

ENVIRONMENTAL LAW FOUNDATION



# Transparency in the ESJ General Order

Environmental Law Foundation & Environmental Justice Coalition for  
Water

# Outline of Presentation

- Anonymity is Impermissible Under the Constitution, Case Law, and the State Board's Policies
- The Regional Board and the Public Need Data for Effective Oversight
- This Order Provides for Only Anonymized Data
- The Anonymized Data Does Not Allow the Board or the Public to Evaluate Whether the Program is Working

A satellite image of Earth's surface, showing a mix of land and water. The land is depicted in various shades of brown, tan, and green, indicating different vegetation and terrain types. The water is a deep blue. The image is oriented vertically, with the top of the frame showing a dark, possibly oceanic area. The text "The ESJ Order Must Be Transparent" is overlaid in white, sans-serif font, centered in the upper half of the image.

# The ESJ Order Must Be Transparent

# The ESJ Order Must be Transparent

- California Constitution, art. I, § 3(b)(1): “The people have the **right of access to information** concerning the conduct of the **people’s business....**”
- Water is the “people’s business.”
  - California Constitution, art. X, § 5: “The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a **public use, and subject to the regulation and control of the State....**”
  - Water Code § 102: “All water within the State is the **property of the people** of the State....”
  - Water Code § 104: “[T]he **people of the State have a paramount interest in the use of all the water of the State** and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.”



# The ESJ Order Must be Transparent

- Nonpoint Source Policy, Key Element 4:
  - “An NPS control implementation program shall include **sufficient feedback mechanisms** so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.”
  - “[A]ll monitoring programs should be **reproducible**, provide a permanent/documented record and be **available to the public.**” (*Id.*)

# The ESJ Order Must be Transparent

- Recent Court Holdings:
- “[T]he record indicates the monitoring requirements of the Order are **inadequate** to detect groundwater degradation, much less prevent it.” (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255)
  - Monitoring must be able to link discharges to changes in water quality

# The ESJ Order Must be Transparent

- “Two pillars of the Water Quality Act are to protect the quality of community water supplies and to promote public access....**The public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public’s water supplies.**”
- “There is **no justification for such obfuscation....**”
  - *Zamora v. Central Coast Regional Water Quality Control Board* (Oct. 28, 2016) (San Luis Obispo Sup. Ct. No. 15CV-0247, at p. 2-3.)
- Nitrogen applied data is not trade secret.
  - *Rava Ranches v. California Water Quality Board, Central Coast Region* (Nov. 17, 2016); *Triangle Farms v. California Regional Water Quality Board, Central Coast Region* (Dec. 29, 2016) (Mont. Sup. Ct Nos. 16CV000255 and 16CV000257.)

# The ESJ Order Must be Transparent

- The public and the Board must both be able to trace exceedances to specific dischargers.
  - Where "monitoring data [is] submitted... by a cooperative monitoring group" that does not identify **"individual discharges,"** "neither the Board, nor the cooperative monitoring group, nor (in many cases) the grower can identify **where the pollution is coming from or [how to] effectively reduc[e] the pollution and degradation."**
    - *Monterey Coastkeeper v. Cal. State Water Resources Control Board* (Aug. 10, 2015) at 34, Sac. Sup. Ct. No. 34-2012-80001324



# Oversight is required

- Regional Boards **cannot** fully **delegate** their regulatory authority to 3<sup>rd</sup> Party
  - It is a “fundamental” principle of “universal application” that powers conferred upon governmental bodies and their officers “involving the exercise of **judgment or discretion** are in the nature of **public trusts** and **cannot be surrendered or delegated** to others.” (*Sacramento Chamber of Commerce v. Stephens* (1931) 212 Cal. 607, 610.)
    - A delegation is only valid if the public body “retains **ultimate control** over administration so that it may safeguard the public interest.” (*Holley v. Orange County* (1895) 106 Cal. 420, 424; *Intl. Longshoremen’s and Warehousemen’s Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 297-98.)
  - “[B]y involving members of the regulated industry the agency runs the risks associated with the **fox guarding the henhouse**. As a result, there is a **tight line** between lawful and unlawful delegation of regulatory authority.” (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1490.)

# Oversight is required

- Regional Board cannot **abdicate** its police powers
  - “[T]he government may not contract away its right to exercise the police power in the future.” (*Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 800.)



# The Second Draft Order is Not Transparent

# The Second Draft Order Is Not Transparent

- The 2<sup>nd</sup> Draft contains anonymized data.
  - Unlawful under NPS Policy, Constitution.
  - Public cannot request raw data
- Applies the wrong standard: “At the same time, the revisions provide a more detailed set of field-specific data available to the Central Valley Water Board for oversight of the program and provide **more transparency** and assurance of progress for interested persons outside of the regulatory agency.” (Order, at p. 53.)
  - Previous Draft provided for public disclosure.
  - NPS Policy requires that feedback mechanism allow the public to tell if program is working, and must be reproducible and public.

# Anonymized Data is Insufficient

- 2<sup>nd</sup> Draft's anonymized tables do not allow verification that program is working.
- Public has a right to know who is discharging into a public resources
- No data on spatial distribution of dischargers
- No data on size of operations

# Data is Designed to Answer Only A Narrow Set of Questions

- Table 1: Limited data on MP implementation
  - Without geographic information
- Table 2: Limited information on N application by field
  - Anonymized
  - No acreage
  - No geographic information
  - Can be linked to Table 1
- Table 3: Limited information on N application by secret APN identifier
  - Cannot be linked to Tables 1 or 2
  - No geographic information
  - No acreage
- Table 4: Limited township level N data
  - Cannot be linked to other tables
  - No MP implementation data

# What Questions Can the Anonymized Tables Not Answer?

- Cannot identify largest dischargers because acreage is not shown
- Cannot identify whether MPs should have been implemented and whether they are effective
- Cannot evaluate whether dischargers should be subject to SQMP or GQMP but are not
- Cannot identify whether there are geographic patterns to MP implementation
  - Or whether those patterns correlate with water quality changes
- Cannot identify whether neighboring operators are good or bad neighbors because location information does not tie to operator ID
- Cannot reproduce 3<sup>rd</sup> Party's calculations without raw data or acreage
- Whether growers are gaming the reporting system
  - Example: Tier 3 growers on the Central Coast split operations to move to a lower tier
- Questions we don't know to ask yet



Cannot see magnitude or detail of MP implementation

- How far from edge?
- What is "limited?"

Cannot see whether discharger should be in SQMP

No location ID: cannot tell if neighboring farm is implementing MPs

How many split applications? What proportions?

Cannot see where MPs should have been used but weren't (i.e. were other parcels next to streams?)

No Acreage

**TABLE 1**  
**Sample Field-Level Management Practice Data Reported to the Regional Board by Anonymous Member ID\***  
**(Second Staff-Proposed Draft Order)**

D	Data from INMP Summary Report						Data from Farm Evaluation			Data from MPIR			
Anonymous Member ID	Crop	Outlier Notification? (Annual)	INMP Certification Method (Annual)	Irrigation Method	Irrigation Practices (Annual)	Nitrogen Management Practices (Annual)	Pest Management Practices (Every Five Years)	Sediment and Erosion Management Practices (Every Five Years)	Irrigation wells? Abandoned wells? (Every Five Years)	In a SQMP area? (Annual)	Practices implemented to comply with SQMP	In a GQMP area?	Practices implemented to comply with GQMP
243721	Tomato <sub>1</sub>	Yes	CCA	Drip	Measured soil moisture	Evaluated crop nitrogen need; used fertigation	Followed label restrictions	Used off season cover crop	Yes, No	No	NA	No	NA
243721	Tomato <sub>2</sub>	No	CCA	Drip	Weather-based measured soil moisture	Used tissue/petiole testing	Used drift control agents	Stabilized creek and stream banks	Yes, Yes	No	NA	No	NA
243721	Corn	No	Self	Furrow	Tailwater return	Used split fertilizer applications	none	No irrigation drainage	Yes, Yes	No	NA	No	NA
341962	Almond	No	NRCS	Drip	Weather-based scheduling	Used split fertilizer applications	Used buffer zones	Field is lower than surrounding terrain	Yes, No	Yes	Limited edge of field spraying	Yes	Used split fertilizer application
810619	Corn	No	CCA	Furrow	Tailwater return	Tested irrigation water nitrogen concentration	Used vegetated drain ditches	Flow dissipaters, stabilized creek and stream banks	No, No	Yes	integrated pest management	No	NA
810619	Alfalfa	Yes	Self	Border flood	Laser-leveled fields	none	Applied no pesticides	Used in-furrow dams	No, Yes	Yes	integrated pest management	No	NA
781936	Almond <sub>1</sub>	No	CCA	Sprinkler	Measured soil moisture	Tested soil for residual nitrogen	Mapped sensitive areas	irrigated with drip or micro irrigation syst.	Yes, No	No	NA	Yes	Compost added to soil
781936	Almond <sub>2</sub>	No	CCA	Flood	Irrigation based on crop water need	Tested soil for residual nitrogen	Used end-of-row sprayer shutoff	Planted cover crops or native vegetation	Yes, Yes	No	NA	Yes	Compost added to soil

\*The data in this table is for illustrative purposes only and does not represent actual data collected.

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No location info, cannot tell whether runoff is an issue or whether neighbor is implementing MPs

No acreage, so impossible to tell

- magnitude of loading
- which Member IDs are associated with large or small operators

**TABLE 2**

**Sample Field-Level Nitrogen Data Reported to the Regional Board by Anonymous Member ID\***  
(Second Staff-Proposed Order)

Anonymous Member ID	Crop for each field	N Applied via Fertilizer (lbs/ac)	N Applied via Organics/ Compost (lbs/ac)	N Applied via Irrigation (lbs/ac)	Total Nitrogen Applied (lbs/ac)	Nitrogen Removed (lbs/ac)	A/R	A-R (lbs/ac)	3 yr A/R
243721	Tomato <sub>1</sub>	180	10	6	196	148	1.3	48	1.3
243721	Tomato <sub>2</sub>	150	0	45	195	60	3.3	135	3.7
243721	Corn, silage	230	0	17	247	210	1.2	37	1.4
341962	Almond	180	5	22	207	140	1.5	67	1.3
810619	Corn, grain	200	0	5	205	120	1.7	85	1.6
810619	Alfalfa	0	0	35	35	510	0.1	-475	0.1
781936	Almond <sub>1</sub>	250	0	0	250	130	1.9	120	2.1
781936	Almond <sub>2</sub>	135	10	31	176	54	3.3	122	3.6

\*The data in this table is for illustrative purposes only and does not represent actual data collected.

No acreage, so  
can't prioritize  
large fields

**TABLE 3**  
**Sample Field-Level Nitrogen Data Reported to the Regional Board by**  
**Anonymous APN ID\***  
**(Second Staff-Proposed Order)**

No location info, so can't  
tell if a problem field is  
close to one's residence

Anonymous APN ID	Crop for each field	N Applied via Fertilizer (lbs/ac)	N Applied via Organics/ Compost (lbs/ac)	N Applied via Irrigation (lbs/ac)	Total Nitrogen Applied (lbs/ac)	Nitrogen Removed (lbs/ac)	A/R	A-R (lbs/ac)	3 yr A/R
AQRTM	Tomato <sub>1</sub>	180	10	6	196	148	1.3	48	1.3
AQRTM	Tomato <sub>2</sub>	150	0	45	195	60	3.3	135	3.7
AQRTM	Corn, silage	230	0	17	247	210	1.2	37	1.4
GJZQN	Almond	180	5	22	207	140	1.5	67	1.3
MNOPR	Almond	180	5	22	207	160	1.3	47	1.2
CFRMO	Corn, grain	110	0	5	115	92	1.3	23	1.6
QZIFE	Corn, grain	110	0	5	115	92	1.3	23	1.6
QZIFE	Alfalfa	135	10	31	176	54	3.3	122	3.6
ROTBM	Almond	250	0	0	250	130	1.9	120	2.1
LGTVI	Almond	135	10	31	176	54	3.3	122	3.6

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Unclear  
how to  
deal with  
multiple  
rotations  
per year  
on same  
field

Can't tell, even anonymously, which Members are in any given township.

- Cannot tell if members are spatially grouped or scattered.

**TABLE 4**  
**Sample Township-Level Nitrogen Data Reported to the Regional Board\***  
**(Second Staff-Proposed Order)**

Township Range (TR)	Crop	Total Acreage (ac)	N Applied via Fertilizer (total lbs)	N Applied via Organics/Compost (total lbs)	N Applied via Irrigation (total lbs)	Total Nitrogen Applied (total lbs)	Nitrogen Removed (total lbs)	A/R	A-R (total lbs)
02S07E	Almonds	88	20000	60	2390	22450	22400	1.0	50
02S07E	Corn, silage	54	12420	0	650	13070	11340	1.2	1730
02S07E	Walnuts	35	5250	0	500	5750	3575	1.6	2175
05S14E	Almonds	115	20700	0	3540	24240	16100	1.5	8140
05S14E	Corn, grain	600	66000	250	0	66250	55200	1.2	11050
05S14E	Grapes	112	2800	75	200	3075	3140	1.0	-65
05S14E	Oats	32	--	--	--	--	--	--	--
05S14E	Pistachios	1293	155160	0	3550	158710	108612	1.5	50098
05S14E	Wheat	1040	156000	200	900	157100	104000	1.5	53100
06S09E	Almonds	38	5700	0	705	6405	2052	3.1	4353
06S09E	Corn, grain	2144	235840	0	9858	245698	197248	1.2	48450
07S11E	Almonds	4696	657440	2000	3250	662690	422640	1.6	240050
07S11E	Tomatoes	891	160380	0	9928	170308	131868	1.3	38440
07S11E	Walnuts	105	15750	45	0	15795	8400	1.9	7395
08S13E	Barley	400	57000	200	400	57600	32000	1.8	25600
10S15E	Almonds	9328	2000000	800	14048	2014848	1679040	1.2	335808
10S15E	Corn, grain	387	42570	250	0	42820	35604	1.2	7216
10S15E	Tomatoes	91	12000	30	500	12530	17900	0.7	-5370
10S15E	Walnuts	80	11500	0	50	11550	9600	1.2	1950
11S17E	Almonds	9817	1511000	0	820	1511820	1079870	1.4	431950
11S17E	Corn, silage	54	12420	0	650	13070	11340	1.2	1730
11S17E	Walnuts	760	140000	300	6000	146300	66500	2.2	79800
13S17E	Almonds	1724	410000	0	3760	413760	258600	1.6	155160
13S17E	Tomatoes	186	19500	10	0	19510	1467	13.3	18043
13S17E	Walnuts	189	30000	200	1550	31750	6250	5.1	25500

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Cannot link high applications to specific members

No MP information: cannot correlate application trends with MPs

# No Backstop

- The Order does not contain a regulatory backstop to prevent overapplication of nitrogen.
- Combined with anonymous reporting, the public has little recourse.
- Environmental Justice communities bear the risk of regulatory failure.

# Anonymity Should Not Be Precedential

- The current Central Coast waiver does not allow anonymity for nitrogen applied data. Requiring future orders to provide for anonymity is a step back.
- The State Board should not prevent the Regional Boards from requiring public disclosure of data
- The questionable basis for granting anonymity in this case should not influence future orders





# Thank You.

Questions? [nkane@envirolaw.org](mailto:nkane@envirolaw.org)

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