



January 10, 2013

Karl Longley
Chair, Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Re: Comments on draft Waste Discharge Requirements for Individual Growers

Dear Mr. Longley,

As representatives of environmental and environmental justice communities located in the Central Valley and throughout California, our organizations have closely followed the development of the Water Board's development of Waste Discharge Requirements for Irrigated Agricultural Discharges. The draft order for individual grower has several improvements over the recently adopted coalition order, but shares the same shortcomings in its compliance with the State Board's anti-degradation policy. We offer the following comments to improve the order.

Annual monitoring and reporting

We strongly support the proposal to require annual monitoring of on-farm irrigation and domestic wells for a range of contaminants of concern. In particular, the requirement to monitor pesticides on the 6800 (A) list that have been applied within five years represents a distinct improvement over the coalition order.

We also support the reporting requirements for total nitrogen application and estimated crop need. As we have stated previously, this provides key information on the total nitrogen loading, something that the nitrogen ratio requirement in the coalition order fails to do.

Draft order fails to comply with Anti-degradation policy.



This draft order contains the same or similar language that we have already petitioned the State Board to repeal; specifically, it allows discharges to exceed water quality objectives for up to 10 years, provided a Groundwater Exceedance Plan is in place. We incorporate by reference the petition of the East San Joaquin River WDR (R5-2012-0116) filed on behalf of AGUA and other petitioners on January 7, 2013.

However this order goes even further in its violation of the anti-degradation policy by failing to apply the anti-degradation policy to the orders. The order contains no requirement to address trends of degradation. Instead, the order appears to assume that degradation can continue unchecked until a water quality objective is exceeded. This order doesn't even pretend that only limited degradation can occur; it is silent on the issue of allowable degradation.

Conclusion

We appreciate the opportunity to review this order and provide input. We trust that the final order will remedy the problems we've identified so that we can support the order once it is finally issued.

Sincerely,

A handwritten signature in black ink that reads "Laurel Firestone".

Laurel Firestone
Co-Executive Director and Attorney at Law
Community Water Center

A handwritten signature in black ink that reads "Jennifer Clary".

Jennifer Clary
Water Policy Analyst
Clean Water Action

Phoebe Seaton
California Rural Legal Assistance Foundation

1 PHOEBE SEATON (CA Bar No. 238273)
2 2115 Kern Street, Suite 370
3 Fresno, CA 93721
4 Tel. 559-233-6710
5 Fax: 559-841-0724
6 E-mail: pseaton@crla.org

7
8 LAUREL FIRESTONE (CA Bar No. 234236)
9 Community Water Center
10 519 12th St.
11 Sacramento, CA 95815
12 Tel. (559) 789-7245
13 Fax (916) 706-2731
14 E-mail: laurel.firestone@communitywatercenter.org

15
16
17 For Petitioners Asociación de Gente Unida por el Agua (AGUA), Fairmead Community
18 and Friends, and Planada en Accion.

19
20 Sent Via: Electronic Submission

21
22 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

23
24 _____)
25)
26 **In the Matter of Waste Discharge Requirements)**
27 **General Order for Growers Within The Eastern San)**
28 **Joaquin River Watershed That Are Members Of)**
29 **The Third-Party Group - Central Valley Region)**
30 **Order No. R5-2012-0116)**
31 _____)
32)

**PETITION FOR
REVIEW**

33 Pursuant to Section 13320 of California Water Code and Section 2050 of Title 23
34 of the California Code of Regulations (CCR), Asociación de Gente Unida por el Agua
35 (AGUA), Fairmead Community and Friends, and Planada en Accion, (“petitioners”)
36 petition the State Water Resources Control Board (“State Board”) to review and amend
37 the final decision of the California Regional Water Quality Control Board for the Central
38 Valley Region (“Regional Board”) adopting the Waste Discharge Requirements General
39 Order for Growers Within the Eastern San Joaquin River Watershed That Are Member of

1 the Third-Party Group ("General Order") on December 7, 2012. See Order No. R5-
2 2012-0116. The issues raised in this petition were raised in timely written comments and
3 direct testimony.

4

5 1. NAME AND ADDRESS OF THE PETITIONERS:

6

7 Asociación de Gente Unida por el Agua
8 311 W. Murray Ave.
9 Visalia, CA 93291
10 Attention: Susana De Anda, Coordinator

11

12 Planada en Accion
13 c/o Silverio Damian
14 462 Gwinn Street
15 Planada, CA 95365
16 P.O Box 618
17 Planada, CA 95365

18

19 Fairmead Community and Friends
20 1225 Gill Ave.
21 Madera, CA 93637

22

23

24 2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD
25 WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY
26 OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH
27 IS REFERRED TO IN THE PETITION:

28

29 Petitioners seek review of Order No. R5-2012-0116, Waste Discharge

30 Requirements General Order for Growers Within the Eastern San Joaquin River

31 Watershed That Are Member of the Third-Party Group. Copies of the order adopted by

32 the Regional Board at its Dec. 7, 2012 meeting are attached hereto.

33

34 3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO
35 ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

December 7, 2012.

4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

Thirteen years after the passage of legislation requiring the Regional Water Boards to review and revise their conditional waivers of waste discharge for irrigated agriculture, and ten years after the legislative deadline to do so, the Regional Board has failed to pass general waste discharge requirements for approximately 3600 subject growers that adequately protect water quality for the beneficial uses of the region. This lapse is particularly grievous in its impact on municipal drinking water use of groundwater, which receives no protection under either the original waiver or the current conditional waiver.

Residents of this region are heavily dependent upon groundwater. According to the State Board’s own draft report “Communities Reliant Upon Contaminated Groundwater” 300,000 residents of Stanislaus and Merced Counties rely upon contaminated groundwater. Up to 100,000 people in these two counties rely upon domestic wells.¹ Today the vast majority of San Joaquin Valley community water systems rely on groundwater as a drinking water source. According to the 2008 Existing Conditions Report, nitrate concentrations in groundwater in the eastern San Joaquin Valley exceeded drinking water standards in approximately 25% of domestic water

¹ Data cited was added to the record in the EJ Comment letter to Central Valley Regional Water Quality Control Board, dated May 21, 2012, signed by California Rural Legal Assistance Foundation, Clean Water Action and Community Water Center.

1 supply wells, and 23 different pesticides were detected in 41 of 60 groundwater samples
2 collected.

3 There is no question that irrigated lands are responsible for a significant share of
4 this nitrate contamination and that current practices on irrigated lands continue to
5 contribute to nitrate pollution of groundwater used as a source of drinking water. The
6 Existing Conditions report makes that finding², which has been reinforced by Thomas
7 Harter and Jay R. Lund in their report, *Addressing Nitrate in California's Drinking*
8 *Water, With a Focus on Tulare Lake Basin and Salinas Valley Groundwater*, Report for
9 the State Water Resources Control Board Report to the Legislature (2012) and all 7
10 technical reports, *available at <http://groundwaternitrate.oucdavis.edu>*. That report
11 indicated that contamination is ongoing and that 96% of the nitrate contribution to
12 groundwater in these agricultural areas could be attributed to agriculture. While the
13 report does not measure specific loading in this region, its finding that agriculture is the
14 overwhelming source of contamination must also provide a similar certainty for this
15 region.

16 The Porter Cologne Water Quality Control Act³ and the State's Anti-degradation
17 Policy⁴ require that the Regional Board issue waste discharge requirements that protect
18 the region's water quality for designated beneficial uses, as set out in the Basin Plans.
19 However, this General Order allows the maximum amount of groundwater degradation
20 and even pollution to continue from the region's approximately 835,000 acres of irrigated

² *Irrigated Lands Regulatory Program, Existing Conditions Report*, Page 4-223-224, Central Valley Regional Water Quality Control Board, 2008

³ California Water Code §§ 13000 et seq.

⁴ Resolution 68-16.

1 lands in contravention of the Basin Plan, State Anti-degradation Policy, and the Porter
2 Cologne Water Quality Control Act.⁵

3 In doing so, the General Order violates California Law by failing to comply with
4 the State's Anti-degradation policy, permits pollution and nuisance in violation of the
5 Water Code, unlawfully delegates authority exclusively held by the Board to the
6 Executive Officer and disproportionately impacts low-income, communities of color⁶, in
7 violation of California's Civil Rights and Fair Housing Laws.

8 Petitioner's written and oral testimony before and during the December 7, 2012
9 hearing clearly outline the failures of the General Order to adequately protect human
10 health, particularly with regard to groundwater degradation. The comment letters and
11 power point presentations presented to the Regional Board are attached hereto. The
12 arguments contained in those comments are outlined below.

13 I. This general WDR will allow for degradation and even pollution of
14 groundwater quality, in violation of the State's Anti-degradation Policy and
15 state law.
16

17 The Anti-degradation Policy requires that the Regional Board set waste discharge
18 requirements that will maintain the highest water quality consistent with the maximum
19 benefit to the people of the State.⁷ Specifically, the highest water quality that has existed

⁵ See California Water Code §§ 13240, 13241, and 13263, requiring that waste discharge requirements implement the relevant water quality control plans, including the Basin Plans, which in turn include the Anti-degradation Policy, as well as water quality objectives.

⁶ Data cited was added to the record in the EJ Comment letter to the Central Valley Regional Water Quality Control Board dated September 27, 2010, signed by Community Water Center et.al.

⁷ Resolution 68-16 states,

Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

1 since 1968⁸ (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water*
2 *Quality Control Bd.* (2012) 210 Cal. App. 4th 1255, 1270) is to be maintained unless it
3 has been demonstrated to the State that any change in water quality 1) will be consistent
4 with the maximum benefit to the people of the state; 2) will not unreasonably affect
5 present or probable future beneficial uses of such water; and 3) will not result in water
6 quality less than prescribed in state policies.⁹ Furthermore, any activity that produces or
7 may produce a waste or increased volume or concentration of waste and which
8 discharges or proposes to discharge to existing high quality waters must meet waste
9 discharge requirements which will result in the best practicable treatment or control of
10 the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b)
11 the highest water quality consistent with maximum benefit to the people of the State will
12 be maintained.¹⁰

13 This WDR allows for discharge into high quality waters while failing to make
14 required findings permitting it to do so by:

- 15 1. Failing to establish a baseline for water quality or a mechanism for
16 doing so to determine the level of degradation or change from baseline
17 water quality occurring and permitted by this WDR;

⁸ Baseline water quality has been interpreted to mean “the best quality of the receiving water that has existed since 1968, . . . unless subsequent lowering was due to regulatory action consistent with State and federal antidegradation policies.” APU 90-004. *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal. App. 4th 1255, 1270. Additionally, the California Environmental Protection Agency, and the Regional Water Quality Control Board Central Valley Region’s, *A Compilation of Water Quality Goals* (August 2003), defines background levels to be maintained as “the concentration of substances in natural waters that are unaffected by waste management practices or contamination incidents.” p. 6. Under either interpretation, this general WDR fails to protect baseline water quality.

⁹ See California Environmental Protection Agency, Regional Water Quality Control Board Central Valley Region. *A Compilation of Water Quality Goals* (August 2003), p. 6.

¹⁰ State Water Resources Control Board Resolution No. 68-16.

- 1 2. Failing to require sufficient monitoring and reporting requirements to
- 2 detect degradation or enforce water quality limitations;
- 3 3. Failing to set appropriate Receiving Water Limitations for compliance
- 4 to meet the requirements of anti-degradation;
- 5 4. Allowing “limited degradation” without making required anti-
- 6 degradation finding permitting it to do so;
- 7 5. Allowing continued degradation, exceedances of water quality
- 8 objectives, and even nuisance to areas operating under a Ground Water
- 9 Quality Management Plan;
- 10 6. Failing to require Best Practicable Treatment and Control (BPTC).

11 These failures render the permit, in essence, an improper authorization to continue
12 degradation of our groundwater.

13
14 a. The State anti-degradation policy applies to the East San Joaquin River
15 Watershed

16
17 The State Board's anti-degradation policy applies whenever (a) there is existing
18 high quality water, and (b) an activity which produces or may produce waste or an
19 increased volume or concentration of waste that will discharge into such high quality
20 water. (Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality
21 Control Bd. (2012) 210 Cal. App. 4th 1255, 1268, citing SWRQCB Resolution 68-16)
22 The East San Joaquin River Watershed is predominantly composed of high quality waters
23 and is thus subject to the States Anti-Degradation Policy.

1 The State’s anti-degradation policy defines high quality waters as those where the
2 best quality that has existed since 1968 is better than the water quality objectives, as laid
3 out in the Water Quality Control Plan for the California Regional Quality Control Plan
4 Central Valley Region Sacramento Basin San Joaquin River Basin (Basin Plan).

5 Despite the failure of the Order to lay out baseline water quality or even include a
6 mechanism to establish baseline quality, as required by law, other data shows that the
7 Eastside San Joaquin River Watershed is nearly entirely made up of high quality waters.
8 The information sheet of the Order (Attachment A) states that only “22% of sampled
9 square mile sections had maximum nitrate levels above applicable water quality
10 objectives.”¹¹ That number presumably over estimates the amount of water that does not
11 qualify as high quality water as defined by the state law since high quality water is that
12 water that was of better quality than water quality objectives at some point since 1968
13 (Asociacion de Gente Unida por el Agua at 1270). As acknowledged by the information
14 sheet, “it is unknown when the degradation occurred” and water is considered high
15 quality pursuant to the Resolution if it was better than the water quality objective at some
16 point since 1968. Furthermore, the fact that 22% of the water tested above the water
17 quality objective for nitrates has no bearing on whether or not the water is high quality
18 with respect to other constituents.¹²

19 Therefore, according to the State anti-degradation policy, the region contains high
20 quality water, and, as such, the Order must comply with said policy.

- 21 i. The Order applies to activities which produce or may produce a
22 waste or increase in volume or concentration of waste to high
23 quality water
24

¹¹ Attachment A to Order R5-2012-0116-Information Sheet, pg. 35

¹² Id.

1 The order, by its own admission, allows for limited degradation of groundwater¹³.
2 Furthermore, as discussed in greater detail below, its policies allow for the continued
3 degradation of high quality water¹⁴. Thus, again, the State’s anti-degradation policy
4 applies to this order.

5
6 II. The Order is in violation of the anti-degradation policy

7
8 a. The General Order fails to establish a baseline in violation of
9 the anti-degradation policy

10
11 The Board failed to establish a baseline for enforcement of anti-degradation
12 policy, and failed to require any information to establish a baseline to determine levels of
13 degradation occurring and permitted under this permit. When undertaking an anti-
14 degradation analysis, the Regional Board must compare the baseline water quality to the
15 water quality objectives. *Asociacion de Gente Unida por el Agua, et al., v. Central Valley*
16 *Regional Water Quality Control Board* 210 Cal. App. 4th 1255, 1270. By failing to
17 establish a baseline, the General Order, ipso facto, makes anti-degradation analysis
18 impossible and is thus violative of the anti-degradation policy.

19
20 b. The General Order fails to require sufficient monitoring
21 requirements to track or detect degradation.

22
23 The Regional Board finds in the Information Sheet of the General Order that,
24 “Regional trend monitoring of surface water and groundwater together with periodic
25 assessments of available surface water and groundwater information is required to
26 determine compliance with water quality objectives and determine whether any trends in

¹³ Order R5-2012-0116, pg. 10, Finding 36

¹⁴ Id., pg. 16, section III.B.

1 water quality improvement or degradation are occurring¹⁵.” Therefore, the Regional
2 Board is relying on the Trend Monitoring to determine trends and degradation, and yet
3 the monitoring requirements do not provide sufficient information to see any trends or
4 detect degradation for most contaminants.

5 i. Trend Monitoring Plans do not require monitoring of all
6 Constituents of Concern.
7

8 The General Order does not require Trend Monitoring Plans to include all
9 constituents of concern (COCs) related to agricultural discharges in the region –
10 specifically, deleterious minerals, pesticide run-off or degradation products from
11 pesticides. Only through inclusion of these products in trend monitoring wells, can the
12 General order determine actual degradation trends and ensure the General Order
13 adequately protects groundwater from these contaminants.

14 Similarly, lack of trend monitoring for Contaminants of Concern, particularly
15 pesticides and degradates, means that the Board does not have a mechanism to detect
16 degradation or ensure compliance with limitations for those constituents. The Order
17 requires no monitoring for pesticides or degradates in groundwater.

18 The Order gives the Executive Officer the authority to require additional
19 monitoring or the development of management plans if it is determined that “irrigated
20 agriculture may be causing or contributing to a trend of degradation of groundwater.” But
21 it is unclear how that determination can be made if trend monitoring is only focused on
22 the narrow band of contaminants of concern identified in Table 3 of the Monitoring and
23 Reporting Program¹⁶.

¹⁵ Attachment A to Order R5-2012-0116-Information Sheet, pg. 30

¹⁶ Attachment B to Order R5-2012-0116-MRP Order, pg. 19

1 In order to meet the requirements of the anti-degradation policy and the basin
2 plan, sufficient monitoring should be required in the General Order for all COCs that are
3 related to agricultural discharges in the region. At a minimum, that means that the
4 General Order must require monitoring of all COC for a region, rather than just the
5 handful required by the order.

- 6
7 ii. The General Order fails to require adequate reporting of
8 nitrogen application despite nitrogen's documented
9 impact on groundwater
10

11 The nitrogen ratio is an essential tool for understanding the efficiency of nitrogen
12 use and provides a good basis for comparing operations. However, it does not provide
13 needed information on potential nitrogen loading to groundwater because it does not
14 provide direct information about the amount of nitrogen applied to the surface. This
15 inhibits the ability of the water board to prioritize enforcement based on threats to water
16 quality. In the Existing Conditions Report, staff noted the relationship between nitrogen
17 application and nitrate concentrations in groundwater¹⁷. The order requires that
18 information on nitrogen application be collected by the grower and reported to the third
19 party coalition, but does not include such reporting in the annual summary report to the
20 Board. The third party coalition is not required to maintain this information in a usable
21 format, and may destroy it after five years, severely limiting the utility of such reporting.
22 Without nitrogen application reporting, and therefore no indicator of nitrogen loading or
23 impact to water quality on a farm basis, the permit lacks the ability to ensure it is
24 complying with the Basin Plan and the anti-degradation policy. Furthermore, it is

¹⁷ *Irrigated Lands Regulatory Program Existing Conditions Report, Groundwater Quality pp 4-223, -224*

1 critical that nitrogen application reporting apply to all waters – both high and low
2 vulnerability areas – to ensure that there is some mechanism to determine threats to high
3 quality waters to ensure compliance with the anti-degradation policy.

4

5 iii. Reporting at a township level does not adequately
6 monitor threats to groundwater quality.

7

8 The Regional Water Quality Control Board’s late change to the geographic unit
9 subject to reporting requirements – township level reporting – further undermines
10 meaningful efforts to protect groundwater. The township-level reporting requirement has
11 no hydrologic justification. A 36-square mile region can straddle groundwater basins,
12 contain plumes of contamination and dozens of crops with differing nitrogen application
13 rates. This gross level of reporting will make it difficult, if not impossible, to confirm
14 compliance with the Order. A better example is the United States Geological Survey
15 (USGS), which served as the technical lead for the State Water Board’s Priority Basin
16 Project, part of its Groundwater Ambient Monitoring and Assessment Program,
17 beginning in 2004. The USGS was responsible for water quality sampling in
18 California’s groundwater basins to characterize the water quality in each basin and
19 identify trends in groundwater quality. USGS used a grid of one well per square mile to
20 provide an accurate overview of the aquifer.

21 Additionally, reporting of nitrogen use efficiency should be required for all
22 waters, not just high vulnerability areas¹⁸. In order to ensure that all high quality waters
23 are adequately protected under the anti-degradation policy, there must be a mechanism to
24 determine whether degradation is occurring and a way of determining whether BPTC is

¹⁸ Order R5-2012-0116, Pg.26, section VII.D.2.

1 being implemented. (Asociacion de Gente Unida por el Agua v. Central Valley Regional
2 Water Quality Control Bd. (2012) 210 Cal. App. 4th 1255, 1274.) Currently, the
3 requirement to report nitrogen use efficiency ratios is only for high vulnerability areas,
4 leaving most high quality waters in the region without any adequate or effective indicator
5 of BPTC or where nitrogen use efficiency may indicate a threat to groundwater quality.

6

7 d. The General Order fails to set appropriate Receiving Water Limitations for
8 compliance to meet the requirements of anti-degradation.

9

10 The Receiving Water Limitations¹⁹ in the General Order fail to comply with Anti-
11 degradation Policy or the Basin Plans, and do not support the findings in the order. Far
12 from only allowing, “limited degradation” the order only requires that “wastes discharged
13 from Member operations shall not cause or contribute to an exceedance of applicable
14 water quality objectives in the underlying groundwater, unreasonably affect applicable
15 beneficial uses, or cause or contribute to a condition of pollution or nuisance,” and then
16 allows at least up to 10 years of continued contribution to exceedances, pollution or
17 nuisance in the footnote attached to those limitations²⁰. Allowing contribution to
18 exceedances, pollution or nuisance to occur for 10 years is not consistent with the
19 requirements of the anti-degradation policy or Porter Cologne or the basin plan. While
20 the Board can allow for phased compliance, the board may not authorize time schedules
21 that allow for unnecessary time lag (23 CCR 2231(b)). The California Code of
22 Regulations also makes clear that time schedules are designed to ensure rapid, and not
23 delayed compliance. (22 CCR 2231(d): Time schedules should be periodically reviewed

¹⁹ Order R5-2012-0116 pg.16

²⁰ Id. Footnote 15

1 and should be updated, when necessary, to assure the most rapid compliance). Similarly,
2 the undue delay in the Management Practices Effectiveness Report – not due until 2021 –
3 undermines the enforceability of BPTC and violates the Board’s duty to ensure rapid
4 compliance through this order. Furthermore, by allowing exceedances and further
5 degradation of groundwater in areas subject to a Groundwater Quality Monitoring Plan,
6 the Order permits not only the highest possible levels of degradation without an anti-
7 degradation analysis, but pollution and nuisance for up to 10 years, which is prohibited
8 by the anti-degradation policy, and inconsistent with the findings of the order.

9

10 e. The General order allows for degradation without making required findings
11 permitting it do so.
12

13 The General Order, on its face, allows for degradation in excess of and in
14 violation of that allowed by the state anti-degradation policy. As noted above, Finding 36
15 states that “this Order authorizes limited degradation of high quality waters, not to exceed
16 water quality objectives...” The very order sets out the wrong standard for compliance
17 with state anti-degradation law.

18 State anti-degradation law requires that baseline water quality²¹ is to be
19 maintained unless it has been demonstrated to the State that any change in water quality
20 1) will be consistent with the maximum benefit to the people of the state; 2) will not
21 unreasonably affect present or probable future beneficial uses of such water; and 3) will

²¹ Baseline water quality has been interpreted to mean “the best quality of the receiving water that has existed since 1968, ... unless subsequent lowering was due to regulatory action consistent with State and federal antidegradation policies.” APU 90-004. Asociacion de Gente Unida Para el Agua, at 1270. Additionally, the California Environmental Protection Agency, and the Regional Water Quality Control Board Central Valley Region’s, *A Compilation of Water Quality Goals* (August 2003), defines background levels to be maintained as “the concentration of substances in natural waters that are unaffected by waste management practices or contamination incidents.” p. 6. Under either interpretation, this general WDR fails to protect baseline water quality.

1 not result in water quality less than prescribed in state policies.²² Any activity which
2 produces or may produce a waste or increased volume or concentration of waste and
3 which discharges or proposes to discharge to existing high quality waters will be required
4 to meet waste discharge requirements which will result in the best practicable treatment
5 or control of the discharge necessary to assure that (a) pollution or nuisance will not
6 occur and (b) the highest water quality consistent with maximum benefit to the people of
7 the State will be maintained.

8 Thus, analysis of whether the General Order violates the anti-degradation policy
9 is a 3 step process: (1) Will baseline water quality be maintained; (2) If not, has the board
10 demonstrated that the change in water quality (a) will be consistent with the maximum
11 benefit to the people of the state; (b) will not unreasonably affect present or probable
12 future beneficial uses of such water; and (c) will not result in water quality less than
13 prescribed in state policies and (3) has the Board established that the activities subject to
14 this order that will or may produce a waste or increased volume or concentration of waste
15 and which discharges or proposes to discharge to existing high quality waters will be
16 required to meet waste discharge requirements which will result in the best practicable
17 treatment or control of the discharge necessary to assure that (a) pollution or nuisance
18 will not occur and (b) the highest water quality consistent with maximum benefit to the
19 people of the State will be maintained.

20

21 i. Baseline water quality will not be maintained

22

²² See California Environmental Protection Agency, Regional Water Quality Control Board Central Valley Region. *A Compilation of Water Quality Goals* (August 2003), p. 6.

1 Baseline water quality has been interpreted to mean “the best quality of the
2 receiving water that has existed since 1968,... unless subsequent lowering was due to
3 regulatory action consistent with State and federal anti-degradation policies.” APU 90-
4 004. *See* Asociacion de Gente Unida Para el Agua, at 1270. Additionally, the California
5 Environmental Protection Agency, and the Regional Water Quality Control Board
6 Central Valley Region’s, *A Compilation of Water Quality Goals* (August 2003), defines
7 background levels to be maintained as “the concentration of substances in natural waters
8 that are unaffected by waste management practices or contamination incidents.” p. 6.
9 Under either interpretation, this general WDR fails to protect baseline water quality. The
10 WDR fails entirely to protect baseline water quality by failing to establish a baseline or
11 set in place a mechanism for doing so.

12
13 ii. The Order Fails to Demonstrate that the Benefits of Degradation
14 outweigh its Costs
15

16 The Order fails to demonstrate that a change in water quality (a) will be
17 consistent with the maximum benefit to the people of the state; (b) will not unreasonably
18 affect present or probable future beneficial uses of such water; and (c) will not result in
19 water quality less than prescribed in state policies.

20
21 1. The Order fails to demonstrate that the change in water
22 quality will be consistent with the maximum benefit to the
23 people of the state.
24

1 sets forth the change to the baseline – that is the level of water quality that is consistent
2 with the maximum benefit to the people of the state – and that level must be protected.
3 There is no finding as to what that level is.

4 The finding that “limited degradation” is allowed is far too vague to mean
5 anything. As discussed above, neither the Regional Board nor the public has any idea of
6 how much degradation is being allowed, particularly given that while the finding is only
7 for “limited degradation,” the General Order actually allows every ounce of degradation
8 up to the water quality objectives, and even then to exceed water quality objectives for up
9 to 10 years. Fundamentally, the General Order is missing adequate findings and
10 consideration for the Board to make an informed decision.

11 If the General Order allows degradation up to water quality objectives and only
12 sets that as the enforceable compliance goal, then it is permitting all degradation from
13 baseline up to just below the level of exceedance – far from limited degradation, this is
14 the maximum amount of degradation possible to permit. If the Board wants to permit this
15 maximum level of degradation, it needs to determine that this is the highest water quality
16 for the maximum benefit to the people of the state. There is no such finding, no analysis
17 or basis for such a finding.

the site. Factors to be considered include (1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods. With reference to economic costs, both costs to the discharger and the affected public must be considered. ‘Cost savings to the discharger, standing alone, absent a demonstration of how these savings are necessary to accommodate “important social and economic development” are not adequate justification’ for allowing degradation. See [State Board] Order No. WQ 86-17, at 22, n.10. With respect to social costs, consideration must be given to whether a lower water quality can be abated through reasonable means. In other words, the lower water quality should not result from inappropriate treatment facilities or less than-optimal operation of treatment facilities. Local ordinances concerning water quality or nuisance and the use of the water as a water supply may also be factors in determining maximum benefit to the people.’(St. Water Res. Control Bd., Guidance Memorandum (Feb. 16, 1995) pp. 4-5.

1 Furthermore, for the same reasons listed above, the WDR fails to meet the best
2 practicable treatment and control requirements of the anti-degradation policy. This
3 general WDR will allow for discharge of pollutants above baseline, or highest quality,
4 levels into the region’s groundwater,²⁶ without imposing the best practicable treatment or
5 control (“BPTC”) requirements, which by definition require first determining that it will
6 not result in degradation that will unreasonably affect present or probable beneficial uses
7 and that it will result in maintaining the highest water quality consistent with maximum
8 benefit to the people of the State.²⁷ As by definition BPTC cannot result in pollution or
9 nuisance, while the requirements of the order expressly allow for those results for up to
10 10 years through a groundwater management plan, the permit on its face fails to meet
11 BPTC requirements. For the reasons outlined above, this permit not only fails to make the
12 necessary findings and determinations, but fails to require sufficient requirements to
13 ensure those standards can be met. As such, this permit does not require the BPTC or
14 adequate performance standards or sufficient reporting and monitoring requirements to
15 protect high quality groundwater.

16 In particular, in the information sheet of the General Order, the Regional Board
17 states that the SQMPs/GQMPs are reviewed periodically²⁸ to determine whether adequate
18 progress is being made to address the degradation trend or impairment. However, there is
19 not only no determination of baseline, but there is no determination of the level of
20 degradation allowed beyond a vague reference to “limited degradation.” Fundamentally,
21 the General Order fails to set the right goal and then fails to be able to measure whether it

²⁷ State Water Resources Control Board Resolution No. 68-16.

²⁸ Attachment A, pg. 36

1 is meeting that goal. Therefore, by definition, this cannot be best practical treatment and
2 control.

3

4

5 III. The Order allows pollution and nuisance to groundwater in violation of the
6 anti-degradation policy and state law.

7

8 The State anti-degradation policy prohibits occurrence of pollution or nuisance as
9 a result of discharge (Resolution 68-16). According to the Water Code, "Pollution"
10 means an alteration of the quality of the waters of the state by waste to a degree which
11 unreasonably affects ...: (A) The waters for beneficial uses. (Cal. Water Code
12 13050(l)(1)). For all the reasons that the Order violates the state's anti-degradation
13 policies, the Order, too, will result in Pollution as defined by the Water Code. Such
14 reasons include but are not limited to:

- 15 a) Explicitly allow "limited degradation" up to the water quality
16 objectives without the required findings permitting such "limited
17 degradation."
18 b) Allowing discharges to contribute to exceedances of water quality
19 objectives and nuisance for up to 10 years in areas subject to GQMPs
20 permits.
21 c) Failure to establish a baseline to assess and analyze degradation or the
22 impacts of discharge.
23 d) Failure to establish adequate monitoring and reporting procedures to
24 adequately monitor degradation or potential impacts to beneficial uses.

1 "Nuisance" means anything which is (1) Is injurious to health, or is indecent or
2 offensive to the senses, or an obstruction to the free use of property, so as to
3 interfere with the comfortable enjoyment of life or property, (2) Affects at the same time
4 an entire community or neighborhood, or any considerable number of persons,
5 (3) Occurs during, or as a result of, the treatment or disposal of wastes. (Cal. Water
6 Code 13050(m).

7 By allowing degradation of groundwater up to the water quality objective, by
8 disregarding relevant public health goals in favor of often less protective water quality
9 objectives, by failing to monitor for all constituents of concern, and allowing continued
10 discharger contribution to exceedences of water quality objectives and nuisance for up to
11 the next ten years, the Order allows for discharge of waste that is both injurious to health
12 and interferes with the enjoyment of property for those whose domestic water quality will
13 be impacted.

14 Separate and apart from prohibitions in the State's anti-degradation policy,
15 California law prohibits outright pollution and nuisance with respect to the state's
16 groundwater. (Cal. Water Code Section 13050 *et seq.*) These prohibitions in state law are
17 applicable to both high quality waters, subject also to the anti-degradation policy and
18 other waters. Thus to the extent that this order permits discharges that constitute
19 nuisance or pollution, as discussed above, this Order violates California law with respect
20 to its treatment of and failure to protect all groundwater in the East San Joaquin River
21 Watershed.

22

23 IV. The substantive requirements of this order are not subject to review and
24 approval of the Board.

1

2 The Board may not delegate authority to the Executive Officer to issue, modify,
3 or revoke waste discharge requirements. Cal. Water Code Section 13223(a)(2). By
4 approving a General Order without specific requirements and instead just containing
5 deadlines for the Executive Officer to approve the requirements without board or public
6 review in the future, the Board has effectively attempted to move its authority and
7 responsibility for issuing waste discharge requirements to the Executive Officer.

8 In this WDR, the Board essentially approved a framework of documents -- and
9 timelines for their preparation -- to implement the program that have yet to be developed.
10 A number of those documents and plans will set the substantive requirements of this
11 order, yet this Order delegates the authority for approving those documents to the
12 Executive Officer without any review or oversight by the Board. We have no idea what
13 this order will actually look like or accomplish 2 years, 5 years, or 10 years from now.
14 Specifically, these essential documents and determinations include the following: 1)
15 Groundwater Quality Assessment Report, 2) Establishment of and changes to high and
16 low vulnerability areas for groundwater, 3) Trend Monitoring Plan, 4) Management
17 Practices Evaluation Program. By essentially reserving the substantive components for
18 subsequent reports – all subject to Executive Officer review and approval - the Board has
19 effectively delegated waste discharge requirements to the Executive Officer in violation
20 of the water code. Cal. Water Code Section 13223(a)(2)

21 The Groundwater Quality Assessment Report (GAR) is a foundational document
22 of the order; multiple reports and requirements tier off its contents, and its adequacy will
23 determine the extent of other planning efforts, including: (1) the designation of high and

1 low vulnerability areas which are based in existing information compiled in the GAR,
2 and which determine the level of oversight and protection provided by the regulations, (2)
3 the constituents and locations to be tracked through the Trend Monitoring Plan, and (3)
4 the focus and priorities of the Management Practices Evaluation Program. The
5 establishment of high and low vulnerability areas sets monitoring and reporting
6 requirements for growers and determines whether discharge limits must be adhered to.
7 The Trend Monitoring Plan determines which constituents will be tracked for purposes of
8 complying with the anti-degradation policy. The Management Practices Effectiveness
9 Program determines the effectiveness of practices enacted to meet the discharge
10 limitation of the order and therefore defines BPTC.

11 Instead the only documents available for public review (but not Board approval)
12 are the reporting templates and the Surface and Groundwater Quality Management Plans.
13 These plans and designations without any Board or public review listed above are so
14 central and substantively determinative of the actual waste discharge requirements that
15 will be imposed, that, by excluding them from public review, the Board has effectively
16 illegally delegated authority to staff or the Executive Officer to establish waste discharge
17 requirements in violation of Porter Cologne Cal. Water Code Section 13223(a)(2) and the
18 sunshine laws of this state. Additionally, the General Order allows for reduced
19 vulnerability designation and reduced reporting requirements without Board or public
20 review or approval. Specifically, the General Order allows that “after 1 March 2017, the
21 Executive Officer may approve reduction in the frequency of updates and submission of
22 Farm Evaluations, if the third-party demonstrates that year to year changes in Farm
23 Evaluation updates are minimal, and the Executive Officer concurs that the practices

1 identified in the Farm Evaluations are consistent with practices that, when properly
2 implemented, will achieve receiving water limitations or best practicable treatment or
3 control, where applicable.²⁹” The initial Farm Evaluations will be completed between
4 2014 and 2017, depending upon the size of the farm and whether it is located in a low or
5 high vulnerability area. That would provide just 0-3 years of information on which to
6 base a decision to reduce the frequency, which is inadequate to determine trends and
7 justify any reductions. A decision to relax reporting requirements is a significant
8 amendment that should be considered and approved in a public process by the Water
9 board, or at least allow for public review and input.

10 Similarly, the General Order allows that, “after 1 March 2017, the Executive
11 Officer may approve reduction in the frequency of submission of Nitrogen Management
12 Plan Summary Reports, if the third-party demonstrates that year to year changes in
13 Nitrogen Management Summary Reports are minimal. and the Executive Officer concurs
14 that the implemented practices are achieving the performance standard (see section
15 IV.B.8).³⁰” This reduction in reporting is in High-Vulnerability areas. Initial Nitrogen
16 Management Plans will be completed between 2014 and 2017, depending upon the size
17 of the farm and whether it is located in a low or high vulnerability area. That would
18 provide just 0-3 years of information on which to base a decision. Again, a decision to
19 relax reporting requirements is a significant amendment that should be considered and
20 approved in a public process by the Water Board or at least have public review and input.

21

²⁹ Order R5-2012-0116, pg.23 VII.B.2

³⁰ Order Pg.26, VII.D.1

1 V. This general WDR will disproportionately impact low income communities
2 and communities of color because it does not protect groundwater from
3 continued degradation.
4

5 The general WDR will allow further groundwater degradation, particularly nitrate
6 contamination, which is the number one cause of drinking water well closure in the State.
7 Already Latino and low-income communities are more likely to have contaminated
8 drinking water in the Central Valley region, and this is most often due to high levels of
9 nitrate in the groundwater.³¹ Specifically in the San Joaquin Valley, small communities
10 with high concentrations of Latinos are disproportionately impacted by nitrate
11 contamination from agricultural waste, meaning Latino communities are more likely to
12 have higher levels of nitrates in their drinking water³². Additionally, Latino and low-
13 income communities are less likely to have health care and access to treatment or
14 substitute water sources, and are more likely to be exposed to cumulative impacts through
15 other media (such as air).

16 By disparately impacting low income, communities of color, the Board's failure to
17 enact groundwater protections, violates our states commitment to equality and freedom
18 from discrimination as laid out in California Government Code, Section 11135 which
19 states that no person in the State of California shall, on the basis of race, national origin,
20 ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be
21 unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to
22 discrimination under, any program or activity that is conducted, operated, or administered

³¹ Environmental Justice Coalition for Water, *Thirsty for Justice: A People's Blueprint for California Water* (2005)

³² Carolina Balasz, et.al., *Social Disparities in Nitrate Contaminated Drinking Water in California's San Joaquin Valley*, Environmental Health Perspectives June 2011. Document added to record in draft form in EJ comment letter on ILRP PEIR dated September 27, 2010.

1 by the state or by any state agency. Furthermore, the Board's failure to enact groundwater
2 protections threatens California's Fair Employment and Housing Act, California
3 Government Code 12900, et seq., which guarantee all Californians the right to hold and
4 enjoy housing without discrimination based on race, color or national origin.

5 The California Government Code Section 65008 renders null and void any action
6 undertaken by a local governmental agency that denies to any individual or group of
7 individual the enjoyment of their residence, landownership or tenancy. The Board's
8 decision, if it fails to protect the drinking water for California's most vulnerable
9 communities, may be null and void.

10 Therefore, this General Order would disproportionately impact low-income
11 communities and communities of color, in violation of California Government Code
12 Section 11135, Fair Employment and Housing Act and Cal. Gov. Code Section 65008.

13

14 5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED.

15 Petitioner AGUA is an unincorporated association made up of residents of Central
16 Valley communities, as well as community-based and non-profit organizations working
17 in the Central Valley. The mission of AGUA is to ensure that all Central Valley residents
18 have access to safe, clean and affordable water.

19 Many of the members' drinking water sources have high levels of nitrate and
20 pesticide contamination, due in large part to contamination from agricultural activities,
21 and many others have had their drinking water quality degraded and are at risk for
22 exceeding water standards in the future as a result of continued agricultural discharges.

1 Because AGUA members and other residents are low-income, many have no
2 choice but to drink contaminated water, for which they pay a monthly water bill, while
3 many others must spend additional money to buy bottled water for their family. Some
4 residents spend up to 10% of their household income on drinking water alone because of
5 nitrate and/or pesticide contamination.

6 Many of the small water systems in the communities in which AGUA members
7 reside are forced to spend up to \$1 million for a new well when possible, or \$14 million
8 for groundwater treatment when the entire aquifer has been contaminated. This means
9 significant increased costs to AGUA members, as well as other similarly situated
10 residents.

11 Petitioner Fairmead Community and Friends is an unincorporated association
12 made up of residents of Madera County, primarily the community of Fairmead, an
13 unincorporated community in the County of Madera. Fairmead's water has tested above
14 the MCL for nitrates.

15 Petitioner Planada en Accion is an unincorporated association made up of
16 residents of the unincorporated community of Planada in Merced County. The
17 community of Planada relies on high quality groundwater for its drinking water. The
18 community is a low income community.

19 Nitrate in drinking water is an acute contaminant that can cause death in infants
20 and birth defects, impaired thyroid and spleen and kidney disease, and which has been
21 linked to cancer. The primary sources of nitrate contamination include agricultural
22 discharges into groundwater.

1 Petitioners' health, interests and finances are directly harmed by the failure of the
2 Regional Board to develop an effective and legally defensible program preventing
3 groundwater contamination from irrigated lands.

4
5 6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH
6 PETITIONERS REQUESTS.
7

8 Petitioners seek an Order by the State Board to:

9 A. Review Order No. R5-2012-0116

10 B. Either amend the General Order or remand the matter to the Regional

11 Board with an order to amend the general order to address the points

12 outlined above and include at a minimum all of the following conditions:

13 i. Require the Board to establish baseline water quality, or require
14 the Groundwater Assessment Report or another requirement to
15 provide data to identify the best water quality since 1968 for
16 purposes of applying/enforcing the state's Anti-degradation policy.

17 ii. Require Trend Monitoring Plans or some other monitoring
18 program to include trend monitoring for all constituents of concern
19 identified in the Groundwater Assessment Report for the
20 watershed, and to identify any degradation that occurs relative to
21 the baseline for the purposes of anti-degradation.

22 iii. Require nitrogen application reporting, in addition to nitrogen use
23 efficiency ratios for all dischargers (in both high and low
24 vulnerability areas), and require reporting by parcel, discharger, or
25 square mile to ensure there are sufficient data collected to identify

1 potential threats and impacts to water quality for all high quality
2 waters.

3 iv. Require Board review and approval of the following key plans,
4 programs and fundamental changes in requirements: (1)
5 Groundwater Quality Assessment Report, (2) Trend Monitoring
6 Plan, (3) Management Practice Evaluation Program, (4) Changes
7 in groundwater vulnerability designations, and (5) Changes in
8 requirements of frequency for farm evaluation plan and nutrient
9 management plan reporting.

10 v. Delete footnote in the groundwater limitations allowing for up to
11 10 years compliance for exceedances of WQ objectives, nuisance
12 or pollution and eliminate this in the timetable for compliance
13 (footnote 15, page16, section III.B)

14 vi. Set clear level of degradation (change from baseline water quality)
15 that is in maximum benefit of the people of the state with sufficient
16 consideration and findings.

17 vii. Include clear and enforceable limits on degradation in the
18 Receiving Water Limitations and requirements of the Order.

19
20 7. A STATEMENT OF THE POINTS AND AUTHORITIES IN SUPPORT OF
21 LEGAL ISSUES RAISED IN THE PETITION.
22

23 Petitioner’s arguments and points of authority are detailed above and in their
24 comment letters, as well as the testimony and the PowerPoint presentations presented to

1 the Regional Board, and attached to this petition. Should the State Board have additional
2 questions regarding the issues raised in this petition, the petitioners will provide
3 additional briefing on any such questions.

4

5 8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE
6 APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT
7 THE PETITIONER.
8

9 A true and correct copy of this petition was submitted electronically on January 7,
10 2013 to the Central Valley Regional Board, Care of Ms. Pamela Creedon, Executive
11 Officer.

12 In addition, a true and correct copy of this petition was electronically circulated to
13 Parry Klassen and Theresa Dunham, as representatives of potential dischargers that may
14 seek coverage under this General Order.

15

16 9. A STATEMENT THAT THE ISSUES RAISED IN THE PETITION WERE
17 PRESENTED TO THE REGIONAL BOARD BEFORE THE REGIONAL
18 BOARD ACTED, OR AN EXPLANATION OF WHY THE PETITIONER
19 COULD NOT RAISE THOSE OBJECTIONS BEFORE THE REGIONAL
20 BOARD.
21

22 The petitioner presented the issues raised in this petition to the Regional Board
23 during or before the December 7, 2012 hearing on the Waste Discharge Requirements
24 General Order for Growers Within the Eastern San Joaquin River Watershed That Are
25 Member of the Third-Party Group.

26 If you have any questions regarding this petition, please contact Phoebe Seaton at
27 (559) 233-6710 x 315 or Laurel Firestone at (559) 789-7245.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Dated January 7, 2013

Respectfully Submitted,



Laurel Firestone, Community Water Center

For: Phoebe Seaton, CRLA, Inc.

Attorneys for Petitioners, Asociación de Gente Unida por el Agua (AGUA), Fairmead
Community and Friends, and Planada en Accion.

Attachments:

1. Order No. R5-2012-0116
2. EJ Comments on draft ILRP PEIR 9/27/10
3. Environmental Health Perspectives , *Social Disparities in Nitrate Contaminated Drinking Water in California's San Joaquin Valley*, 2011 Final published article by Balazs et. al (June 2011) (draft report was referenced in PEIR comments)
4. East San Joaquin River draft order, EJ comments August 6, 2012
5. EJ pesticide memo, August 6, 2012
6. Central Valley Board EJ Presentation, November 30, 2012 powerpoint
7. Central Valley Board EJ Presentation, December 7, 2012 powerpoint