BEFORE THE STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF PETITION OF
SOUTHERN SAN JOAQUIN VALLEY WATER QUALITY COALITION,
CALIFORNIA FARM BUREAU FEDERATION, AND SAN JOAQUIN COUNTY RESOURCE CONSERVATION DISTRICT ON BEHALF OF THE SAN JOAQUIN COUNTY AND DELTA WATER QUALITY COALITION FOR REVIEW OF ACTION AND FAILURE TO ACT BY CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

RESPONSE OF PETITIONERS SOUTHERN SAN JOAQUIN VALLEY WATER QUALITY COALITION, THE CALIFORNIA FARM BUREAU FEDERATION, AND THE SAN JOAQUIN COUNTY RESOURCE CONSERVATION DISTRICT ON BEHALF OF THE SAN JOAQUIN COUNTY AND DELTA WATER QUALITY COALITION

RESPONSE OF SOUTHERN SAN JOAQUIN VALLEY WATER QUALITY COALITION ET AL.
The Southern San Joaquin Valley Water Quality Coalition, the California Farm Bureau Federation, and the San Joaquin County Resource Conservation District on behalf of the San Joaquin County and Delta Water Quality Coalition, (collectively, “Petitioners”) submit this response to petitions by California Sportfishing Protection Alliance and California Water Impact Network (collectively, “CSPA”), and Asociación de Gente Unida por el Agua, Fairmead Community and Friends, and Planada en Accion (collectively, “AGUA”), relating to the California Regional Water Quality Control Board, Central Valley Region’s (“Regional Board”) adoption of Resolution No. R5-2012-0116, Waste Discharge Requirements General Order for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (“WDR” or “ESJ WDR”).

I. INTRODUCTION

This response focuses on the Regional Board’s compliance with the State Water Resources Control Board’s (“State Board”) Nonpoint Source Program Strategy and Implementation Plan (“NPS Policy”), and the State Board’s Statement of Policy with Respect to Maintaining High Quality Waters, Resolution No. 68-16 (“Resolution 68-16”).

In 1968, the State Board adopted Resolution 68-16, also referred to as the “Antidegradation Policy,” with the goal of maintaining the state’s “high quality” waters, that is, waters with quality that exceeds the water quality objectives (“WQOs”) in the applicable Basin Plan. To meet this objective, Resolution 68-16 requires a regional board, before permitting degradation of high quality waters, to find that any change in water quality (1) would be consistent with the maximum benefit to the people of the state; (2) would not unreasonably affect present or probable future beneficial uses of such water; and (3) would not result in water quality less than prescribed in state policies. (Resolution 68-16, p. 1.) Resolution 68-16 further requires a regional water board, when issuing a permit to allow a discharge of waste into existing high quality waters, to establish requirements that result in the best practicable treatment or control (“BPTC”) to ensure pollution or nuisance will not occur, and that the highest water quality consistent with maximum benefit to the people of the state will be maintained. (Ibid.)
The State Board adopted the NPS Policy more recently, in 2004, to improve the state’s ability to address nonpoint source ("NPS") pollution. Under the NPS Policy, implementation programs for NPS pollution control may be developed by the regional water boards, the State Board, an individual discharger, or by or for a coalition of dischargers in cooperation with a third-party representative, organization, or government agency. (NPS Policy, p. 8.) To ensure that adopted programs are sufficiently protective, the NPS Policy requires each program to meet several requirements, including that the adopted program achieves and maintains WQOs, describes water quality management practices to be implemented and the process for evaluating these practices, and provides sufficient feedback mechanisms to allow the regional board and others to evaluate the program’s effectiveness. (See NPS Policy, pp. 11-15.)

In adopting the Eastern San Joaquin WDR, the Regional Board properly concluded that the WDR was protective of water quality and consistent with the requirements of both Resolution 68-16 and the NPS Policy. Under the WDR, the third-party group representing the Eastern San Joaquin River Watershed is required, among other things, to (1) maintain a list of participants, including parcel information; (2) prepare and implement a monitoring and reporting program that meets the requirements of the Monitoring and Reporting Program ("MRP") for both surface water and groundwater; (3) report exceedances of water quality standards to the Regional Board; and, (4) develop, submit, and implement management plans when there are exceedances of water quality standards. Further, the WDR establishes requirements that will limit the degradation of high quality waters through the implementation of BPTC by all dischargers participating in the WDR through farm management performance standards, nitrogen planning, farm planning, and feedback monitoring. Collectively, these requirements establish a comprehensive program that extensively monitors agricultural discharges, identifies areas of concern on a watershed basis, surveys and evaluates member management practices, employs BPTC, and ensures that extensive member outreach occurs when there are water quality issues of concern.

CSPA would like a more rigid program that employs individual monitoring and requires specific control technologies, among other requirements; AGUA would like a similarly
demanding program. But the Regional Board recognized that its job was not to develop the
strictest program, however infeasible, but to establish a workable program consistent with the
law. The Regional Board thus explained that the WDR is intended to “restore and/or maintain the
highest reasonable quality of state waters” (Draft Program Environmental Impact Report, p. 2-6,
emphasis added, hereinafter “Draft PEIR”), while maintaining the economic viability of
agriculture since “irrigated agriculture in the Central Valley provides valuable food and fiber
products to communities worldwide. (ESJ WDR, Order R5-2012-0116-R1 (Revised October
2103) (hereinafter “WDR”) Attachment A, Information Sheet, p. 3; see also Draft Program
Environmental Impact Report, p. 2-6.) The Board further explained that the WDR is intended to
encourage implementation of management practices that improve water quality, but to do so
“without jeopardizing the economic viability for all sizes of irrigated agricultural operations in the
Central Valley or placing an undue burden on rural communities to provide safe drinking water.”
(WDR, Attachment A, Information Sheet, p. 3; Draft PEIR, p. 2-6.)

AGUA and CSPA’s positions, however, ignore these considerations; they ignore the
complex hydrology in the Central Valley, the nature of nonpoint source pollution from large
numbers of similarly situated individuals, and the practical and economic considerations the
Regional Board must employ. Their arguments, moreover, disregard the evidentiary record, the
Regional Board’s findings, the Water Code (such as Water Code § 13267), and the substantial
discretion afforded the Regional Board in employing its technical expertise and in implementing
the law. Because of these reasons, the State Board should reject AGUA and CSPA’s petitions for
review.

II. ARGUMENT

A. The Regional Board’s Approval of the WDR Does Not Violate Resolution 68-16

CSPA and AGUA imagine a different Resolution 68-16 than the one in existence.
Contrary to their claims, nothing in Resolution No. 68-16 requires individual waterbody-by-
waterbody baseline analyses. Nor does it require individual monitoring. CSPA and AGUA’s
misplaced arguments stem from a fundamental misreading of Resolution 68-16, believing the
policy to demand the highest water quality no matter the costs. The State Board, however, adopted a different policy than that supposed by CSPA and AGUA, one that seeks a balance “to achieve the highest water quality consistent with the maximum benefit to the people of the state.” Resolution 68-16 thus balances four important positive factors: quality water, food production, economic vitality, and employment. The two substantive provisions of the policy continue in that theme of balance. The first provision clarifies that it is applicable to waters that are of better quality than when water quality standards were established, rather than all waters. Once applicable, the policy generally requires high quality water to be maintained but permits the state to depart from this standard when it is for the benefit of the people of the state and best practicable controls are implemented.

The balance advanced in the antidegradation policy is consistent with the Porter-Cologne Act, which has an underlying requirement of reasonableness to the regulation of water quality in the state. Section 13300 states that the Regional Boards may only regulate water quality “reasonably, considering all demands being made and to be made on those waters.” Similarly, under Section 13050, “pollution means any alteration of the quality of water which may unreasonably affect” the waters of the state. While the Regional Board is required to ensure the “reasonable protection of beneficial uses,…it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses.” (Wat. Code, § 13241 [setting forth the Act’s water quality objectives].) These multiple references to reasonableness indicate the legislature’s desire for moderation and balance.

In applying this policy guidance to the Eastern San Joaquin General Order, one must recognize the importance of Central Valley agriculture to the farms, the employment sector, the business communities and the residents of this area. The Central Valley of California is renowned worldwide as the most productive food production region of the world. Agriculture is the principal element of California’s economy and it is the lifeblood of the Central Valley. One must also recognize, however, the importance of achieving and maintaining the quality of the state’s waters in these water courses and aquifers.
Both CSPA and AGUA’s primary contention with the Regional Board’s adoption of the ESJ WDR is that it violated Resolution No. 68-16. Although both petitions include additional allegations, the underlying theme is the WDR fails to comply with Resolution No. 68-16. As such, we respond to AGUA and CSPA’s arguments collectively unless otherwise indicated.

1. The WDR’s Determination of High Quality Waters as a Baseline Was Proper and Complies with Resolution 68-16

Petitioners CSPA and AGUA contend the WDR fails to comply with Resolution 68-16 and that the Regional Board failed to make adequate findings.1 Specifically, the environmental Petitioners argue that the WDR does not comply with Resolution 68-16 because the Regional Board failed to establish a proper baseline for all waterbodies and all constituents within the Eastern San Joaquin watershed. (See AGUA Petition for Review, pp. 6, 9, 15-16; [“The Board failed to establish a baseline for enforcement of antidegradation policy, and failed to require any information to establish a baseline to determine levels of degradation occurring and permitted under this permit.” Id. at p. 9.]). To support its argument, AGUA relies solely on Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd. (“Asociacion”) (2012) 210 Cal.App.4th 1255 and its reference of the Administrative Procedures Update 90-004, Antidegradation Policy for Implementation of NPDES Permitting (APU 90-004). (Ibid.)

The term “baseline” is not used in either Resolution 68-16 or the federal antidegradation policy, and no specificity or direction on how such a determination should be made is provided within the policies themselves. Rather, the determination is left to the discretion of the Regional Board. In order to self-direct the baseline analysis, Petitioners’ rely on APU 90-004; such reliance for determining baseline is misplaced. APU 90-004 is a guidance document to aid in the National Pollutant Discharge Elimination System (“NPDES”) permitting process. (APU 90-004, p.1.) The ESJ WDR regulates discharges from irrigated agriculture, not point sources subject to NPDES permits. Thus, while APU 90-004 may be used for general instructive purposes (see

1 As a general point, the Regional Board’s antidegradation findings are appropriate; the findings recognized that due to significant variation in conditions within the Eastern San Joaquin watershed area, an antidegradation analysis would be required for at least some of the waterbodies, and performed an adequate antidegradation analysis for the WDR. (WDR, Attachment A, Information Sheet, pp. 31-44; Draft PEIR, Appendix A, pp. 57-68. 114-116, 167.)
Asociacion, supra, 210 Cal.App.4th at p. 1270), its application is not germane to discharges from irrigated agriculture. (WDR, Attachment A, Information Sheet, p. 33; [“Administrative Procedures Update 90-004, Antidegradation Policy for Implementation of NPDES Permitting, provides guidance for the Regional Water Boards in implementing Resolution 68-16 and 40 CFR 131.12, as these provisions apply to NPDES permitting. APU 90-004 is not applicable in the context of this Order because nonpoint discharges from agriculture are exempt from NPDES permitting.” Emphasis added.].)

Further, CSPA and AGUA’s contention that a baseline analysis is needed for every individual waterbody fails. Nothing within Resolution No. 68-16 requires individual waterbody-by-waterbody baseline analysis. AGUA’s own support, APU-90-004 states, “baseline quality is pollutant specific, not waterbody specific.” (APU-90-004, p. 4.)

With no specific guidance pertinent to the determination of baseline, it was within the Regional Board’s discretion to determine high quality waters. As stated by the Regional Board:

Very little guidance has been provided in state or federal law with respect to applying the antidegradation policy to a program or general permit where multiple water bodies are affected by various discharges, some of which may be high quality waters and some of which may, by contrast, have constituents at levels that already exceed water quality objectives. Given these limitations, the board has used readily available information regarding the water quality status of surface and ground waters in the Eastern San Joaquin River Watershed to construct provisions in this Order to meet the substantive requirements of Resolution 68-16. (WDR, Attachment A, Information Sheet, p. 36.)

Using this information, the Regional Board found that at least some of the waters within the Eastern San Joaquin watershed are high quality waters.2 (WDR, Attachment A, Information Sheet, pp. 37, 43.) Based on this finding, the Regional Board then conducted a prior antidegradation analysis in compliance with Resolution 68-16.

2 “Given the significant variation in conditions over the broad areas covered by this Order, any application of the antidegradation requirements must account for the fact that at least some of the waters into which agricultural discharges will occur are high quality waters (for some constituents). Further, the Order provisions should also account for the fact that even where a water body is not high quality (such that discharge into that water body is not subject to the antidegradation policy), the board should, under State Water Board precedent, impose limitations more stringent than the objectives set forth in the Basin Plan, if those limits can be met by ‘best efforts.’” (WDR Attachment A, Information Sheet, p. 37.)
2. The WDR’s Monitoring Requirements Comply with Resolution 68-16

Contrary to CSPA and AGUA’s assertions, the WDR’s representative monitoring program is comprehensive and complies with Resolution 68-16 as well as the NPS Policy. The monitoring program was designed to include a sufficient number of sites, parameters, and frequency of monitoring to be able to identify and address any water quality problems and be representative of the effect of irrigated lands discharges on receiving waters. The monitoring program must also “collect sufficient information to answer critical questions” developed by the previous conditional waiver. (See WDR Attachment A, Information Sheet, p. 10 listing the requirements of a surface water quality monitoring program.)

a. Resolution 68-16 Does Not Require Individual Monitoring

i. Individual monitoring is cost prohibitive

CSPA demands the impossible in seeking the use of individual monitoring. If individual monitoring were required for the Eastern San Joaquin Watershed, as CSPA seeks, it would necessarily be required for the whole of the Central Valley and its over 25,000 farms—a cost-prohibitive requirement, as the record for the Program Environmental Impact Report for the Irrigated Lands Regulatory Program (“PEIR”) demonstrates.

Alternative 5 in the PEIR included individual farm monitoring. The cost estimate for monitoring alone for Alternative 5 was $296.5 million per year. (See ICF Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program, July 2010, at page 2-26, Table 2-22, hereinafter “ICF Technical Memorandum”). With tracking, reporting, and administration costs associated with this type of program, total compliance costs were estimated at $311,665,122. (ICF Technical Memorandum at page 2-26, Table 2-22.) This total excluded the $936,615,659 in management practices and $55,482,437 in additional Regional Board staff costs to deal with the information submitted. (Ibid.) Under Alternative 5, the additional staff costs were to be passed onto growers through additional program fees. (Ibid.)

3 As an alternative to individual monitoring, CSPA vaguely requests the use of statistically significant monitoring. (CSPA Petition for Review, p. 5.)
In sum, then, the on-farm monitoring advanced by CSPA would contain at least a $1.3 billion annual price tag for Central Valley growers:

- **Annual Compliance Costs:** $311,655,122
- **Annual Management Practices:** $936,615,659
- **Annual Program Fees for Regional Board staff positions:** $55,482,437
- **Total Annual Cost:** $1,303,753,218

In addition to the extreme costs, the amount of data that would be collected from the 25,000 individual growers within the Central Valley would be so voluminous that the Regional Board would be unable to manage the data or conduct any meaningful analysis as required under Resolution No. 68-16. Thus, individual monitoring is impractical and infeasible.

ii. **Watershed-based monitoring is effective for determining if growers are implementing BPTC for agricultural discharges in the Central Valley**

Regardless of the costs associated with requiring individual monitoring, CSPA claims the Regional Board must require such monitoring because it cannot otherwise protect water quality or determine whether implemented best management practices are effective. (CSPA Petition for Review, pp. 4-5.) AGUA, although not specifically requesting individual monitoring, similarly asserts that watershed-level reporting is insufficient. (AGUA Petition for Review, p. 12.) CSPA and AGUA’s assertions of the inadequacies of watershed-based monitoring are belied by the record evidence under the previous order (“Coalition Group Conditional Waiver”) for the Central Valley.

Under the Coalition Group Conditional Waiver, watershed-based monitoring was shown to be effective for determining the quality of the Coalition area’s waters, whether growers were implementing BPTC, and for improving water quality. When an exceedance was found more than once in a three-year period, the Coalitions worked with Regional Board staff to develop a “Management Plan” for more intensive monitoring and effective outreach to the farms in the affected area, resulting in implementation of Management Plans for 98 water bodies in the Central Valley, prioritized based on need. (Karen Larsen & David Scholes, PowerPoint
Presentation on the Status of Irrigated Lands Regulatory Program Coalition Group Monitoring and Reporting Program, Central Valley Water Board Meeting, Slide 9 (April 23, 2009). The implemented Management Plans required Coalitions to identify and contact growers with direct discharge potential to waterbodies when an exceedance was detected. The Coalitions successfully made these contacts and followed-up with each grower to identify current management practices and new management practices to improve water quality. (See e.g., San Joaquin County and Delta Water Quality Coalition, 2011 Management Plan Update Report, pp. 27-36, at <http://www.waterboards.ca.gov/centralvalley/water_issues/irrigated_lands/management_plans_reviews/coalitions/sanjoaquin_county_delta_waterquality/2012apr1_sjcdwqcmpur.pdf> [as of Jan. 9, 2014] [Coalition’s documentation of fulfillment of performance goals]; id. at pp. 41-80 [Coalition’s documentation of management practice implementation and effectiveness].) More importantly, these new management practices did improve water quality. (See, e.g., id. at pp. 4, 69 [showing San Joaquin County and Delta Water Quality Coalition’s management plan efforts resulted in significant reduction in exceedances]; Central Valley Regional Water Quality Control Board, Board Meeting Transcript, p. 158 (June 9, 2011) [noting that East San Joaquin Water Quality Coalition reporting showed eight exceedances of the WQO for chlorpyrifos at two specific subwatershed monitoring sites between 2005 and 2008, and no exceedances between 2008 and 2010].)

Under the ESJ WDR, its associated MRP will do even more to improve water quality as a result of more effective monitoring practices. While the previous requirement included monitoring of a broad suite of parameters once every three years, the new MRP always requires monitoring in at least one of the “Core” monitoring sites located in each of the similarly situated “zones.”4 (WDR, Attachment A, Information Sheet, p. 11.) As the Regional Board explained, “[t]his approach will ensure that each ‘zone’ includes one or more sites in which comprehensive

---

4 As part of their August 2008 Monitoring and Reporting Program Plan (“2008 MRPP”), the East San Joaquin Water Quality Coalition designated six zones within its area based on hydrology, crop types, land use, soil types, and rainfall. (WDR, Monitoring and Reporting Program, p. 3, fn. 2.) The zones identified in the 2008 MRPP are the same zones as those identified in the WDR. (Ibid.)
assessment monitoring is being conducted, which should allow the board to track and identify any significant changes.” (Ibid.) If an exceedance is found more than once in a three-year period, the WDR, similar to the previous Coalition Group Conditional Waiver, requires the third-party to develop a Management Plan to identify new management practices necessary to achieve compliance, set a time schedule for implementing the identified management practices, and evaluate the effectiveness of the new management practices. (WDR, Attachment A, Information Sheet, p. 13, 19.) Management Plans may also be required if there is a trend of degradation that threatens a beneficial use. (Ibid.)

Despite the proven effectiveness of previous watershed-based monitoring programs, and despite the improvements in this WDR made to ensure even more effective monitoring, CSPA nonetheless maintains that individual monitoring is needed to identify discharges that impair water quality in “localized areas” upstream of existing monitoring sites. (CSPA Petition for Review, p. 5.) This argument rests on the flawed assumption that all tributaries of an identified water body have the same beneficial uses, and thus should have the same WQOs, as each identified water body in the Basin Plan for which the State Board has designed beneficial uses. Clearly, an agricultural drainage ditch that is not a natural water body and/or only contains water in the summer months because of return flows from irrigated agriculture, does not have the same beneficial uses as a main stream river to which it may ultimately be tributary. This is precisely why the State Board has not identified beneficial uses, and hence WQOs, for hundreds of tributary waterbodies in the Central Valley and has included specific language in the Basin Plan as follows:

The beneficial uses of any specifically identified water body generally apply to its tributary streams, except as provided below: . . . .

In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Board’s judgment will be applied.

In should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis.
The Basin Plan and the new MRP both provide the Regional Board with the necessary discretion to tailor monitoring to address the complex and unique attributes of the water bodies in watershed area, and to prioritize monitoring so that limited resources are spent to achieve the greatest improvement in water quality.

iii. Individualized field monitoring does not comply with Water Code section 13267(b)(1)

CSPA and AGUA argue that in order to comply with Resolution 68-16, the WDR must include individualized field monitoring. (CSPA Petition for Review, pp. 4-5; AGUA Petition for Review, pp. 9-11.) As discussed supra, individual monitoring is not required under Resolution 68-16 nor is it feasible or cost effective. Additionally, individual field monitoring does not comply with Water Code section 13276(b)(1) as it was found to be unreasonable and cost prohibitive when reviewed in the PEIR. The requirements of Resolution 68-16 must be harmonized with the Water Code’s requirement that any required monitoring be reasonable and cost-effective. (See Wat. Code, § 13267 (b)(1); see also Resolution 68-16 specifying “higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature.” Emphasis added.)

As evidenced in the PEIR, the individualized monitoring approach was extensively studied. (Draft PEIR, Appendix A, p. 95.) The PEIR provides the following discussion regarding individual field monitoring and regional monitoring approaches: “the waste discharge characteristics of runoff from each farm would be determined [under farm-based monitoring]. However, with this approach, it will be difficult to characterize the actual effects agricultural waste discharges are having on receiving water bodies. A good example is where a farm discharges to a large river. Farm-based monitoring would not necessarily provide enough information to tell whether the discharge is affecting the river’s water quality.” (Ibid.)

As described in the PEIR, monitoring only discharges from fields would not provide the needed information to determine the effects on receiving water bodies given that water quality objectives
apply within receiving waters. \textit{(Ibid.)} Thus, to address this, individual monitoring would also need to sample receiving waters to determine the effects of each field’s discharge on the receiving waters. However, such a program would have significant costs and would be unreasonable. \textit{(Ibid.)}

As noted in the PEIR, the cost of individual monitoring would impose a “significant” cost on the industry and staff resources. \textit{(Ibid.)} This finding is significant in light of Water Code section 13267, which requires any monitoring be reasonable and cost-effective. \textit{(See Wat. Code, § 13267(b)(1).)} The economic analysis of alternative five (individual monitoring) revealed that the increased cost could cause widespread impacts to the industry, including loss of land in production, value of production, revenue; and decreased employment. For these reasons, individual monitoring was found to be cost-prohibitive and unreasonable, in contrast with Water Code section 13267(b)(1), as well as inconsistent with the goals of the Irrigated Lands Regulatory Program to maintain the economic viability of agriculture.

iv. \textbf{Contrary to CSPA’s suggestions, no court has categorically rejected watershed-based monitoring as ineffective}

Contrary to CSPA’s suggestions, the court in \textit{Asociacion, supra,} 210 Cal.App.4th 1255 did not categorically rejected watershed-based monitoring as ineffective. In \textit{Asociacion}, the court took issue with a \textit{specific} monitoring system that used supply wells, not monitoring wells. The court noted evidence showing that, “[u]nlike monitoring wells, domestic/milkbarn supply wells . . . are typically screened well below the water table and across substantial vertical distances,” and that such supply wells generally do not show pollution until several years after its release. \textit{(Id. at 1275.)} Faced with this and other evidence showing the inadequacy of supply wells in this specific situation, and receiving no contrary evidence, the court was required to “conclude as a matter of law that the monitoring program [wa]s inadequate.” \textit{(Ibid.)}

In addition to the court not categorically rejecting watershed monitoring in \textit{Asociacion}, the use of Coalition Groups for watershed monitoring and management practices implementation has
been upheld by the State Board, as well as courts. (State Board Order WQO 2004-0003, p. 9;\textsuperscript{5} Decision of Court After Hearings on Motions for Peremptory Writ of Mandate (April 28, 2005), in the matters of \textit{Deltakeeper, et al. v. Calif. Regional Water Quality Control Bd., et al.} (Super Ct. Sacramento County Case No. 04CS00235) and \textit{Calif. Farm Bureau Federation, et al. v. State Water Resources Control Bd.} (Super Ct. Sacramento County Case No. 04CS00264).)

In contrast to the facts in \textit{Asociacion}, there is ample evidence that the monitoring wells here are sufficient to determine whether growers were implementing BPTC and to maintain and improve water quality. (See discussion regarding the ESJ monitoring program at pp. 8-10; discussion regarding BPTC \textit{infra} at pp. 24-26.) CSPA believes the individual monitoring would provide even greater protections, but that does not make such monitoring mandatory. Given the adequacy of watershed-based monitoring, along with the impossibly high costs of individual monitoring, the Regional Board reasonably required watershed-based monitoring. Thus, CSPA’s argument that the ESJ coalition’s monitoring program is inferior because it does not yield specific individual discharge information with respect to monitoring of discharges and implementation of management practices is null.

\textbf{b. The Eastern San Joaquin monitoring program is extensive}

The Eastern San Joaquin MRP is 29 pages of detailed monitoring requirements and its two appendices add an additional 15 pages of monitoring detail for a total 44 pages of monitoring protocol and requirements. The WDR advances a multi-faceted regulatory program involving trend and targeted groundwater monitoring, coupled with identification of Best Management Practices to ensure BPTC.

\textsuperscript{5} “We note that in the Central Valley there are an estimated 25,000 farming operations and that, until now, this entire industry has been largely unregulated by the Regional Board. We strongly believe that in light of this number of operations, it is to the benefit of both the regulators and the regulated community to encourage the formation of Coalition Groups. Not only will communications and regulation be more simple with a smaller number of regulated entities, but the monitoring requirements for Groups are much greater and will provide much more useful information.” (State Board Order WQO 2004-0003, p. 9.)
i. The MRP is consistent with the NPS Program

The MRP states that: “This Monitoring and Reporting Program (MRP) conforms to the goals of the Non-point Source (NPS) Program as outlined in The Plan for California’s Nonpoint Source Pollution (NSP) Program by:

- tracking, monitoring, assessing and reporting program activities,
- ensuring consistent and accurate reporting of monitoring activities,
- targeting NPS Program activities at the watershed level,
- coordinating with public and private partners, and
- tracking implementation of management practices to improve water quality and protect existing beneficial uses.

Monitoring data collected to meet the requirements of the WDR must be collected and analyzed in a manner that assures the quality of the data. The third-party must follow sampling and analytical procedures as specified in Attachment C, Order No. R5-2008-0005, Coalition Group Monitoring Program Quality Assurance Project Plan Guidelines (QAPP Guidelines) and any revisions thereto approved by the Executive Officer.” (WDR MRP, p. 2.)

ii. Surface Water Monitoring

The requirements for surface water monitoring sites are extensive:

There are three different types of monitoring sites described below: 1) Core sites; 2) Represented sites; and 3) Special Project sites. Core sites are monitored comprehensively on an ongoing basis to track trends in surface water quality and to identify water quality problems. Represented sites generally have characteristics similar to, and are, therefore, represented by the Core sites within their common zone. When a water quality problem is identified at a Core site, the represented sites are evaluated and potentially monitored to determine whether the water quality problem is also occurring at the Represented site (some represented water bodies may not have a monitoring site, e.g. in cases where there is no access). Special Project sites are identified and monitored to investigate identified water quality problems. A Core site or Represented site may also be a Special Project site. (WDR MRP, p. 3.)

In addition, Table 1 at MRP pages 4 and 5 specifies the many monitoring sites in order to make sure all of the area is covered. All such monitoring is required to start on a timely basis and is scheduled. Table 2 on pages 7 and 8 of the MPR outline all the constituents monitored.
iii. **Groundwater Quality**

The MRP explains that “[t]he groundwater quality monitoring, assessment, and evaluation requirements in this MRP have been developed in consideration of the critical questions developed by the Groundwater Monitoring Advisory Workgroup (questions are presented in the Information Sheet, Attachment A). The third-party must collect sufficient data to describe irrigated agricultural impacts on groundwater quality and to determine whether existing or newly implemented management practices comply with the groundwater receiving water limitations of the Order.” (WDR MRP, p. 12.)

The extensive groundwater program under the Eastern San Joaquin WDR is far more than merely a monitoring requirement. The WDR requires a Groundwater Quality Assessment Reports (“GAR”), Groundwater Quality Management Plans, a Management Practice Evaluation Program (“MPEP”), and a Groundwater Quality Trend Monitoring Program. On balance, the MRP states:

Each of these elements has its own specific objectives (provided below), and the design of each will differ in accordance with the specific objectives to be reached. While it is anticipated that these programs will provide sufficient groundwater quality and management practice effectiveness data to evaluate whether management practices of irrigated agriculture are protective of groundwater quality, the Executive Officer may also, pursuant to Water Code section 13267, order Members to perform additional monitoring of evaluations, where violations of this Order are documented or the irrigated agricultural operation is found to be a significant threat to groundwater quality. (WDR MRP, p. 12.)

c. **The Groundwater Quality Assessment Report is an extensive analysis of the status of the groundwater**

As provided in the MRP, the “GAR’s objectives are:

- Provide an assessment of all available, applicable and relevant data and information to determine the high and low vulnerability areas where discharges from irrigated lands may result in groundwater quality degradation.
- Establish priorities for implementation of monitoring and studies within high vulnerability areas.
- Provide a basis for establishing workplans to assess groundwater quality trends.
- Provide a basis for establishing workplans and priorities to evaluate the effectiveness of agricultural management practices to protect groundwater quality.
• Provide a basis for establishing groundwater quality management plans in high vulnerability areas and priorities for implementation of those plans.” (WDR MRP, pp. 12, 13.)

d. Management Practice Evaluation Program is likewise elaborate

Similar to the GAR, the MRP includes an elaborate section detailing the MPEP’s objectives:

• Identify whether existing site-specific and/or commodity-specific management practices are protective of groundwater quality within high vulnerability groundwater areas,

• Determine if newly implemented management practices are improving or may result in improving groundwater quality.

• Develop an estimate of the effect of Members’ discharges of constituents of concern on groundwater quality in high vulnerability areas. A mass balance and conceptual model of the transport, storage, and degradation/chemical transformation mechanisms for the constituents of concern, or equivalent method approved by the Executive Officer, must be provided.

• Utilize the results of evaluated management practices to determine whether practices implemented at represented Member farms (i.e., those not specifically evaluated, but having similar site conditions), need to be improved.” (WDR MRP, p. 15.)

e. The Groundwater Quality Trend Monitoring Report outlines the importance of an aggressive trend monitoring regime

The objective of the Trend Monitoring is: "(1) to determine current water quality conditions of groundwater relevant to irrigated agriculture, and (2) to develop long-term groundwater quality information that can be used to evaluate the regional effects (i.e., not site-specific effects) of irrigated agriculture and its practices.” (WDR MRP, p. 16.)

The monitoring program is the triggering and reporting component of the WDR. Water quality is, however, enhanced by what such monitoring leads to. The WDR calls for management practices evaluation workplans to assure that management modifications are engaged to address any water quality issues.

MRP Appendix MRP-2 is the monitoring well installation and sampling plan. It requires the third-party coalitions to submit their Monitoring Well Installation and Sampling Plans (MWISP) to the Executive Officer for approval. Those plans contain:
The Eastern San Joaquin WDR sets forth an elaborate monitoring program to direct changes in management practices to address water quality exceedances or degradations.

f. The WDR’s list of constituents is adequate and supported by the record

AGUA contends the WDR does not comply with Resolution 68-16 because the monitoring program does not require the monitoring of all constituents of concern. (See AGUA’s Opening Brief, pp. 10-11.) AGUA incorrectly postures that monitoring for all constituents is required to ensure compliance with the antidegradation policy.

Although AGUA cites no authority for this position, it may be relying on Asociacion. In Asociacion, the court found that the dairy monitoring program was inadequate for reasons specific to that order, including the lack of testing for all constituents of concern. (Asociacion, supra, p. 1275.) The court concluded “the monitoring plan requires testing only for nitrate, electrical conductivity (which measures salts) and phosphorous” but the record showed other pollutants, such as organic matter and pathogens, also have the potential to affect groundwater. (Id. at p.1276.) In Asociacion, the court found the Regional Board’s decision to only require
monitoring for a limited number of constituents was not supported by the evidence given that the Regional Board failed to cite evidence contradicting appellants’ evidence that other constituents associated with dairy operations were causing water quality programs. (Id. at p. 1281).

Here, unlike in Asociacion, the Regional Board has made express findings as to adequacy of the monitoring program’s parameters, including the constituents of concern selected for monitoring. The WDR’s Information Sheet details the basic questions the updated surface water quality monitoring program must answer, as well as the changes made to the new program based off of data collected to date. (See WDR, Attachment A, Information Sheet, pp. 10-12.) Similarly, the WDR’s Information Sheet contains questions for the groundwater monitoring program identified by groundwater experts. These experts, “representing state agencies, the United States Environmental Protection Agency (USEPA), the United States Geological Survey (USGS), academia, and private consultants,” created these “critical questions” to guide the groundwater program in order for it to comply with the ILRP. (Id. at pp. 14-15.)

The design of any monitoring program requires analysis and reasoned judgment (based on a reasoned evaluation of available information) of how best to answer the questions of interest by determining what to monitor, how frequently to monitor, where to monitor, when to monitor, and the quality of the information needed. This is precisely the type of judgment that should be reserved for Regional Board staff, and not second-guessed absent the presentation of convincing evidence as to why the decision is technically flawed – which AGUA has not provided.

Notably, the foundation for the monitoring program in the ESJ WDR is the surface water monitoring program in the prior irrigated lands regulatory program, which neither AGUA nor any other party has challenged with respect to its list of constituents. The new MRP in the WDR reflects the technical challenges of extending an existing surface water quality program to groundwater. Groundwater is completely distinct and different than surface water in all respects, certainly including the very different hydrology between surface waters and groundwater aquifers. The state’s groundwater is generally hundreds of feet below the surface (some 800 feet) and percolation from the field surface to the state’s groundwater will likely take four or more
decades. More significant is that as irrigation water percolates through the soil column, most soluble constituents degrade or tie up to soil particles such that there is very limited evidence of agricultural properties other than salts and nitrates reaching down to the state’s groundwater.

Consequently, the recent groundwater reports (Addressing Nitrate in California’s Drinking Water, With a Focus on Tulare Lake basin and Salinas Valley Groundwater, by Thomas Harter) and the irrigated lands General Orders have expressly dealt only with nitrates and salts. The only exception to this regulatory focus on these constituents involves a few pesticides that have reached shallow groundwater. The state regulatory agency charged with pesticide jurisdiction is the California Department of Pesticide Regulation (“CDPR”) which has a separate and extensive regulatory program dealing with those chemicals. Those regulatory programs of CDPR operate in coordination with the Regional Boards on the irrigated lands waivers and General Orders, including the Eastern San Joaquin General Order.

Throughout the Regional Board’s development of the General Order, the entire focus has therefore been on addressing nitrates and salts in groundwater, in addition to the longer list of constituents tested in surface water. The environmental Petitioners have had every opportunity to bring forth any data relative to groundwater problems caused by valley agriculture beyond salt and nitrate, including any technical evidence to support the need to monitor additional constituents in groundwater, yet they have provided none. The bald assertion that this already enormous regulatory program should be expanded to address additional constituents in groundwater – without technical evidence in the record to warrant this expansion – is specious. Further, if such an expansion were to be considered, it could only be considered after an evaluation of the additional costs associated with expanding the MRP. Again, AGUA has failed to present any evidence to determine whether the increased cost of adding additional constituents to the groundwater monitoring program is warranted such that it is a best practicable method of preventing degradation.

g. The WDR requires extensive monitoring of nitrogen application

To minimize nitrogen application and ensure compliance with Resolution 68-16, the
WDR sets forth extensive requirements for members and the third-party group. Under the WDR, all members must implement a farm-specific Nitrogen Management Plan ("NMP") that identifies practices that will minimize excess nitrogen application relative to crop need, minimize nitrate movement through surface runoff, and minimize leaching past the root zone. (WDR, pp. 18, 25; see also WDR, Attachment A, Information Sheet, p. 21.) The WDR further requires members in high vulnerability areas to certify their NMPs and provide to the third-party Nitrogen Management Plan Summary Reports ("NMP Reports") that indicate the nitrogen consumption ratio for each crop grown for each parcel enrolled by the member. (WDR, pp. 25.) Members must also provide their NMP and NMP Reports to Regional Board staff if requested or if board staff or an authorized representative conducts an inspection of the member’s farm. (Ibid.)

Using information received from the NMP Reports, the third-party must then prepare an annual summary to be submitted to the Regional Board. (WDR MRP, pp. 21, 23.) As part of the summary, the third-party will aggregate information provided to characterize the input, uptake, and loss of nitrogen fertilizer applications by specific crops in the Eastern San Joaquin River Watershed. (Id. at p. 23.) The third-party must then, at a minimum, compare farms with the same crops, similar soil conditions, and similar practices, helping the third-party identify effective practices to minimize nitrogen use and protect water quality. (Ibid.)

AGUA’s several arguments about the inadequacy of nitrogen monitoring under the WDR are inconsistent with the facts and ignore practical and economic considerations. AGUA first incorrectly argues the nitrogen consumption ratio does not provide information about the amount of nitrogen applied to the surface. (AGUA Petition for Review at p. 11.) The nitrogen consumption ratio is a ratio of crop consumption to total nitrogen available for crop uptake from sources including, but not limited to, fertilizers, manures, composts, nitrates in irrigation supply water, and soil. (WDR, pp. 25.) Members are required to indicate the nitrogen consumption ratio for each crop grown for each parcel enrolled by the member. (Ibid.) In doing so, members

---

6 Members will complete their NMP and NMP Reports using templates developed by the Executive Officer or by the third-party in consultation with the Regional Board and, as appropriate, certain other agencies. (WDR MRP, pp. 24-25.)
indicate the amount of nitrogen applied, which the third-party then uses to characterize the input, uptake, and loss of nitrogen fertilizer applications by specific crops in the Eastern San Joaquin River Watershed. (WDR MRP, p. 23.)

Second, AGUA alleges the WDR is inadequate in that it does not require the third-party to submit NMP Reports to the Regional Board. (AGUA Petition for Review at p. 11.) AGUA apparently desires a redundant program in which both the third-party and the Regional Board review all NMP Reports. Apart from being infeasible, this request ignores the fact that the third-party must prepare a summary of the NMP Reports for the Regional Board. (WDR MRP, p. 21.) If Regional Board staff believes more information is desirable after reviewing the third-party’s summary, the staff may then request that a member provide its NMP Report. (WDR, p. 25.)

AGUA next claims, without any explanation, that the requirement that members and the third-party maintain all required reports and materials for at least five years is too short a period. (AGUA Petition for Review at p. 11.) It is not clear why AGUA believes a longer period necessary. In any event, the five-year holding period may be extended because of unresolved litigation or the Executive Officer’s request, addressing potential concerns. (WDR, p. 35.)

Lastly, AGUA demands that all members must provide nitrogen plan summary reports. (AGUA Petition for Review, pp. 11-12.) No matter that the member might be in area that is complying with all water quality objectives and experiencing improvement in water quality, AGUA believes the member must expend time and resources to prepare a nitrogen report. Such a program expends limited resources to achieve little, if any, improvement to water quality. The Regional Board appropriately developed reporting requirements based on a member’s area. If the member is in a high vulnerability area where nitrate is identified as a constituent of concern, the member must provide NMP Reports to the third-party. (WDR, p. 25.) Members in low

---

7 High vulnerability areas are those where either (1) an applicable WQO or water quality trigger limit is exceeded twice in a three-year period for the same constituent, and irrigated agriculture may cause or contribute to the exceedances; (2) the Basin Plan requires development of a surface water quality management plan for a constituent(s) discharged by irrigated agriculture; or (3) the Executive Officer determines that irrigated agriculture may be causing or contributing to a trend of degradation of surface water that may threaten applicable Basin Plan beneficial uses. (WDR, Definitions, Acronyms, and Abbreviations, p. 3.)
vulnerability areas, on the other hand, do not need to provide these reports, though they still must
prepare nitrogen management plans to minimize excess nutrient application relative to crop need.
(WDR, pp. 18, 25.) And if an area previously labeled as one of low vulnerability is found to
exhibit any of the features for high vulnerability areas (e.g., if farming may have contributed to
two exceedances of applicable WQOs in a three-year period), members in the area would then
need to submit summary reports. (WDR, Attachment A, Information Sheet, p. 21.) This program
prioritizes efforts to address known water quality issues, and ensures compliance with Resolution
68-16.

3. The WDR Sets Appropriate Receiving Water Limitations

In adopting WDRs, regional boards are authorized to set a time schedule for compliance,
which may be revised at the board’s discretion. (Water Code, § 13263(c).) Consistent with this
provision, the Regional Board established a schedule for compliance with the WDR’s receiving
water limitations. (WDR, p. 35.) Members implementing an approved Surface Water Quality
Management Plan (“SQMP”) must comply with the receiving water limitations on a time
schedule that is “as short as practicable,” but not later than 10 years after the SQMP is submitted
to the Executive Officer for approval. (Ibid.) All other members are subject to the receiving
water limitations effective immediately. (Ibid. at p. 35 fns. 14, 15.)

Misreading the Regional Board’s established time schedule, AGUA argues the timeline
for compliance permits undue delay, suggesting that members have without qualification 10 years
to come into compliance. (AGUA Petition for Review, p. 13.) AGUA entirely neglects to note
that compliance with the receiving water limitations must occur on a time schedule that is “as
short as practicable.” Avoiding discussing this limitation altogether, AGUA never explains how a
requirement that compliance occur on “as short as practicable” a time schedule somehow permits
undue delay. Nor can it. In requiring members to comply with the receiving water limitations, at
the latest, on a time schedule that is “as short as practicable,” the Regional Board established a
reasonable time schedule consistent with Resolution 68-16.
4. The WDR Allows for Limited Degradation Consistent with Resolution 68-16

Before permitting degradation of high quality waters, Resolution 68-16 requires a regional board to find that any change in water quality (1) would be consistent with the maximum benefit to the people of the state; (2) would not unreasonably affect present or probable future beneficial uses of such water; and (3) would not result in water quality less than prescribed in state policies. The board must also assure that any authorized degradation of high quality waters is subject to WDRs that will result in BPTC of the discharge necessary to ensure that (1) pollution or nuisance will not occur and (2) the highest water quality consistent with the maximum benefit to the people of the state will be maintained.

a. The Regional Board properly made the required Resolution 68-16 findings before permitting degradation of high quality waters

In Asociacion, the court looked to four factors in determining whether the WDR was consistent with the maximum benefit to the people of the state: the past, present, and probable beneficial uses of water, the economic and social costs compared to the benefits, the environmental aspects, and the implementation of feasible alternative treatment or control methods. (Asociacion, supra, 210 Cal. App. at p. 1279.) Making the required findings, the Regional Board found that the limited degradation permitted under the WDR was consistent with the maximum benefit to the people of the state will be maintained. (WDR, pp. 41-42.) In explaining why this was so, the Regional Board acknowledged the importance of Central Valley agriculture for employment and for the state and nation’s food supply, and explained, among other things, that the WDR requires compliance with water quality objectives and beneficial uses, requires the implementation of BPTC, and includes performance standards that would work to prevent further degradation of surface and groundwater quality. (Ibid.) Thus, The Regional Board looked at the beneficial uses of the water and balanced the costs and benefits. The Regional Board also reviewed the environmental aspects of the WDR and discussed alternative treatment methods. (WDR, Attachment D, Findings of Fact and Statement of Overriding Consideration, p. 33.) The Regional Board complied with Resolution 68-16. AGUA’s varied
attacks on the Regional Board’s findings overlook the Board’s analysis. Ignoring the Board’s explanation altogether, AGUA claims the Regional Board “engaged in no . . . analysis” of why the WDR would be consistent with the maximum benefit to the people of the state. (AGUA Petition for Review, p. 17.) In similar fashion, AGUA asserts that the “finding that ‘limited degradation’ is allowed is far too vague to mean anything,” (AGUA Petition for Review at p. 18) even though the WDR explains what it means: degradation that will not cause or contribute to exceedances of water quality objectives, unreasonably affect beneficial uses, or cause a condition of pollution or nuisance. (WDR, p. 42).

AGUA lastly suggests that it understands what “limited degradation” is permitted under the WDR, but argues it permits too much. AGUA claims that permitting degradation up to water qualities objectives is inadequate because it might result in accidental exceedances of water quality objectives. (AGUA Petition for Review at p. 19.) AGUA asserts the WDR should therefore set limits far below water quality objectives. (Ibid.) The theoretical possibility of an exceedance does not justify placing such an undue burden on irrigated agricultural operations, particularly when measures are already in place to address any exceedances. (WDR, Attachment A, Information Sheet, pp. 13, 19 [if an exceedance is found more than once in a three-year period, the third-party must develop a Management Plan to identify new management practices necessary to achieve compliance, set a time schedule for implementing the identified management practices, and evaluate the effectiveness of the new management practices].)

b. The WDR Results in Implementation of BPTC

As noted above, to permit degradation, the Regional Board was required to implement WDRs that would result in the best practicable treatment or control (“BPTC”). “Practicable” means feasible—and feasibility considerations, as the Regional Board explained, preclude the use of specific technologies, practices, or treatment devices to achieve BPTC in the watershed. (WDR, p. 35.) Rather than selecting specific technologies, the Regional Board established a set of performance standards that focus on management practices, education, and outreach, and that
establish additional measures in the event degradation trends are observed. (Ibid.) These standards are similar to those installed under various NPS programs in California, and are similar to standards the U.S. E.P.A. considers the best available, economically achievable means of reducing pollution of surface and ground water from agriculture. (Ibid.)

AGUA and CSPA nonetheless both attack the WDR as insufficient to achieve BPTC. Reciting flawed arguments, AGUA claims the WDR fails to require BPTC because members would have, without qualification, 10 years to comply with receiving water limitations. (AGUA Petition for Review, p. 20.) Again, AGUA entirely ignores the WDR’s requirement that compliance occur on “as short as practicable” a time schedule—a requirement consistent with Water Code section 13263, subdivision (c), which permits the regional boards to set time schedules for compliance with WDRs. (WDR, p. 35.)

CSPA then claims the BPTC is too vague since under watershed-based monitoring it is impossible to know whether BPTC is being implemented or, if it is, whether it is effective. (CSPA Petition for Review, p. 8.) To begin, CSPA’s argument relies on a faulty premise. As discussed, record evidence illustrates that watershed-based monitoring programs are effective for determining if growers are implementing BPTC. (See discussion regarding BPTC on pp. 8-10.) Moreover, CSPA’s gripe with the BPTC appears to be that it does not require specific technologies or controls. But while BPTC for point source discharges is often based on proven technology and the methods utilized by similarly situated dischargers, nonpoint source discharges are markedly different in character. Given site-specific, crop-specific, and regional variability, no specific set of technologies, practices, or treatment devices can be said to achieve BPTC/best efforts universally in the watershed. (WDR, p. 35.) Growers need flexibility in their management practices to best achieve performance given their unique situations. (WDR, Attachment A, Information Sheet, p.37.) This being the case, the Regional Board established the following two distinct processes to achieve BPTC: (1) establishment of a baseline set of universal farm water quality management standards combined with upfront evaluation, planning and implementation of management practices to attain those goals, and (2) additional planning and
implementation measures where degradation trends are observed that threaten to impair a beneficial use or where beneficial uses are impaired. (Ibid.) The process of reviewing the data and instituting additional practices when necessary assures BPTC/best efforts and facilitates the collection of information necessary to demonstrate the effectiveness of the practices. (WDR, Attachment A, Information Sheet p. 40.) The processes will ensure the highest quality of water is for the maximum benefit of the people. (Ibid.)

The established management standards are not, as CSPA suggest, vague, ineffective performance standards, but rather are proven methods for addressing nonpoint source pollution, similar to those measures set forth in California’s Management Measures for Polluted Runoff—a guidance document developed by the State Board, California Coastal Commission, and other agencies—and the U.S. E.P.A.’s National Management Measures to Control Nonpoint Source Pollution from Agriculture. (See WDR, pp. 36-37.) The WDR’s suite of monitoring programs and reporting requirements will provide the Regional Board with the information necessary to determine whether actions are being taken to achieve BPTC. (WDR, Attachment A, Information Sheet p.41.)

c. The WDR contains proper time schedules

In order to ensure discharges that are allowed to high quality waters will not unreasonably affect beneficial uses and will not result in water quality below applicable water quality objectives, the WDR contains numerous provisions including time schedules for compliance. CSPA and AGUA argue that the WDR will not “accomplish timely detection of a change in water quality” (CSPA Petition for Review, p. 6) and will result in an unnecessary time lag. (AGUA Petition for Review, p. 13.)

In contrast to the environmental Petitioners’ contentions, the time schedules do not allow for a “time lag” and are not inconsistent with the requirements of the Basin Plan, the Water Code, and Resolution 68-16. The WDR finds that discharges to high quality waters are authorized pursuant to the following requirements: “The receiving water limitations in section III of the Order, the compliance schedules in section XII, and the Monitoring and Reporting Program’s
requirements to track compliance with the Order, are designed to ensure that the limited
degradation will not cause or contribute to exceedances of water quality objectives, unreasonably
affect beneficial uses, or cause a condition of pollution or nuisance.” (WDR, Attachment A,
Information Sheet, p. 44.)

Resolution 68-16 and Water Code section 13263 do not require instantaneous compliance
or otherwise provide time limitations on achieving policy objectives. Additionally, Water Code
section 13263(c) provides the Regional Board broad discretion to prescribe time schedules within
waste discharge requirements. Further, the State Board’s NPS Policy encourages time schedules
for NPS control implementation programs, such as the ESJ WDR, in order to allow the necessary
time to achieve water quality standards. (NPS Policy, Key Element 3, p. 13.) In Asociacion, the
court explicitly endorsed the use of time schedules and phased approaches, stating: “A phased
approach… is reasonable, and is authorized by section 13263, which allows the requirements of a
regional water quality control board to contain a time schedule.” (Asociacion, supra, 210
Cal.App.4th at p. 1277.)

AGUA argues that the ten year time schedule allows “contribution to exceedances,
pollution or nuisance to occur for 10 years.” (AGUA Petition for Review, p. 13.) Given the
nature of discharges from irrigated agriculture, which can contain nonpoint source pollution,
appropriate time is needed to determine effective management practices and to establish timelines
to implement those practices through surface water management plans, groundwater management
plans, and the Management Practices Evaluation Program. The WDR’s time schedule for
compliance does just that—provides a reasonable amount of time without allowing for an
unnecessary time lag.9

8 In Asociacion, the court found the dairy monitoring program deficient because the Order contained no timetable for
the installation of the monitoring wells. (Asociacion, supra, p. 1278.) Unlike the dairy Order, the ESJ WDR
contains an explicit time schedule tied to additional requirements such as management plans.
9 It is worth noting that the Coalition is to provide a time schedule as short as practicable, but may not exceed ten years. (WDR, pp. 36-37, emphasis added.)
B. AGUA and CSPA Argue that *Asociacion de Gente Unida por El Agua et al, v. Central Valley Regional Water Quality Control Board* Fully Applies to This ILRP General Order, However, it is Distinguishable

Justice Blease, writing for the majority in *Asociacion*, found that the originally proffered Dairy General Order failed to comply with the Resolution 68-16. The court observed that the Dairy General Order, which dealt with a traditional point source situation, unlike the Eastern San Joaquin WDR which deals with nonpoint source field percolation, did not effectively prohibit further degradation because it did not “prohibit dairy waste to groundwater.” (*Asociacion supra*, 210 Cal.App.4th at p. 1259).

Farm irrigation water percolating into and through the soil column, unlike waste retention ponds, is impossible to contain, and it may possibly contain salts sourced from the irrigation water and/or nutrients applied, which the plants cannot fully take up through their roots. Consequently, this is wholly distinct from the Dairy situation. The Dairy Order dealt with handling a classical waste distinct from farm irrigation percolation, and farms cannot fail to irrigate. As stated above, Resolution 68-18 seeks a reasonable balance which cannot possibly be reconciled with a prohibition to irrigate/percolate.

The *Asociacion* decision found that the original Dairy Order was inconsistent with Resolution 68-18 due to less than adequate monitoring. The *Asociacion* court recognized that the classical waste from dairy operations is generally “the collection and retention of waste and wastewater in holding ponds.” (*Id.* at p. 1260). The court also observed that those adverse impacts to groundwater were due to discharges from the cow, which is highly distinguishable from the application of irrigation water to fields and/or the applying necessary plant nutrients to establish a crop.

The *Asociacion* decision took considerable focus of Finding 13 of the Dairy Order because it did not prohibit the discharge of “manure, leachate, process waste water,” etc. (*Id.* at p. 10.) The Eastern San Joaquin WDR has no similar “escape language.” Rather, the Eastern San Joaquin WDR categorically prohibits discharges of waste to waters of the state, including groundwater. (WDR, p. 17.)
The *Asociacion* court also took issue with the monitoring provisions of the Dairy Order. The court stated that the monitoring program must be sufficient to alert if groundwater is being degraded. (*Asociacion, supra*, at p. 1274). The court reasoned that because no contrary evidence was presented, 1) monitoring from supply wells are not located in proper areas, 2) monitoring would not show pollution for several years, and 3) monitoring does not test for all required constituents. (*Id.* at p. 1275)

The *Asociacion* decision addressed “vadose monitoring of retention pond and corral areas,” and faulted the Dairy Order for relying on monitoring supply wells far removed from these points of waste discharge. (*Id.* at p. 1276) The Eastern San Joaquin WDR, however, covers all the farm landscape as totally distinct from a dairy retention pond, therefore, all wells (supply, irrigation, domestic or specific monitoring wells) are proper and relevant to monitoring in this agricultural nonpoint source situation.

C. For the Same Reasons the WDR will not violate Resolution 68-16, the WDR Will Not, as AGUA Claims, Allow Pollution and Nuisance to Groundwater in Violation of the Water Code section 13050 et seq.

AGUA claims the WDR unreasonably effects beneficial uses, in violation of the Water Code, for the very same reasons in violates Resolution 68-16. (AGUA Petition for Review, pp. 21-22.) Specifically, AGUA asserts that the WDR allows “limited degradation” up to the water quality objectives without the required findings permitting such “limited degradation;” allows discharges to contribute to exceedances of water quality objectives and nuisance for up to 10 years; fails to establish a baseline to assess and analyze degradation or the impacts of discharge; and fails to establish adequate monitoring and reporting procedures.

As discussed above, none of AGUA’s claims are persuasive. The Regional Board made the required finding to permit limited degradation of high quality waters, including that the WDR’s provisions be consistent with the maximum benefit to the people of the state. (See discussion regarding limited degradation on pp. 22-24.) The Regional Board reasonably set a time schedule for compliance with the WDRs in requiring compliance on a time schedule that is “as short as practicable,” but not more than 10 years after the SQMP is submitted to the Executive
Officer for approval. (See discussion regarding time schedules on pp. 22, 26-27.) And the Regional Board established monitoring and reporting procedures that have been shown effective in determining whether growers were implementing BPTC, and in improving water quality. (See discussion on pages 8-10.) Thus, similar to the reasons the WDR complies with Resolution 68-16, the WDR does not allow groundwater pollution or nuisance in violation of Water Code section 13050 et seq.

D. The WDR Complies with State Board’s NPS Policy

Under the State Board’s NPS Policy, implementation programs for NPS pollution control may be developed by the regional water boards, the State Board, an individual discharger, or by or for a coalition of dischargers in cooperation with a third-party representative, organization, or government agency. (NPS Policy, p. 8.) To ensure that adopted programs are effective in implementing and enforcing the state’s nonpoint source pollution control plan, the NPS Policy requires each program to meet the following five elements:

• Key Element 1: The ultimate purpose of the nonpoint source pollution control implementation program must be explicitly stated and, at a minimum, must address nonpoint source pollution control in a manner that achieves and maintains WQOs.

• Key Element 2: The nonpoint source pollution control implementation program must include a description of the water quality management practices and other program elements expected to be implemented, the process to be used to select or develop management practices, along with an evaluation process to ensure proper implementation and verification.

• Key Element 3: The nonpoint source pollution control implementation program should include a time schedule and quantifiable milestones, if the Regional Board so requires.

• Key Element 4: The nonpoint source pollution control implementation program must include sufficient feedback mechanisms so that the Regional Board, dischargers, and the public can determine whether the program is achieving its stated purpose, or whether additional or different management practices or other actions are required.

• Key Element 5: Each Regional Board must make clear, in advance, the potential consequences for failure to achieve the objectives of its nonpoint source pollution control implementation program, emphasizing that it is the responsibility of individual dischargers to take all necessary implementation actions to meet water quality requirements.
The Regional Board applied these elements in its consideration of the WDR, and properly concluded that the WDR is consistent with each of the five key elements of the NPS Policy. Regarding Key Element 3, the surface and groundwater quality management plans include time schedules for implementing and meeting receiving water limitations. (WDR, Attachment A, Information Sheet, p. 29.) There are also numerous consequences for those who fail to meet the objectives of the program, including additional monitoring, enforcement actions, and revoking coverage under the General Order. (WDR, Attachment A, Information Sheet p. 30.) As discussed in further detail below, the WDR is also consistent with Key Elements 1, 2, and 4.

1. **Watershed-Based Monitoring Achieves and Maintains WQOs and Beneficial Uses, Consistent with Key Element 1 of the NPS Policy**

In the narrative description of Key Element 1, the NPS Policy states that if a program relies on the use of management practices ("MPs"), then there should be a strong correlation between the MPs implemented and the relevant water quality requirements. (NPS Policy, p. 12.) The Regional Board must be able to ensure that all significant pollution sources are addressed. *(Ibid.)*

CSPA argues the WDR conflicts with Key Element 1 because, it alleges, the Regional Board does not know the specific MPs implemented. (CSPA Petition for Review at p. 9.) CSPA further alleges that watershed-based monitoring is insufficient to enable the Regional Board to correlate the specific MPs implemented to the relevant water quality requirements. *(Ibid.)*

The record evidence rejects CSPA’s claims. As discussed *supra*, watershed-based monitoring has been shown to be effective for determining whether growers are implementing BPTC, and has worked to improve water quality. (See discussion above at pp. 8-10.) The Regional Board also explicitly stated its purpose, goals, and objectives of the program. (WDR, Attachment A, Information Sheet pp. 3-4.) The WDR therefore includes requirements to meet applicable water quality objectives and is consistent with Key Element 1.
2. Watershed-Based Monitoring Sufficiently Informs the Regional Board of the Suitability and Effectiveness of MPs, Consistent With Key Element 2 of the NPS Policy

CSPA alleges that watershed-based monitoring is inadequate to satisfy Key Element 2, and that to show MPs are successful, this element requires farm-based water quality management plans and edge-of-field monitoring. (CSPA Petition for Review at pp. 10-12.)

Nothing in the NPS Policy states or implies that Key Element 2 can only be met through farm-specific water quality management plans and farm-specific monitoring. And again, record evidence illustrates that the existing watershed-based monitoring program is effective for determining if growers are implementing BPTC and is working to improve water quality. (See discussion above at pp. 8-10.)

As the Regional Board explained, the WDR requires each individual operation to develop a farm evaluation that will describe their management practices in place to protect surface water and groundwater quality. It further requires the development of surface/groundwater quality management plans in areas where there are exceedances of water quality objectives. These plans include the requirement that the third-party identify new management practices necessary to achieve compliance, set a time schedule for implementing the identified management practices, and evaluate the effectiveness of the new management practices. (WDR, Attachment A, Information Sheet, p. 13, 19.) This approach is consistent with Key Element 2.

3. Watershed-Based Monitoring Provides Feedback Mechanisms Sufficient to Evaluate Program Effectiveness, Consistent with Key Element 4 of the NPS Policy

Contrary to CSPA’s claims, the record evidence shows the existing watershed-based monitoring program is effective for determining if growers are implementing BPTC. (See CSPA Petition for Review at p. 12.) CSPA goes on to claim that the Regional Board concedes that under the WDR it cannot determine local violations, individual compliance, or effectiveness of management practices. (Ibid.) But attributing to the Regional Board a statement it never made does not help CSPA overcome evidence rejecting its position.
To provide the feedback required under Key Element 4, the WDR requires surface and groundwater quality monitoring, tracking of management practices, and evaluation of the effectiveness of implemented practices (WDR, Attachment A, Information Sheet, p. 28; see also *id.* at pp. 13, 19) —feedback that allows iterative implementation of practices to ensure that program goals are achieved.

**E. The Fact that the WDR Requires Executive Officer Approval of Certain Substantive Requirements Reflects the Realistic Technical Challenges of this Enormous New Regulatory Endeavor**

AGUA argues that delegation to the Executive Director of the ability to approve certain parts of the regulatory program, including (1) the Groundwater Assessment Report, (2) the high and low vulnerability groundwater area determinations, (3) Trend Monitoring Plans, and the (4) Management Practices Evaluation Program, is an improper delegation of authority by the Regional Board.

These real parties similarly do not like the inherent uncertainty associated with these provisions and would prefer that the program be more defined in the WDR. That said, reality is not perfection. AGUA and CSPA have been pushing, and suing, the Regional Board for years to adopt WDRs that cover groundwater, despite the fact that little technical data exists to warrant such a program or establish its regulatory parameters. The development of the (1) the Groundwater Assessment Reports, (2) the high and low vulnerability groundwater area determinations, (3) Trend Monitoring Plans, and the (4) Management Practices Evaluation Program, are all essential components of the regulatory program because they will identify the water quality problem areas and the management practices required to prevent further degradation. This information is simply not available today. If AGUA’s argument on this issue is to be accepted, then the result would be a return to the prior waiver program so that the Regional Board can conduct these exercises itself in order to refine the regulatory program before adoption of the WDRs.
F. AGUA’s Claim of Disparate Impacts Fails Because AGUA Did Not Meet its Burden to Show a Causal Connection

AGUA claims in a conclusory fashion that the WDR disproportionately impacts low income and Latino communities in violation of Government Code section 11135, the California Fair Employment and Housing Act (“CFEHA”), and Government Code section 65008, a housing discrimination statute. (AGUA Petition for Review, pp. 26-27.) The WDR, however, does not disparately impact these communities, nor does it engage in discrimination. AGUA has not met its burden to show a causal connection between the WDR and any disparate impacts.

California Government Code section 11135 prohibits a state agency program from discriminating on the basis of race, ethnicity, national origin, and color, among other characteristics. For a plaintiff to have a successful disparate impact claim under section 11135, the plaintiff must show that “the defendant’s facially neutral practice causes a disproportionate adverse impact on a protected class.” (Darensburg v. Metro. Transp. Comm’n (9th Cir. 2011) 636 F.3d 511, 519.) AGUA has not met this burden. AGUA does not articulate how the WDR will cause further degradation in a manner that will have a disproportionate adverse impact on the Latino community. Stating that the WDR will lead to nitrate contamination and that Latino communities in the Central Valley are more likely to have higher nitrate levels in their drinking water does not show a sufficient causal connection. AGUA presents no specific evidence that shows the WDR’s provisions will cause the contamination of groundwater in a disproportionate manner. As the WDR complies with all provisions of the Water Code, the Basin Plan, and Resolution 68-16, it monitors and protects all groundwater throughout the Eastern San Joaquin watershed equally. As such, the WDR applies equally to all people in the region, regardless of race, ethnicity, national origin, or color.

AGUA also claims the WDR will violate the CFEHA and Government Code section 65008, yet does not describe how it will do so. The CFEHA prohibits discrimination in housing, and section 65008 prohibits a local government from interfering with an individual’s enjoyment of his or her housing because of certain characteristics, such as race. Section 65008, however, applies to local governments, not bodies of the state such as the Regional Board. In addition,
AGUA does not explain how the WDR threatens the housing opportunities of and discriminates against the Latino community. There is also no evidence that the WDR treats the Latino community differently from others when it comes to the enjoyment of housing or landownership. Again, as the WDR applies to all groundwater equally, it applies to all people in the region equally. AGUA has not shown a violation of the CFEHA or Government Code section 65008.

Respectfully submitted,

Dated: January 10, 2014

SPALETTA LAW PC

By: JENNIFER L. SPALETTA
Attorney for Petitioner
SAN JOAQUIN COUNTY RESOURCE CONSERVATION DISTRICT

Dated: January 10, 2014

CALIFORNIA FARM BUREAU FEDERATION

By: KARI E. FISHER
Attorney for Petitioner
CALIFORNIA FARM BUREAU FEDERATION

Dated: January 10, 2014

BEST BEST & KRIEGER LLP

By: WILLIAM J. THOMAS
Attorney for Petitioners
SOUTHERN SAN JOAQUIN VALLEY WATER QUALITY COALITION; ARVIN-EDISON WATER STORAGE DISTRICT; WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT; SEMITROPIC WATER STORAGE DISTRICT
ADDITIONAL COUNSEL OF RECORD

Ernest A. Conant, SBN: 89111
Law Offices of Young Wooldridge, LLP
1800-30th Street, Fourth Floor
Bakersfield, CA 93301
Telephone: (661) 327-9661
Facsimile: (661) 327-0720

Attorneys for Petitioners
Arvin-Edison Water Storage District; Wheeler Ridge-Maricopa
Water Storage District; and Semitropic Water Storage District

COUNSEL’S EMAIL ADDRESSES

Jennifer Spaletta: jennifer@spalettalaw.com
David Green: david@spalettalaw.com
Kari Fisher: kfisher@cfbf.com
William Thomas: William.Thomas@bbklaw.com
Kelsey Blegen: Kelsey.Blegen@bbklaw.com
Ernest Conant: econant@youngwooldridge.com
DECLARATION OF SERVICE

I am a citizen of the United States and employed in the County of Sacramento; I am over the age of eighteen years and not a party to the within entitled action; my business address is 2300 River Plaza Drive, Sacramento, California 95833.

On January 10, 2014, I served the RESPONSE OF PETITIONERS SOUTHERN SAN JOAQUIN VALLEY WATER QUALITY COALITION, THE CALIFORNIA FARM BUREAU FEDERATION, AND THE SAN JOAQUIN COUNTY RESOURCE CONSERVATION DISTRICT ON BEHALF OF THE SAN JOAQUIN COUNTY AND DELTA WATER QUALITY COALITION on the party (ies) in this action, by placing a true copy thereof in an appropriate, sealed envelope(s), each addressed as follows:

(X) (By Mail) I placed such sealed envelope(s), with postage thereon fully prepaid for first-class mail, for collection and mailing at California Farm Bureau Federation, Sacramento, California, following ordinary business practices. I am readily familiar with the practice of California Farm Bureau Federation for collection and processing of correspondence - said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

(X) (By e-mail or electronic transmission) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 10, 2014 at Sacramento, California.

[Signature]

Pamela K. Hotz
Service List

A-2239(a), (b) and (c) Petition of Asociacion De Gente Unita et al.

[via U.S. Mail and email]
Nancy M. McDonough, Esq.
Kari E. Fisher, Esq.
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
kfisher@cbfb.com
photz@cbfb.com
nmcdonough@cbfb.com

[via U.S. Mail and email]
William J. Thomas, Esq.
Wendy Y. Wang, Esq.
Best Best & Krieger LLP
500 Capitol Mall, Suite 1700
Sacramento, CA 95814
william.thomas@bbklaw.com
wendy.wang@bbklaw.com

Mr. Robert Crandall [via email only]
Assistant Executive Officer
Central Valley Regional Water Quality
Control Board, Redding Office
415 Knollcrest Drive
Redding, CA 96002
rrcrandall@waterboards.ca.gov

Mr. Kenneth D. Landau [via email only]
Assistant Executive Officer
Central Valley Regional Water Quality
Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114
klandau@waterboards.ca.gov

[via U.S. Mail and email]
Mr. John Brodie, Watershed Coordinator
San Joaquin County Resource
Conservation District on behalf
of the San Joaquin County and
Delta Water Quality Coalition
3422 W. Hammer Lane, Suite A
Stockton, CA 95219
rvranglr@yahoo.com

Mr. Clay Rodgers [via email only]
Assistant Executive Officer
Central Valley Regional Water Quality
Control Board, Fresno Office
1885 E Street
Fresno, CA 93706-2020
crogers@waterboards.ca.gov

Alex P. Mayer, Esq. [via email only]
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
amayer@waterboards.ca.gov

Patrick E. Pulupa, Esq. [via email only]
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
ppulupa@waterboards.ca.gov

Mr. Adam Laputz [via email only]
Senior Water Resources Control Engineer
Central Valley Regional Water Quality
Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114
awlaputz@waterboards.ca.gov

Lori T. Okun, Esq. [via email only]
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
lokun@waterboards.ca.gov

(continued next page)

Please note: Service by e-mail only unless noted “via U.S. Mail only.”
Service List

A-2239(a), (b) and (c) Petition of Asociacion De Gente Unita et al.

 cc: [via U.S. Mail and email]
 Phoebe Seaton, Esq.
 California Rural Legal Assistance, Inc.
 2115 Kern Street, Suite 370
 Fresno, CA 93721
 pseaton@crla.org

 [via U.S. Mail only]
 Ms. Susana De Anda, Coordinator
 Asociacion de Gente Unida por el Agua
 311 W. Murray Avenue
 Visalia, CA 93291

 [via U.S. Mail only]
 Fairmead Community and Friends
 1225 Gill Avenue
 Madera, CA 93637

 [via U.S. Mail only]
 Mr. Silverio Damian
 Planada en Accion
 462 Gwinn Street
 P.O. Box 618
 Planada, CA 95365

 [via U.S. Mail and email]
 Mike Jackson, Esq.
 Law Office of Mike Jackson
 P.O. Box 207
 429 West Main Street
 Quincy, CA 95971
 mjatty@sbcglobal.net

 [via U.S. Mail and email]
 Ms. Carolee Krieger, President
 California Water Impact Network
 808 Romero Canyon Road
 Santa Barbara, CA 93108
 Caroleekrieger7@gmail.com

 Jennifer L. Spalletta, Esq.
 Spalletta Law PC
 P.O. Box 2660
 Lodi, CA 95241
 Jennifer@spallettalaw.com

 [via U.S. Mail and email]
 Therese A. Dunham, Esq.
 Somach Simmons & Dunn
 500 Capitol Mall, Suite 1000
 Sacramento, CA 95814
 tdunham@somachlaw.com

 [via U.S. Mail only]
 Mr. Perry Klassen, Executive Director
 East San Joaquin Water Quality Coalition
 1201 L Street
 Modesto, CA 95354

 [via U.S. Mail and email]
 Michael R. Lozeau, Esq.
 Lozeau Drury LLP
 420 12th Street, Suite 250
 Oakland, CA 94607
 michael@lozeaudruery.com

 [via U.S. Mail and email]
 Ernest A. Conant, Esq.
 Law Offices of Young Wooldridge, LLP
 1800 30th Street, Fourth Floor
 Bakersfield, CA 93301
 econant@youngwooldridge.com

 [via U.S. Mail and email]
 Mr. David Orth
 Steering Committee Chairman
 Southern San Joaquin Valley Water Quality Coalition
 4886 E. Jensen Avenue
 Fresno, CA 93725
 dorth@kcrd.org

 Laurel Firestone, Esq.
 Community Water Center
 909 12th Street, Suite 200
 Sacramento, CA 95814-2942
 laurel.firestone@communitywatercenter.org

 Mr. Bill Jennings
 California Sportfishing Protection Alliance
 3536 Rainier Avenue
 Stockton, CA 95204
 deltakeep@me.com

 Please note: Service by e-mail only unless noted “via U.S. Mail only.”
Please note: Service by e-mail only unless noted “via U.S. Mail only.”