are no shortcomings with the existing surface
10 water monitoring program. Second, the Central Valley Water Board, technical experts and the
11 irrigated lands coalitions have already spent significant time and resources developing the 2007
12 Monitoring Design Guidance document, which evaluated possible monitoring designs that could
13 be implemented to meet the requirements of the program. The process that was used to develop
14 the 2007 Guidance (which assures compliance with the Nonpoint Source Policy) focused on
15 answering the programmatic questions identified above. From these questions, the 2007
16 Guidance recommends specific elements be included in an irrigated lands surface water
17 monitoring program. The recommended elements, and how the ESJ surface water monitoring
18 program meets these elements, are summarized here.

- 19 • Element 1 – Monitor at fixed intervals while factoring in major discharge events (i.e.,
20 assessment monitoring). *ESJ Coalition conducts monitoring once a month, plus monitors*
21 *during storm events.*
- 22 • Element 2 – Representativeness must be defined (i.e., magnitude and extent monitoring).
23 *The ESJ Coalition conducted a statistical analysis to determine zones based on crops, use,*
24 *climate, and geography. Therefore, monitoring at the Core site works as a surrogate to*
25 *determine if additional monitoring should occur at the Represented sites.*
- 26 • Element 3 – Identify if agriculture is the source (i.e., source identification monitoring).
27 *The Coalition has selected locations that will primarily consist of water or drainage from*
28 *areas that are predominantly agriculture upstream of the monitoring location, and that*

1 *are accessible and safe to access. Potential sources of pesticide contamination are*
2 *identified using Pesticide Use Reports and by evaluating management practices*
3 *implemented by members. In past years (2005-2009), the ESJ Coalition employed*
4 *upstream monitoring to assist with source identification, however the ESJ Coalition found*
5 *that the current strategy is more effective and can be implemented sooner with greater*
6 *impact on water quality.*

- 7 • Element 4 – Conduct outreach, evaluate existing management practices, and track
8 implementation of newly implemented practices to improve water quality (i.e.,
9 management practices monitoring). *The ESJ Coalition has developed effective Surface*
10 *Water Quality Management Plans, which focus on these steps and result in improved*
11 *water quality, the implementation of additional practices and the removal of site-specific*
12 *management plans.*
- 13 • Element 5 - Track whether water quality conditions are improving or worsening (i.e.,
14 trend monitoring). *The ESJ Coalition is able to assess trends on a zone level based on*
15 *both Core and Represented site monitoring data. Core site data is the most consistent and*
16 *provides for a long-term data set. The Represented sites give additional information*
17 *regarding water quality at other locations within the Zone relative to the Core site data*
18 *and allow for a comparison of pesticide use and grower practices.*

19 Further, the 2007 Guidance document recommends that:

- 20 • Monitoring should be focused on decision making;
- 21 • Monitoring efforts should reflect the potential for water quality impact with more
22 monitoring allocation to situations where the potential impact is higher; and
- 23 • Monitoring should be adaptive where mid-course corrections occur based on monitoring
24 results.

25 The ESJ Coalition’s monitoring program meets these recommendations, and in
26 combination with outreach efforts and an effective management plan approach, has resulted in
27 significantly improved water quality. The combination of monitoring and outreach has been very
28

1 successful in cleaning up water quality problems. Of the 74 management plans involving
2 pesticides or toxicity, 42 of those plans have been successfully implemented.

3 **2. The ESJ Surface Water Program Has Evolved Because it Is an**
4 **Adaptive and an Iterative Program – Not Because of Costs.**

5 Next, the Second Draft Order implies that the reason for the current monitoring design
6 was a result of a compromise to reduce monitoring costs in order to increase funds for
7 management practice implementation. Although it is true that reducing the cost of monitoring
8 allows the ESJ Coalition to apply those resources to conducting grower outreach and education, it
9 is an oversimplification of the history of the irrigated lands program and the ESJ Coalition's
10 monitoring design to say that cost was the primary reason for the change in the monitoring
11 design. In fact, the ESJ Coalition and Central Valley Water Board have implemented an iterative,
12 adaptive program that includes immediate notification of the Central Valley Water Board of any
13 exceedances (within five business days of receiving results), quarterly data reporting for all water
14 quality results, quarterly meetings to review progress toward meeting performance measures and
15 goals of the management plans, and an annual assessment of water quality results and
16 management plan progress. The monitoring design has been refined over the years based on the
17 history of monitoring results and an assessment of how to best answer the program questions in
18 accordance with the 2007 Guidance. If the monitoring design was not adequately addressing the
19 program questions, this would have been identified by Central Valley Water Board staff in
20 comments to the Annual Monitoring Reports, and additional monitoring would have been
21 required.

22 Further, from these allegations regarding the sufficiency of the ESJ Coalition surface
23 water monitoring program, State Board staff propose seven questions for an Expert Panel to
24 address the perceived deficiencies. Of the seven questions, only two actually address the design
25 of a surface water monitoring program, and a third question is tangential to the design of the
26 monitoring program. The two relevant questions have already been answered and are an integral
27 part of the ESJ Coalition's surface water monitoring program. (See section III.A.) For the
28

1 remaining questions, there is no direct or indirect connection between the questions posed and the
2 allegations regarding sufficiency of the ESJ's surface water monitoring program.

3 In summary, the questions posed for an Expert Panel have either already been
4 incorporated directly into the monitoring program design, or are unrelated to the petition before
5 the State Board, which deals directly with the ESJ General Order and petitions thereon.

6 **3. The ESJ Surface Water Program Has Sufficient Spatial Density to**
7 **Identify Areas of Possible Pollution and an Upstream/Downstream**
8 **Approach Is Not Practical or Scientifically Defensible.**

9 The Second Draft Order, borrowing from the Agricultural Expert Panel, appears to
10 suggest that monitoring should move upstream and occur in one or more locations. (Second Draft
11 Order, pp. 57-58.) The rationale behind this recommendation is that upstream monitoring both
12 increases the spatial coverage of monitoring and can be used to identify sources of discharges
13 once exceedances occur. By referencing this approach, State Board staff and the Agricultural
14 Expert Panel must be assuming that the upstream-downstream monitoring approach can be used
15 to identify the location(s) where a pesticide is discharged into the waterbody. However, to use
16 this approach successfully, a great deal of information needs to be known about the watershed.
17 For example, to correctly identify sources, one needs to assume that all inflows and outflows of
18 water or pesticides are known and quantifiable. A second assumption is that the velocity of water
19 in the creek is known such that the same mass unit of water can be monitored as that mass moves
20 from upstream to downstream. If the same mass of water is not monitored from the top of the
21 watershed as it moves downstream, there is no way to determine the location of sources of
22 discharges. In other words, there are two measurements of concentration that can be made, the
23 concentration of a constituent at the downstream Point A and upstream Point B. Unless the same
24 mass of water is sampled at Point B, and again downstream at Point A, the source(s) of the
25 chemical in the water cannot be identified. Potential sources can be identified only if every input
26 of chemical and water is known and quantifiable and the same mass of water is sampled as it
27 moves from upstream to downstream. This type of monitoring, same mass of water from
28

1 upstream to downstream, is a Lagrangian monitoring design. This design is not possible for the
2 small streams and waterbodies in the Coalition region for three reasons.

3 1. Many waterbodies do not have an additional monitoring site(s) available upstream.

4 2. There are some watersheds where multiple monitoring sites are available for
5 monitoring. However, the flow rate between the locations is not possible to measure and can vary
6 substantially from upstream to downstream, even within a single day. Irrigation schedules result
7 in water entering and leaving the system throughout the day and week, and those are not possible
8 to track. To obtain a sufficient quantity of water for irrigation, growers may construct temporary
9 barriers to flow, only to remove them within a few hours. In addition, for some of the natural
10 streams, there are gaining and losing reaches making it impossible to determine where a mass of
11 water is at any point in time.

12 3. Surface water moving into and out of the waterbody is difficult to identify and
13 nearly impossible to quantify. Without being able to mass balance the water in the creek, it is not
14 possible to determine where pesticides enter the system.

15 If water moving into or out of a creek cannot be quantified as is common with nonpoint
16 source discharges, the most likely outcome is that downstream discharges are not detected. For
17 example, a chemical detected in the water at an upstream monitoring location must come from
18 upstream of that site. If the same mass of water is sampled at a downstream monitoring location
19 and the chemical is detected at the same concentration at that site, the conclusion could be that
20 there are no discharges of pesticide to the stream. However, there is no way to conclude that the
21 only discharge is above the upstream monitoring site. Water entering the creek between the
22 upstream and downstream monitoring sites could have the same concentration as the water in the
23 creek resulting in no change to the concentration of the chemical in the creek. If water entering
24 the creek below the upstream monitoring location has a lower concentration of the chemical, the
25 concentration at the downstream monitoring location will be lower than the concentration at the
26 upstream monitoring site, leading to the erroneous conclusion that only water entered the creek
27 between the two sites resulting in dilution of the upstream signal.

1 Finally, a chemical may be present at the upstream monitoring site but at a concentration
2 too small to measure. A small amount of the chemical may enter the creek between the upstream
3 and downstream monitoring locations resulting in sufficient mass to be measurable. The
4 erroneous conclusion here is that there are no discharges upstream and the only discharges are
5 between the two monitoring sites. In conclusion, unless every input of water and chemical is
6 identified and measured, it is not possible to determine the actual source of pollutants using
7 upstream and downstream monitoring.

8 Notably, the ESJ Coalition attempted to use an upstream/downstream design in the past by
9 establishing upstream monitoring sites on eight waterbodies in an attempt to identify sources of
10 chemicals causing exceedances. The number of upstream sites varied from one to three. All
11 upstream sites within a watershed were monitored on the same day for the same constituents.
12 Monitoring at upstream locations was restricted to months of the year when exceedances occurred
13 in the downstream location, i.e., monitoring at upstream locations did not occur every month for
14 all constituents. Given the difficulty isolating a single mass unit of water and quantifying all
15 inputs and outflows, the Coalition's upstream and downstream monitoring results were of no use
16 in identifying potential sources of discharges.

17 For example, in 2008 there were 62 sampling events involving both upstream and
18 downstream monitoring for metals, nutrients, pesticides, and toxicity. Thirteen upstream-
19 downstream results were different; 6 metals, 2 nutrients, 3 pesticides, and 2 toxicities. Of the five
20 exceedances likely caused by growers (pesticides and toxicity), three were upstream but not
21 downstream. Therefore, upstream monitoring resulted in discovering water quality problems that
22 potentially did not exist downstream in less than 5% of the events.⁷ In addition, it was not
23 possible to identify or quantify all inputs and outputs of water and chemical, placing in doubt
24 even this conclusion. As a result of the difficulties in interpreting the results of the upstream-
25 downstream monitoring, and the inability to reconcile the locations of pesticide applications with
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27 _____
28 ⁷ 62 results were evaluated from monitoring at downstream and upstream locations in 2008; only 3 of those results
had detections at the upstream location and not the downstream location.

1 the concentration of chemical in the creeks, the Coalition discontinued upstream-downstream
2 monitoring.

3 In summary, and contrary to statements in the Second Draft Order, upstream/downstream
4 monitoring is not an appropriate monitoring design for a complex, irrigated lands program.

5 **4. Considering Probabilities of Detection, the ESJ Surface Water**
6 **Monitoring Program has Sufficient Temporal Density.**

7 The Second Draft Order includes a conclusory statement that “we cannot find that it is, in
8 fact, ‘of sufficient density (spatially and temporally) to identify general locations of possible
9 pollution.’” (Second Draft Order, p. 59.) No additional information is offered to explain why
10 State Board staff believe that temporal density is insufficient. Leaving aside the Second Draft
11 Order’s lack of evidence to support its findings, the existing ESJ surface water monitoring design
12 includes sufficient monitoring events to detect water quality problems from agricultural
13 discharges, should such problems occur.

14 To demonstrate the temporal sufficiency of the ESJ surface water monitoring program,
15 one can calculate the probability of detection of discharge using three assumptions:

- 16 1. All applications have the same potential to create a detectable discharge.
- 17 2. On average, all discharged chemicals remain in the system for the same amount of
18 time, although the time is unknown.
- 19 3. Applications can be made on any day during the 30-day period between sampling.
20 If only one application occurs during a 30-day period, there is a 1/30 probability of that
21 application being made on any day.

22 With these assumptions, the probability of detection was calculated for a combination
23 factors assuming a single sampling event per month: time the chemical remains in the system
24 could be 1 to 10 days, number of applications in the watershed varied between 1 and 30, and the
25 sampling interval is 30 days. Given these variables, the Probability of Detection (PD) is:

26
$$PD = \frac{\text{Number of applications} * \text{Number of days the discharge remains in the system}}{\text{Number of days between samples}}$$

27

28

1 For example, if a single discharge remains in the creek for 30 days and sampling occurs
2 once every 30 days, that one sample event is guaranteed to detect the discharge (100% Probability
3 of Detection). If a single discharge remains in the system for 10 days and sampling occurs every
4 30 days, there is a 33% Probability of Detection because the discharge could have occurred
5 during the 10 days immediately prior to sampling, or during the 10 – 30-day period prior to
6 sampling, which is outside the window of detection.

7 Using the assumptions above, the Probability of Detection ranges from 3% to 100%
8 (*Table 1*). When there is only a single application during a 30-day period, the Probability of
9 Detection ranges from 3% to 30% depending on whether the chemical remains in the creek for 1
10 day or 10 days, respectively. If there are 5 applications per month, the probability of detection
11 ranges from 16.67% to 100% depending on the time the chemical remains in the creek. Once the
12 chemical remains in the creek for at least 5 days, the probability of detection reaches 100%.
13 When there are 10 applications, if the chemical remains in the creek for 3 or more days, the
14 probability of detection is 100%. When there are 20 applications, if the chemical remains for 2 or
15 more days, the probability of detection is 100%. For 30 applications or more, the probability of
16 detection is 100% even if the chemical flushes from the creek in a single day.

17 The Pesticide Evaluation Protocol process has identified the pesticides that will be
18 monitored by the ESJ Coalition during the 2018 Water Year. For each of those targeted
19 chemicals, the ESJ Coalition has information about the number of applications at each monitoring
20 location each month during the previous three years (2014 – 2017). The number of applications
21 of individual targeted chemicals range from 1 to over 400 in a 30-day period. The average
22 number of applications for chemicals targeted for monitoring is 66, and 54%, or over half of all
23 pesticides sampled, have more than 30 applications. Further, if a chemical is in the system for at
24 least two or three days, the probability of detection for most chemicals approaches 50% - even if
25 the number of applications is around five. If a chemical remains in the water for a week, which is
26 common in the summer, you are guaranteed that the probability of detection is 100% for five
27 applications.

Table 1. Probability of Detection of applications (discharges) based on 1 sample collected every 30 days; evaluated for 1, 5, 10, 20 and 30 applications in a 30-day period.

Days in system	Number of applications between samples	Probability of detection (%)
1	1	3.33
2	1	6.67
3	1	10.00
4	1	13.33
5	1	16.67
6	1	20.00
7	1	23.33
8	1	26.67
9	1	30.00
10	1	33.33
1	5	16.67
2	5	33.33
3	5	50.00
4	5	66.67
5	5	83.33
6	5	100.00
7	5	100.00
8	5	100.00
9	5	100.00
10	5	100.00
1	10	33.33
2	10	66.67
3	10	100.00

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Days in system	Number of applications between samples	Probability of detection (%)
4	10	100.00
5	10	100.00
6	10	100.00
7	10	100.00
8	10	100.00
9	10	100.00
10	10	100.00
1	20	66.67
2	20	100.00
3	20	100.00
4	20	100.00
5	20	100.00
6	20	100.00
7	20	100.00
8	20	100.00
9	20	100.00
10	20	100.00
1	30	100.00
2	30	100.00
3	30	100.00
4	30	100.00
5	30	100.00
6	30	100.00
7	30	100.00
8	30	100.00

Days in system	Number of applications between samples	Probability of detection (%)
9	30	100.00
10	30	100.00

Thus, based on the Probability of Detections evaluation, the ESJ monthly monitoring program has a high likelihood of detecting chemical constituent discharges in surface water. This clearly illustrates the temporal sufficiency of the ESJ surface water monitoring program.

5. Mismatched Data Between Core and Representative Sites Is Not Evidence That the ESJ Coalition Monitoring Program Is Insufficient.

The Second Draft Order claims that monitoring data indicates that exceedances observed at core sites do not occur at represented sites and vice versa (i.e., there is a mismatch in the monitoring results between the two types of sites). (Second Draft Order, p. 59.) While it is true that there are mismatched results, State Board staff reaches an erroneous conclusion that the core sites are not representative of the represented sites, and the zones do not represent a true homogeneous monitoring unit. This wrong conclusion is most likely a result of not fully understanding the ESJ's monitoring program.

The ESJ Coalition reviewed its monitoring data and from 2013 to 2017, and there are several instances of mismatched results (Table 3). From 2013 to 2015, mismatches could have occurred between the primary core site in each zone and the represented sites in that zone. From 2015 - 2017, mismatches could have occurred between the secondary core site and the represented sites in each zone. Of the 251 results available during this time period, there were 39 instances where there was an exceedance at the primary core site but no exceedance at the represented site. Conversely, in 13 instances there was an exceedance at the represented site but no exceedance at the core site. From 2015 - 2017, there were 158 results available for comparison. There were exceedances at the secondary core site but no exceedance at the represented site in 11 instances, and in 7 instances there were exceedances at the represented site and no exceedance at the core site.

Table 3. Mismatches between core and represented site results for 2013 – 2017.

Primary Core Site Summary	# of Differences (10/1/13-9/30/15)
Core Exceedance/Represented No	39
Represented Exceedance/ Core No	13
Same Results	199

Second Core Site Summary	# of Differences (10/1/15-7/1/17)
Core Exceedance/Represented No	11
Represented Exceedance/ Core No	7
Same	142

In the primary core-represented site comparison, whenever there was an exceedance at the core site with no accompanying exceedance at the represented site (39 instances), the core site was Prairie Flower Drain in Zone 2. Of the 13 instances of exceedances at the represented site but no exceedance at the core site, in 11 of those instances the comparison involved Prairie Flower Drain. In other words, of the 52 mismatches between core and represented sites between 2013 and 2015, 50 of them involved Prairie Flower Drain in Zone 2.

Of the 18 instances of mismatched results from 2015 to 2017, 17 involved comparisons between the secondary core site in Zone 2, Lateral 5 ½ @ South Blaker Rd. Five of the 17 mismatches involved Prairie Flower Drain serving as a represented site. Sixteen of the 18 mismatches involved toxicity to Selenastrum, one was for diuron and one for chlorpyrifos.

For all years combined, there were 70 instances of mismatched results. In 67 of those mismatches, the sites involved were in Zone 2, primarily Prairie Flower Drain as the core site or the represented site after rotating out of core site status. Mismatches are essentially non-existent in all zones except Zone 2, indicating that core sites are representative of represented sites within each zone. With respect to Zone 2, there are several logical reasons for the number of

1 mismatched monitoring results. Most significantly, in zone 2 there is a large percentage of non-
2 members. In addition, the analysis examined the presence of exceedances and non-exceedances
3 and did not consider concentration. For example, a chemical could be detected at both the core
4 and represented monitoring sites, but if the concentration of the chemical did not reach the level
5 of an exceedance at one of those sites, the results were considered a mismatch. All of these
6 factors clearly indicate that the State Board's conclusion that core sites are not representative is
7 erroneous and arises from a cursory review of the data.

8 In summary, the Second Draft Order's criticisms are easily explained and none actually
9 show that the ESJ surface water monitoring program is insufficient. Conversely, a national
10 leading expert has reviewed the program and found it to clearly meet all intents and purposes.

11 **IV. TIMELINES WITHIN ESJ GENERAL ORDER SHOULD BE ADJUSTED TO**
12 **COINCIDE WITH TIMELINES THAT WILL APPLY TO OTHER COALITIONS**

13 The Second Draft Order requires members of the ESJ Coalition to submit their Irrigation
14 and Nitrogen Management Plan Summary Report (Nitrogen Summary Report) and Farm
15 Evaluation by March 1, 2019 (members in low vulnerability areas have until March 1, 2021). In
16 order for growers to submit a Nitrogen Summary Report by March 1, 2019, they are required to
17 have a certified Irrigation and Nitrogen Management Plan by March 1, 2018. Even if the State
18 Board adopts an Order on January 23, 2018, there will be insufficient time to develop a new
19 Irrigation and Nitrogen Management Plan template, circulate the template for public review, and
20 have it approved by the Central Valley Water Board's Executive Officer in time for the ESJ
21 Coalition to notify and educate its members of the changes to the template. In addition, the
22 curriculum and trainers of the self-certification classes have not been updated to incorporate the
23 requirements of the newly proposed irrigation and nitrogen management plan.

24 Currently, the ESJ Coalition sends out nitrogen management plan worksheets (the current
25 equivalent of the proposed new irrigation and nitrogen management plan) to its members in
26 November for the upcoming calendar year. For example, for the 2018 crop year, ESJ Coalition
27 members received their worksheets in November of 2017. In order for growers to replace this
28 with a new irrigation and nitrogen management plan worksheet that can be utilized for the 2018

1 crop year, the Coalition would need to have develop a template as soon as possible, and *prior* to
2 the adoption of the Second Draft Order so that a new template can be submitted for approval
3 immediately after the approval of the Order. The Central Valley Water Board's Executive
4 Officer would then need to approve the template by early February in order for the ESJ Coalition
5 to mail the new worksheets to members so that they can have them completed by March 1, 2018.
6 Considering the short turn-around timeframes, it is unrealistic to expect the templates to be ready
7 for dissemination and completion by March 1, 2018.

8 Moreover, it would be nearly impossible for the new irrigation and nitrogen management
9 plans to be certified in 2018 since there has not yet been a certification or training program for
10 Certified Crop Advisors (CCAs) that covers the newly proposed requirements. Even without
11 certification, outreach needs to occur to educate growers regarding the revised requirements.
12 Growers have spent the last two years working with the existing nitrogen management plan
13 template and it will take time and effort to educate growers with respect to the changes and to
14 assist members with filling out a new irrigation and nitrogen management plan worksheet. In
15 reality, this must first be done a full year in advance of a grower completing a Nitrogen Summary
16 Report in 2019 for the 2018 crop year. In order to meet the timelines in the Second Draft Order,
17 outreach would need to occur from January through March 2018, and the certification course
18 would need to be revised by mid-summer. Frankly, there is insufficient time for all of these
19 activities to occur to meet the proposed timelines in the Second Draft Order.

20 Further, the ESJ Coalition maintains a database that stores information from both the
21 Farm Evaluation surveys and the Nitrogen Management Plan Summary Reports. These databases
22 will need to be updated to be able to store information from the new templates. There are also
23 online portals that need to be updated prior to receiving completed, and updated, Nitrogen
24 Summary Reports and updated Farm Evaluation surveys. In order to meet the proposed timelines
25 in the Second Draft Order, ESJ Coalition's database and portal updates would need to occur
26 within a 3-month period, which is also unrealistic.

27 The ESJ Coalition appreciates that the State Board is looking to have the newly proposed
28 revisions implemented as soon as possible. Unfortunately, as noted above, there are serious

1 practical constraints associated with meeting the proposed timelines. To effectively implement
2 the proposed changes, the ESJ Coalition recommends that the following due dates be adjusted as
3 follows: (1) new irrigation and nitrogen management plan worksheet be completed and be
4 available on farm by March 1, 2019; and, (2) revised Nitrogen Summary Report that reflects new
5 irrigation and nitrogen management plan be due on March 1, 2020. In the meantime, ESJ
6 Coalition members will complete their existing nitrogen management plan worksheets (which
7 they received in November 2017 for the 2018 crop year), and use that information to complete the
8 existing Nitrogen Summary Report by March 1, 2019. During 2018, the ESJ Coalition will
9 conduct extensive outreach regarding the new requirements and update its databases as necessary.
10 With these proposed timelines, ESJ Coalition members would receive updated templates in their
11 member packets mailed at the end of 2018.

12 In summary, the requested changes in timelines are limited to those that practically cannot
13 be implemented in the timelines proposed. The ESJ Coalition does not propose changes to other
14 altered due dates. Further, our proposed revisions are reflected on the attached mark-up of the
15 Second Draft Order.

16 **V. LEGAL ARGUMENTS MADE BY OTHERS ARE NOT SUPPORTED BY STATE**
17 **LAW, POLICY, OR THE ADMINISTRATIVE RECORD.**

18 On February 8, 2016, the State Board issued its first proposed order in its review of the
19 ESJ General Order. Public comments in response to the First Draft Order were submitted by
20 various parties on or before June 1, 2016. These responses have been posted on the State Board's
21 website at

22 https://www.waterboards.ca.gov/public_notices/comments/a2239ac/laurel_firestone.pdf.

23 On December 6, 2017, the State Board held a full-day public workshop on the Second
24 Draft Order. At the workshop, there were 12 panel presentations from various stakeholders with
25 different interests and perspectives. The State Board has posted PowerPoint presentations from
26 these panels on its website at

27 [https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2239/workshops/20](https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2239/workshops/20171206_wrksp/agenda_dec6_esjworkshop.pdf)
28 [171206_wrksp/agenda_dec6_esjworkshop.pdf](https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2239/workshops/20171206_wrksp/agenda_dec6_esjworkshop.pdf).

1 The responses presented here respond in part to some of the legal arguments put forward
2 by petitioners AGUA and others, including but not limited to the Environmental Law Foundation
3 (ELF). In general, the legal arguments presented by AGUA and ELF are not supported by statute
4 or evidence in the record.

5 **A. State Board Has a Legal Right and Duty to Protect the Privacy of ESJ**
6 **Coalition Members.**

7 Striking an appropriate balance between the issues of maintaining the confidentiality of
8 grower specific information, while also allowing for reporting of field-level data, has been a
9 publicly vetted topic, including the presentation of extensive testimony before the State Board.
10 As a result, the Second Draft Order sets forth the balance achieved as a result of this public
11 process, which permits the direct reporting of field-level data to the Central Valley Water Board,
12 while maintaining the confidentiality of grower names and locations.

13 As set forth in Section II, the ESJ Coalition acknowledges the addition of anonymous
14 reporting without linking field-level data to specific names and locations. ESJ Coalition does
15 offer revisions to the Second Draft Order herein, explained at Section V.A.3., to clarify the
16 importance of protecting grower specific information, but generally does not challenge the
17 anonymity provisions for field-level data. Nonetheless, it is clear to ESJ Coalition that others will
18 challenge this limitation and instead continue to argue in favor of full disclosure of grower names
19 and locations in response to the Second Draft Order, and despite the extensive public process that
20 resulted in the compromise of certain parties' respective positions representing a balancing of the
21 competing interests. To that end, ESJ Coalition preemptively responds to those forthcoming
22 arguments herein.

23 **1. Confidentiality of Grower Information Is Protected by the Right to**
24 **Privacy, and Supported by State and Federal Conduct in Similar**
25 **Circumstances.**

26 Opponents to ensuring the protection of privacy interests have historically argued that
27 grower names and property locations should be publicly accessible, and continue to assert that the
28 anonymity limitation in the Second Draft Order should be excluded, claiming that both state and

1 federal law supports public disclosure of water quality data. (See California Coastkeeper
2 Alliance et al. 6/1/16 Comment Letter, p. 4.) However, it is initially critical to distinguish a
3 grower's private information, such as name and address, from information reflecting water
4 quality data. There is no relationship between the public release of growers names and evaluation
5 of water quality. It is very difficult, if not impossible, to associate groundwater quality at any
6 point in the aquifer with practices employed at any point on the surface. Therefore, field specific
7 reporting practices and nitrogen use information, without the identification of grower names and
8 locations, is sufficient to track the implementation of practices that will lead to improved
9 groundwater quality.

10 Further, the groundwater trend monitoring network will provide a comprehensive
11 evaluation of groundwater quality across the coalition region and the Management Practices
12 Evaluation Program will assist the ESJ Coalition in understanding the effectiveness of
13 management practices implemented across the ESJ Coalition boundaries in different soil types
14 and with different crops. The combination of regional monitoring of groundwater quality and the
15 reporting of management practices and nitrogen application ratios will allow the Central Valley
16 Water Board to understand whether agricultural management practices are protective of
17 groundwater quality or will likely protect groundwater quality over time. However, the additional
18 disclosure of names and property locations as related to specific growers serves no public purpose
19 whatsoever, let alone any identifiable interest that would outweigh a grower's privacy interests.

20 The proposed public disclosure of the private information of landowners and growers has
21 been a critical concern of the ESJ Coalition and its members since the inception of the irrigated
22 lands program in 2003. The irrigated lands program has been developed in a way that looks to
23 balance privacy against the public's right to information. Indeed, one of the central tenants of the
24 ESJ Coalition program includes not providing individual member information that specifically
25 identifies individual growers, companies, or landowners in a manner that would then be public.
26 This component is critical, because the data and information being requested is arguably
27 proprietary business, or at the very least, traceable to private economic information.

28 For example, the data sets proposed in the Second Draft Order require reporting of post-

1 production crop yields from the grower to the ESJ Coalition. (Draft Appendix A, p. 28.). This
2 means that without little effort, members of the public could calculate individual grower
3 economic information. This runs directly counter to other statutes that protect individual crop
4 yield data from public disclosure.⁸ Further, public disclosure of management practices as well as
5 amounts of nitrogen applied is proprietary business information that needs to be protected. The
6 combination of such information is akin to a mechanical process and/or secret recipe that is
7 protected for other industries. Agriculture should be afforded the same protections and such
8 information should be shielded from public disclosure.

9 Additionally, unlike many industries, agricultural operations are often co-located with a
10 farmer's home, or homes rented or made available to agricultural workers. Thus, field-specific
11 information could be directly related to an individual residence—not a traditional place of
12 business. This is important due to the potential that individuals residing in homes will be targeted
13 or harassed by members of the public based on disclosure of names and property locations, in lieu
14 of the anonymity limitation proposed in the Second Draft Order.

15 Requiring the ESJ Coalition to turn over grower names and property locations along with
16 the field-specific data in lieu of the anonymity limitation proposed by the Second Draft Order is
17 improper for a number of different reasons, including, most importantly, that it eliminates a key
18 value that the ESJ Coalition provides to its members, which is privacy protection of sensitive
19 grower information from mass public exposure. Elimination of this key value will seriously
20 undermine the functionality of the ESJ Coalition, and threaten its very existence, as confirmed by
21 extensive testimony before the State Board, and as recognized in the Second Draft Order.

22 (Second Draft Order, p. 51.) Without the ESJ Coalition, and the other third-party groups which
23 collectively represent more than 20,000 landowners/operators throughout the Central Valley, the
24 Central Valley Water Board and the State Board will have an administrative nightmare in trying
25 to implement any irrigated lands program across the Central Valley, let alone across the state, as
26 is envisioned by the Second Draft Order. This alone should cause State Board members to reject

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28 ⁸ See, e.g., Food & Agr. Code, section 58781.

1 any further request to mandate reporting of grower names and property locations, in lieu of the
2 anonymity limitation currently proposed in the Second Draft Order.

3 For the last thirteen years, the third-party/coalition process has worked well in the Central
4 Valley. It has allowed third parties (i.e., the ESJ Coalition and others) to work directly with their
5 members to provide education and outreach, conduct monitoring, prepare and implement
6 watershed management plans, and prepare comprehensive watershed based annual reports.
7 Coalition activities are funded by members through per acre assessments, and members must
8 remain in good standing to be part of the coalition. In exchange for participating in coalition and
9 remaining as a member in good standing, growers do not have to report individual farming
10 information directly to the Central Valley Water Board in a manner that provides for specific
11 location and land ownership information. This avoids grower information from then being
12 publically available through a simple Public Records Act (PRA) request, or from being displayed
13 on a publically accessible website.

14 Significantly, federal and state law recognizes the importance of grower confidentiality
15 and takes extra steps to protect it. Like California's Public Records Act (PRA), the federal
16 Freedom of Information Act (FOIA) generally promotes disclosure of public records with
17 limitations built in to protect personal information. FOIA includes a statutory exemption for
18 "geological or geophysical information and data, including maps, concerning wells[,]" so that
19 public agencies complying with FOIA are not required to disclose such information. (5 U.S.C. §
20 552(b)(9).) Courts consistently interpret this exemption to allow agencies to withhold
21 information about a water well's location and depth. (*AquAlliance v. United States Bureau of*
22 *Reclamation* (D.D.C. 2015) 139 F.Supp.3d 203, 209-211 (*AquAlliance*); *Nat'l Res. Def. Council*
23 *v. United States DOD* (C.D.Cal. 2005) 388 F.Supp.2d 1086, 1107-1108 (*NRDC*.) When
24 challenged, agencies have been allowed to withhold maps showing the location of wells and
25 construction reports detailing characteristics such as well depth. (*AquAlliance, supra*, 139
26 F.Supp.3d at p. 209; *NRDC, supra*, 388 F.Supp.2d at p. 1108.)

27 Additionally, federal law prohibits the U.S. Department of Agriculture (USDA) from
28 disclosing farm information about "the agricultural operation, farming or conservation practices,

1 or the land itself” or geospatial information provided to participate in USDA programs or
2 geospatial information for these farms. (7 U.S.C. (s) 8791(b)(2); *Ctr. for Biological Diversity v.*
3 *USDA* (9th Cir. 2010) 626 F.3d 1113, 1115-1116 [allowing USDA to withhold GPS coordinates
4 of locations where wolf depredation occurred to protect ranchers’ personal privacy].) This
5 statute alone justifies withholding farm information, but the justification for withholding is
6 further strengthened by a FOIA exemption that makes FOIA inapplicable to matters that are
7 exempt from disclosure under another statute. (5 U.S.C. § 522(b)(3); *Cent. Platte Natural Res.*
8 *Dist. v. USDA* (8th Cir. 2011) 643 F.3d 1142, 1148 [holding USDA was not required to disclose
9 GIS data that identified individual farmers, operators, and other agricultural producers]; *Zanoni*
10 *v. USDA* (D.D.C. 2009) 605 F.Supp.2d 230, 237 [holding that even disclosure of just names is
11 prohibited].)

12 Further consideration should be afforded to state-level marketing orders which likewise
13 strongly protect grower identities and a broad range of important grower information. For
14 example, the marketing order for California raisins requires that all proprietary information
15 including names and addresses, production quantities, prices paid, and trade secrets remain
16 confidential. (State of California Department of Food and Agriculture Marketing Branch,
17 Marketing Order for California Raisins, p. 15.; see also, e.g., Food & Ag Code, section 58781.)
18 The marketing order states that these confidentiality requirements are enforced notwithstanding
19 any other provision of law. (*Id.*)

20 Confidentiality of grower information is clearly valued and supported at the federal and
21 state level, and under general concerns regarding privacy. The State Board has made significant
22 strides in striking a balance between making relevant water quality information available to the
23 public and protecting private grower information. These values must continue to be supported in
24 the Second Draft Order.

25 **2. The Zamora Case has no Precedential Impact on the State Board’s**
26 **Consideration of the Second Draft Order and is Factually**
27 **Inapplicable.**

28 To the extent that the Environmental Law Foundation and/or other groups argue or claim

1 that the superior court decision in *Zamora v. Central Coast Regional Water Quality Control*
2 *Board*, Case No. 15CV-0247 (*Zamora*), is controlling on the State Board’s decision with respect
3 to protection of individual grower information, ESJ Coalition disagrees.

4 First, the *Zamora* decision is a superior court decision that has no precedential value on
5 other proceedings. (*Santa Ana Hospital Medical Center v. Belshé* (1997) 56 Cal.App.4th 819,
6 830-831.) Thus, the State Board should reject any argument crafted around the *Zamora* decision
7 on that basis alone.

8 Second, the information at issue in the *Zamora* case pertained specifically to landowner
9 and/or grower names and addresses that had a responsibility to notify domestic well users if a
10 domestic well exceeded a drinking water standard. To that end, the superior court considered
11 whether notification and compliance letters between a third party coalition, growers and domestic
12 well users, which included names and addresses of the growers and well users, had to be made
13 publicly available. Notably, the letters were only triggered to be sent by and between the
14 coalition, growers and domestic well users, when testing revealed that water in a domestic well
15 exceeded a drinking water standard. Thus, in addition to balancing privacy interests versus the
16 public disclosure of water quality data, there was a public health and safety component due to an
17 identified exceedance at issue before the superior court, which acted to shift the balancing in
18 favor of public disclosure. That is not the information that the State Board seeks to protect in the
19 Second Draft Order. Here, unlike the facts before the superior court in *Zamora*, the State Board
20 is protecting grower names and specific location information for field information relevant to the
21 application and use of nitrogen fertilizers – not an identified exceedance of a state mandated
22 drinking water standard. Indeed, domestic well data and information is not proposed for any
23 protection whatsoever in the Second Draft Order.

24 Third, even if the State Board noted similarities in the type of information addressed by
25 the superior court in *Zamora*, it is critical to note that the limited scope of disclosure approved in
26 *Zamora* is simply not at issue herein. There, the superior court decision turned on whether there
27 was a finding that the information in question was “used” by the Central Coast Water Board
28 during its audits of the coalition’s documents. Thus, the superior court determined that if the

1 Central Coast Water Board reviewed the records during an audit process, then they “used” the
2 records and the records became subject to production under the Public Records Act. Any
3 notification and compliance letter that was not reviewed was not subject to public disclosure and
4 privacy was maintained. Under the Second Draft Order, while the Executive Officer has the
5 discretion to review records, until such records are actually “used” in the same manner as the
6 Central Coast Water Board used the records in *Zamora*, the *Zamora* case findings are not
7 applicable. Thus, *Zamora* is not instructive and, in any case, is not binding precedent on this
8 agency or any court.

9 **3. ESJ Coalition’s Proposed Revisions to the Second Draft Order to**
10 **Clarify the Importance of Protecting Grower-Specific Information.**

11 As discussed *supra* at V.A., determining an appropriate and effective balance between the
12 protection of growers’ privacy interests and public interest in access to water quality data has
13 been a topic of extensive discussion and testimony over the course of many years. As such, the
14 balance between these interests that is set forth in the Second Draft Order, which permits the
15 public release of field-level data while maintaining a grower’s anonymity of name and property
16 location information, represents a significant compromise and achievement given the advocacy of
17 the various parties on behalf of their respective positions over the years. In light of the ongoing
18 concerns of various groups regarding the protection of any privacy interests, ESJ Coalition
19 proposes that the State Board add additional findings to the Second Draft Order to bolster its
20 conclusion to permit grower anonymity regarding names and property locations, while providing
21 full access to other field-level data. The inclusion of additional specific findings will serve to
22 further support the State Board’s order in this regard and ensure that its specific findings upon
23 which the decision is based are memorialized.

24 **B. ESJ General Order as Adopted by the Central Valley Water Board Is**
25 **Consistent With State’s Antidegradation Policy.**

26 Contrary to arguments put forward by AGUA and other environmental interests, the ESJ
27 General Order, and the Central Valley Water Board’s adoption thereof, is consistent and complies
28 with the state’s antidegradation policy, which is applied to the ESJ General Order is embodied in

1 State Board Resolution 68-16 (Statement of Policy with Respect to Maintaining High Quality
2 Waters of California, Resolution 68-16.). Notably, Resolution 68 16 was adopted prior to Porter-
3 Cologne, the Federal Clean Water Act, and the Basin Plans to which it has now been
4 incorporated. Its adoption was encouraged by the United States Department of the Interior as the
5 United States Environmental Protection Agency was not yet in existence. According to
6 Resolution 68-16, the State Board's intent and purpose in its adoption was "that such higher
7 quality [waters] shall be maintained to the maximum extent possible consistent with the
8 declaration of the Legislature." Further, the Legislature's action in question was aimed towards
9 surface water, as evidenced by the policy's additional statement that, "[w]hereas the California
10 Legislature has declared that it is the policy of the State that the granting of permits and licenses
11 for unappropriated water and the disposal of waste into the waters of the State shall be so
12 regulated as to achieve highest water quality consistent with maximum benefit to the people of
13 the State and shall be controlled so as to promote the peace, health, safety and welfare of the
14 people of the State" The State Board has recognized this application to surface water in
15 previously adopted orders.

16 Nonetheless, the State Board applies Resolution 68 16 to groundwater, and has issued
17 significant orders that up until the Second Draft Order have controlled how Resolution 68 16 is
18 applied to discharges to groundwater. Generally, the State Board has made clear that the
19 antidegradation policy is not a "zero-discharge" policy. But beyond that, and as the Second
20 Draft Order appropriately acknowledges, the State Board has provided little guidance or direction
21 regarding application of Resolution 68-16 to nonpoint sources. (Second Draft Order, p. 82.) We
22 agree with statements in the Second Draft Order that it is inappropriate to apply the discrete point
23 source approach in the context of this General Order, and to other discharges similar to those
24 addressed in this Second Draft Order. Accordingly, we support the direction provided in the
25 Second Draft Order with respect to antidegradation considerations in the context of nonpoint
26 source pollution. In addition, in Attachment 1 to this submittal, we propose clarifying text to
27 section B of the Second Draft Order.
28

1 Next, additional revisions to the Second Draft Order incorporate Groundwater Quality
2 Protection Targets that will further address environmental interest criticisms claiming that the ESJ
3 General Order does not comply with Resolution 68-16. These revisions will be forthcoming as
4 soon as possible. In summary, Groundwater Quality Protection Targets will help to evaluate
5 potential nitrogen impacts to groundwater. The formula that will be developed to calculate
6 protection targets will need to account for total applied nitrogen, total removed nitrogen,
7 precipitation and recharge conditions, and other relevant and scientifically justified factors. Once
8 established, this formula would then be used to establish target values for nitrogen for townships.
9 The township target values will then need to be computed to be protective of groundwater quality
10 – consistent with Resolution 68-16.

11 **C. ESJ General Order as Adopted by the Central Valley Water Board Is**
12 **Consistent With the State’s Nonpoint Source Policy.**

13 A fundamental issue in the environmental petitions as well as the Second Draft Order is
14 application of the Nonpoint Source Policy, and its direction that management practices need to
15 have a “high likelihood of leading to attainment of water quality requirements and direction to
16 incorporate sufficient feedback mechanisms to determine if, in fact, the program is meeting its
17 stated purposes.” (Second Draft Order, p. 11.) The Second Draft Order concludes, that with the
18 changes proposed, the ESJ General Order is consistent with the Water Code and with the
19 Nonpoint Source Policy. As a preliminary matter, we disagree that the proposed revisions are
20 necessary for the ESJ General Order to meet and comply with the Water Code and the Nonpoint
21 Source Policy. The ESJ General Order in its current configuration satisfies the Water Code and
22 the Nonpoint Source Policy, and revisions are unnecessary. However, to the extent that the ESJ
23 Coalition has agreed to increase certain types of field level reporting - as long as individual
24 grower names and farm locations remain confidential – we do not oppose certain revisions.

25 Overall, the ESJ General Order meets all intents and purposes with respect to the
26 Nonpoint Source Policy. As discussed at length in the Second Draft Order, the ESJ General Order
27 includes multiple provisions that are designed to ensure compliance with the Nonpoint Source
28 Policy’s key elements and there is no need to repeat that here. (Second Draft Order, pp. 11-21.)

1 **D. Central Valley Water Board and State Board do not Have Legal Authority to**
2 **Use ESJ General Order to Require Replacement Water.**

3 In its June 1, 2016 letter, the AGUA petitioners state that the ESJ General Order needs to
4 be revised to require the provision of replacement water. Not only should the ESJ General Order
5 not be revised accordingly, but it would be improper for the ESJ General Order to include
6 replacement water orders under current law and policy.

7 A waste discharge requirements (WDR) order, like the ESJ General Order, is not the
8 proper vehicle for requiring growers to provide replacement water. WDR orders are issued
9 pursuant to Water Code section 13263. This section provides that WDR orders must “prescribe
10 requirements as to the nature of any proposed discharge, existing discharge, or material change in
11 an existing discharge, except discharges into a community sewer system, with relation to the
12 conditions existing in the disposal area or receiving waters upon, or into which, the discharge is
13 made or proposed.” (Wat. Code, § 13263(a).) These requirements must also implement any
14 relevant water quality control plan, generally referred to as a basin plan, and consider water
15 quality objectives, beneficial uses, and other factors. (*Ibid.*) Absent from the provisions in Water
16 Code section 13263 is any authority for the State Board or a regional water quality control board
17 to require that the discharger pay for or provide replacement water supplies, or take other
18 remedial actions.

19 Water Code section 13304, on the other hand, authorizes the State Board to issue cleanup
20 and abatement orders (CAOs) to dischargers whose discharges have violated WDRs, or who
21 discharge or threaten a discharge that creates or threatens to create a condition of pollution or
22 nuisance. (Wat. Code, § 13304(a); see also *In the Matter of the Petition of BKK Corporation*,
23 State Water Resources Control Board Order No. WQ 86-13, p. 10.) A CAO may require “the
24 provision of, or payment for, uninterrupted replacement water service, which may include
25 wellhead treatment, to each affected public water supplier or private well owner.” (*Ibid.*)

26 Accordingly, a CAO under Water Code section 13304 is the only legal mechanism at this
27 time available to the State Board to require the provision of replacement water – not a WDR
28 order. Because the Second Draft Order is a WDR order issued pursuant to Water Code section

1 13263, it is improper for the Second Draft Order to revise the ESJ General Order to include a
2 requirement for growers to provide, or pay for the provision of, replacement water.

3 Additionally, pending amendments to the Water Quality Control Plans for the Sacramento
4 River and San Joaquin River Basins and Tule Lake Basin (Basin Plans), formulated by the
5 comprehensive stakeholder effort CV-SALTs, will address replacement water needs as part of
6 alternative compliance pathways. However, until such time that the Basin Plans are amended, the
7 State Board has no authority to require replacement as a direct provision in the ESJ General
8 Order.

9 Pending legislation, if passed, could also address replacement water needs, therefore
10 obviating any need to include replacement water requirements in the Second Draft Order.

11 **E. ESJ General Order Properly Includes Time Schedules, as Allowed Under**
12 **Applicable Statute.**

13 Next, both AGUA and ELF make improper legal arguments claiming that ten-year
14 compliance schedules are unlawful. The time schedule provisions included in the ESJ General
15 Order are a proper statutory tool for allowing sufficient time for nonpoint source dischargers to
16 comply with water quality standards. Water Code section 13263, subdivision (c) provides that
17 waste discharge requirements “may contain a time schedule, subject to revision in the discretion
18 of the [water] board.” The Central Valley Water Board is clearly vested with the discretion to
19 include time schedules in WDRs, and has open discretion to determine the necessary duration of
20 that time schedule. Further, time schedules should include schedules when it appears that the
21 discharger cannot meet the requirements immediately. (See, e.g., Cal. Code Regs., tit. 23, §
22 2231.) Therefore, the Central Valley Water Board has the discretion and authority to include a
23 ten-year time schedule in the ESJ General Order.

24 Contrary to assertions by AGUA, ELF, and others, a ten-year (or longer) time schedule is
25 not unreasonable, and comports with applicable state law. First, Basin Plan provisions referenced
26 by AGUA apply only to time schedules that are included in National Pollutant Discharge
27 Elimination System (NPDES) permits; i.e., permits that are issued by the Central Valley Water
28 Board under the federal Clean Water Act, 33 U.S.C., § 1342(a). (Basin Plan (July 2016 rev.), at

1 p. IV-16.03.) The Second Draft Order is not an NPDES permit, but waste discharge requirements
2 (WDRs) issued pursuant to the California Porter-Cologne Water Quality Act, Water Code
3 sections 13000 et seq. (Porter-Cologne). Therefore, the ten-year maximum limitation does not
4 apply to the ESJ General Order. The Basin Plan itself notes that “[t]ime schedules in waste
5 discharge requirements are established consistent with Water Code Section 13263.” (Basin Plan
6 (July 2016 rev.), at p. IV-16.03.)

7 Additionally, the Policy for Implementation and Enforcement of the Nonpoint Source
8 Pollution Control Program (Nonpoint Source Policy) in Key Element 3 does not establish a
9 maximum duration for implementation time schedules, instead providing that a time schedule
10 “may not be longer than that which is reasonably necessary to achieve . . . water quality
11 objectives.” (Nonpoint Source Policy (2004), at p. 13.) This reflects the discretion given to the
12 regional boards in Water Code section 13263, subdivision (c) to create time schedules as they
13 deem appropriate. Accordingly, the ten-year time schedules allowed in the ESJ General Order
14 comply with Porter-Cologne.

15 **F. The ESJ General Order Does Not Have Disparate, Negative Impacts on**
16 **Protected Classes.**

17 The AGUA Petitioners assert that the ESJ General Order disproportionately impacts
18 communities with residents of color and lower income, which purportedly rises to the level of
19 violating various state antidiscrimination statutes generally, as well as in the fair housing and land
20 use and planning contexts. (See Petition, *supra*, p. 26 - 27.) The AGUA Petitioners do not
21 provide a scintilla of legal or factual analysis in support of their positions. Nevertheless, for the
22 reasons set forth below, the ESJ General Order does not violate any of the aforementioned
23 provisions.

24 California’s discrimination prohibition under Government Code Section 11135 mirrors the
25 language of the federal anti-discrimination statute. (Gov. Code, § 11135, subd. (a); cf. 42 U.S.C.
26 § 2000d.) Accordingly, examples of discrimination claims brought under the federal statute are
27 illustrative in evaluating what programs or activities do, and do not, result in a disparate impact
28 under the state statute and are, therefore, unlawful. (*Darensburg v. Metro. Transp. Comm’n* (9th

1 Cir. 2011) 636 F.3d 511) (plaintiffs' allegation that the transportation commission engaged in
2 funding decisions that adversely affected minority riders on the bus system, in violation of
3 Government Code Section 11135, failed because disparate impact was not proven.) A disparate
4 impact claim requires more than a bare assertion of disproportionate effect; instead, the claim
5 necessitates comparison between those persons affected, and those unaffected, by the policy or
6 decision. (*Id.* at p. 519-520, citation omitted.) Such a comparison requires use of an appropriate
7 measure against which to evaluate the disparate impact, if any. Statistics alone, unless found to
8 be reasonably reliable measures of impact, are insufficient to support a finding of disparate
9 impact. (*Id.* at p. 519.)

10 Here, the AGUA Petitioners reference generally a non-peer reviewed whitepaper and
11 research report, respectively, in support of their disproportionate effect allegation. (See Petition,
12 *supra*, at p. 26.) The AGUA Petitioners, however, provide neither evidence, firm statistics, nor
13 even a comparison of the impact that the ESJ General Order would have against any other group,
14 hypothetically or actual, in furtherance of this assertion. Instead, they rely on bare assertions
15 purportedly bolstered by reports that are not in the administrative record.

16 Further, the ESJ General Order does not solely affect certain groups within the Eastern
17 San Joaquin River Watershed area and not others. The ESJ General Order is applicable to the
18 entire populous of the Eastern San Joaquin River Watershed area, with no differentiation made
19 between the community groups and populations therein.⁹ Therefore, the impact, if any, of the
20 ESJ General Order does not disproportionately affect Latinos and low-income groups over
21 another group (the essence of a disparate impact claim); instead, it affects the populous of the
22 entire Eastern San Joaquin River Watershed area – as a whole. Accordingly, the AGUA
23 Petitioners' assertion that the ESJ General Order disproportionately effects low-income and
24 Latino groups within the Eastern San Joaquin River Watershed area is without merit.

25 California's Fair Employment and Housing Act (FEHA) classifies the ability to seek,
26 obtain, and hold housing without discrimination based upon race, national origin, and source of
27

28 ⁹ Please see ESJ Coalition's proposed revisions on this issue. (ESJ revisions to the Second Draft Order at p. 55.)

1 income, among others, as civil rights. (Gov. Code, § 12921, subd. (b).) The AGUA Petitioners
2 simply assert, without explanation, that the ESJ General Order somehow infringes upon these
3 rights. (See Petition, *supra*, at p. 27.) The AGUA Petitioners do not provide a basis for how, or
4 the manner in which, the ESJ General Order discriminates, either intentionally or effectively,
5 against the aforementioned classes with respect to housing accommodations. (See Gov. Code, §
6 12955.8) (proof of intentional violation or proof of discriminatory effect required to prove
7 unlawful practices under FEHA.). Instead, the AGUA Petitioners merely cite to studies
8 documenting some of the water quality issues in the San Joaquin Valley. (See Petition, *supra*, at
9 p. 26.) The AGUA Petitioners also fail to recognize that the unlawful practices outlined in
10 California's FEHA generally apply only to owners and sellers of housing accommodations,
11 financial institutions that provide financing for housing accommodations, and persons/entities
12 whose business involves real estate-related transactions. (See Gov. Code § 12955.) The State
13 and regional water boards are no such institutions. Thus, the assertion that the ESJ General Order
14 violates and civil right related to fair housing pursuant to California's FEHA is simply wrong.

15 Finally, the AGUA Petitioners assert that the ESJ General Order will fail to protect
16 drinking water to such a degree that it will be tantamount to an invalid discriminatory act,
17 pursuant to Government Code Section 65008. (See Petition, *supra*, at p. 27.) However, the
18 reliance thereon is misapplied. Section 65008 applies to land use and planning decisions that
19 deny persons enjoyment of residence, land ownership, or tenancy, because of protected class
20 characteristics, as well as a source of financing for, or intended occupancy of, a residential
21 development. (Gov. Code, § 65008, subd. (a)(1)-(3))(such actions are rendered null and
22 void.) Indeed, this provision is part of the Conservation and Planning Act. (See Gov. Code, §
23 65006.) Any concomitant impact of the ESJ General Order would not be the result of actions by
24 the Regional Water Board because of the San Joaquin Valley residents' race, national origin,
25 color, or income level. Rather, the Central Valley Water Board's actions in the ESJ General
26 Order are based upon the extensive scientific monitoring data deemed appropriate to set discharge
27 standards that protect surface water and groundwater in the Central Valley. The AGUA
28 Petitioners assume too much and, at this point, their bare assertion is purely speculative.

1 **G. The AGUA Petitioners Failed to Exhaust their Administrative Remedies**
2 **Regarding Issues of Violating State Discrimination Statutes.**

3 The AGUA Petitioners failed to exhaust their administrative remedies with respect to all
4 of the discrimination allegations made in the Petition. Thus, such issues are not properly before
5 the State Board. The exhaustion of administrative remedies doctrine includes the issue
6 exhaustion rule, which mandates that a party raise all issues in all stages of the administrative
7 process at which the agency may consider such issues. (*Edgren v. Regents of University of*
8 *California* (1984) 158 Cal.App.3d 515, 520, citations omitted.) In this context, when regional
9 boards take administrative actions, aggrieved parties may appeal a regional board's decision to
10 the State Board within 30 days. Water Code section 13320(a) states in relevant part: "Within 30
11 days of any action or failure to act by a regional board . . . an aggrieved person may petition the
12 state board to review that action or failure to act." General statements before the regional board
13 are insufficient to meet the issue exhaustion requirement. Instead, a petitioner must raise issues
14 with enough specificity to alert the agency of the issues, so the agency may then have an
15 opportunity to respond. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of*
16 *Directors* (2013) 216 Cal.App.4th 614, 631 (comment letters submitted to the District regarding
17 inconsistencies with policies of the County Plan, even when afforded generous interpretation,
18 failed to give the District an opportunity to evaluate and respond to an alleged CEQA violation).)

19 The AGUA Petitioners assert that the ESJ General Order violates FEHA. (See Petition,
20 *supra*, at p. 27.) At no time was the issue, or even topic, of a potential FEHA violation
21 introduced before the Central Valley Water Board. As such, the claim that the ESJ General Order
22 constitutes an unlawful violation of FEHA must fail for failure to exhaust administrative
23 remedies.

24 Similarly, the AGUA Petitioners assert that the ESJ General Order's purported
25 disproportionate impact on lower income and Latino communities rises to the level of violating
26 other state discrimination statutes, specifically Government Code Sections 65008 and
27 11135. (See Petition, *supra*, at p. 27.) Again, the idea that the ESJ General Order violates
28 specifically enumerated discrimination statutes was never raised before the Central Valley Water


1 Board. It is true that in a March 21, 2011 comment letter the AGUA Petitioners generally
2 discussed the disproportionate impact issue. However, they never alleged or discussed such an
3 impact rising to the level of a violation of a specifically enumerated anti-discrimination statute
4 and certainly did not identify which statute or statutes that were purported to be violated. (See
5 RB AR, at pp. 3949 - 3956.) These issues were not properly raised below, which abrogated the
6 Central Valley Water Board's opportunity to respond thereto. Thus, any argument that the
7 AGUA Petitioners met the burden to exhaust their administrative remedies as to Government
8 Code Sections 65008 and 11135 before the Central Valley Water Board is tenuous, at best.

9 **VI. CONCLUSION**

10 Based on the foregoing reasons, the ESJ Coalition recommends changes consistent with
11 our comments above and those on the ESJ Revisions to the Second Draft Order.

12
13
14 SOMACH SIMMONS & DUNN
A Professional Corporation

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16
17 DATED: December 22, 2017

18 By: 
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