



November 30, 2020

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**RE: Comments on East San Joaquin Surface Water Quality Monitoring Program Review Panel Draft Report**

*Sent via electronic submission to: [steve@scwcrp.org](mailto:steve@scwcrp.org)*

Dear East San Joaquin (ESJ) Surface Water Quality Monitoring Program Review Panel (Expert Panel),

California Coastkeeper Alliance (CCKA) represents local Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems. We would like to thank the Expert Panel and Steve Weisberg for your thoughtful consideration of the issues we've raised over the course of the last year, and for providing us the opportunity to submit written comments on the draft report.

Below we lay out our concerns in detail with the draft Report, but at the outset we would like to highlight our recommendations here:

- Move the "Transferability of the Program" call-out section to the Executive Summary;
- Add a finding that "the current ESJ monitoring program CANNOT determine whether a grower is causing or contributing to exceedances of applicable water quality objectives in surface water";
- Add a finding that "the current ESJ monitoring program does not pursue exceedances with increasingly focused monitoring to detect the source of the problem";
- Remove Section 4.1.1. because the justification that the monitoring program meets the goals articulated in the 2012 Order are irrelevant;
- Contact Darrin Polhemus, Deputy Director, Division of Drinking Water at the State Water Board to help the Expert Panel understand the validity and pervasiveness of the State Water Board's concerns regarding representative sites not being representative of core sites;
- If time does not permit the panel to conduct a review of the data to verify the State Water Board's concerns, the Expert Panel should state that "The Expert Panel did not review the core and representative data to determine whether representative sites were representative of core sites";
- Remove the statement that "core sites represent the zone as a whole, while represented sites represent one or more sub-watersheds within the zone; water quality at represented sites and cores sites is expected to be similar";
- Remove the sentence that justifies less sites due to access issues on page 22 of the draft Report: The number of potential suitable sampling sites is further limited by site access issues";
- State that "the core and represented monitoring sites are not able to reasonably identify exceedances throughout the watershed";
- Recommend that before closing a pesticide related management plan, the Regional Board should require a multi-species toxicity test (or two quarters of clean, no toxicity results).
- Recommend the Third-Party stop reporting nitrate results less than 10 to be a no exceedance; and
- Add a footnote that states the Expert Panel was directed to not review Biostimulatory issues.

**1. The Expert Panel should move the “Transferability of the Program” call-out section to the Executive Summary.**

First, while we disagree that the ESJ Monitoring Program is designed and implemented appropriately, we do appreciate the Expert Panel’s call-out on pages 7 and 8 of the report highlighting that the ESJ Monitoring Program is “not necessarily transferrable to other regions of California.” This is a critical point for the environmental community, and we would strongly recommend that the Expert Panel should move the “Transferability of the Program” call-out section to the Executive Summary.

**2. The Expert Panel’s should make a finding that the current ESJ monitoring program does not pursue exceedances with increasingly focused monitoring to detect the source of the problem.**

As CCKA presented at the November 6<sup>th</sup> Third Panel Meeting, we believe there is a large underlying assumption within the draft Report, that if left unaddressed, would be a problematic oversight. Importantly, the Expert Panel should be reviewing the ESJ monitoring program through the lens of the State Water Board’s 2018 goals and concerns – not the 2012 Order’s goals or even CCKA’s goals. The draft Report suggests that CCKA’s criticisms are aimed at the monitoring coalition’s implementation of the 2012 Order – that is not our concern, our criticism is of the 2012 Order itself. On page 20 of the report, the Expert Panel states that “[t]he Panel disagrees with these critiques and believes they reflect the Petitioners’ interpretation that the Program should be based on a *different set of goals* than those the Panel finds are specified in the General Order establishing the Program.” We agree with this statement. Besides some concerns with toxicity and dissolved oxygen (that the Expert Panel properly addresses in the Report), CCKA has not been criticizing the monitoring coalition’s implementation of the 2012 Order. Our criticism lies with the Regional Board’s 2012 Order itself and the monitoring framework within the Order. But more importantly, the reason this Expert Panel was created, was not because CCKA had concerns with the 2012 Order’s monitoring framework – the reason this Panel was created was because the State Water Board had concerns with the Order’s monitoring framework as articulated in its 2018 ESJ Order.

The major flaw with Key Finding 3.1 is the underlying assumption that the 2012 Order is adequate and not flawed. On page 6 of the Report the Panel “concludes that the Program is, on the whole, appropriately designed and implemented to meet the monitoring *program goals laid out in the 2012 Order.*” The Panel goes on to state that it “believes the intent of the Program – as articulated in the Order establishing the Program – is to achieve collective watershed-scale compliance, not individual grower compliance.” Whether individual compliance or watershed-scale compliance is appropriate is a legal and policy question. But the State Water Board has already decided that a monitoring program needs to pursue exceedances upstream to narrow down the source of the exceedance. This panel was formed because the court and the State Water Board had concerns that the 2012 Order and its monitoring program goals did not achieve this policy goal or the Porter-Cologne Water Quality Act. The State Water Board has already opined that the Regional Board’s watershed-scale compliance is not an appropriate policy goal. The issue this Expert Panel is confronting is not whether the monitoring coalition followed the 2012 Order, the issue is whether the 2012 Order monitoring framework is sufficient to meet the State Water Board’s expectations and concerns as laid out in the 2018 Order.

Section 4.1.1. should be removed from the final Report. Section 4.1.1. is full of underlined portions of the 2012 Order to justify watershed-scale compliance monitoring. Reading that section seems clear that the point is to justify the monitoring coalition’s program as properly implementing the 2012 Order’s goals. Again, that misses the central issue raised by the State Water Board in 2018, which was: whether the 2012 Order’s monitoring requirements is comprehensive enough to identify problem areas throughout the watershed.

In 2018 the State Water Board was clear that individual growers had specific requirements, including meeting receiving water limitations. The State Water Board's 2018 Order states that agricultural WDRs "assign certain requirements to the *individual growers* (Members) and certain requirements to the coalition (Third Party). *Each Member must meet receiving water limitations* (except where the Third Party is implementing a management plan to address known exceedances caused by agricultural discharges), which *prohibit the Member from causing or contributing to exceedances* of applicable water quality objectives in surface water and groundwater."<sup>1</sup> Each grower is prohibited from causing or contributing to an exceedance, but the 2012 Order's watershed-scale compliance monitoring goals will never determine whether a grower is meeting that prohibition. The legal concerns that the State Water Board took issue with in 2018 is that the Non-Point Source Policy requires a feedback mechanism to determine whether receiving water limitations are being met – and the 2012 Order does not provide the monitoring necessary to ensure that feedback mechanism.

The key question for this Expert Panel is whether the 2012 Order provides an effective receiving water monitoring program to pursue exceedances in upstream channels and narrow down the source of the exceedance. For a moment I would ask that you suspend memory of what the environmental community argued for as an ideal monitoring program throughout the three Expert Panel meetings, and instead only concentrate on what the State Water Board has already affirmed as appropriate water quality monitoring goals. In 2018, the State Water Board stated that an "*effective receiving water monitoring program must pursue exceedances in upstream channels and narrow down the source of the exceedances.*"<sup>2</sup> The 2012 Order does not pursue exceedances, nor does it narrow down the source of the exceedance – in fact it does the exact opposite, the monitoring expands the pool of potential growers responsible for the exceedance. CCKA is not asking this Expert Panel to make a policy call as to whether watershed verse individual compliance monitoring is most effective – the State Water Board has already made that policy decision.

The State Water Board has already made the policy decision that an effective monitoring program must pursue exceedances to narrow down – not expand – the source of the exceedances. In coming to that policy conclusion, the State Water Board relies on previous State Water Board orders and expert panels. When the State Water Board adopted their 2013 Central Coast Order it stated that the "better approach may be to rely on receiving water monitoring data and to require the third party monitoring groups administering receiving water monitoring to *pursue exceedances with increasingly focused monitoring in upstream channels designed to narrow down and identify the sources of the exceedances.*"<sup>3</sup> This is why CCKA asked the Los Angeles Regional Water Board to present their surface water monitoring program, because they follow the State Water Board's policy decision to pursue exceedances with increased focused monitoring. The State Water Board also relied on past expert panels to defend their concern that the 2012 Order's monitoring did not contain the appropriate special density to locate the source of the problem. The 2014 Agricultural Expert Panel states that a "*single measurement point at the downstream discharge of a very large watershed would be insufficient. When/if problems are identified, sampling should move upstream to locate the source of the problem.*"<sup>4</sup> This panel recommended that sampling should move upstream to determine the source, something the State Water Board used to make its policy decision that monitoring programs most pursue exceedances with increased focus upstream.

We are not asking this Expert Panel to make a policy decision – again, the State Water Board has already made the policy decision that a monitoring program must pursue exceedances with increased focused monitoring in upstream channels to narrow down the source of the exceedance. But, this Panel cannot rely

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<sup>1</sup> State Water Resources Control Board, ESJ 2018 Order, pg. 5.

<sup>2</sup> ESJ 2018 Order, pg. 56.

<sup>3</sup> State Water Board Order 2013-0101, pp. 37-38; and ESJ 2018 Order, pg. 54.

<sup>4</sup> Conclusions of the Agricultural Expert Panel, Recommendations to the State Water Resources Control Board pertaining to the Irrigated Lands Regulatory Program (Sept. 9, 2014), available at [http://www.swrcb.ca.gov/water\\_issues/programs/agriculture/docs/ILRP\\_expert\\_panel\\_final\\_report.pdf](http://www.swrcb.ca.gov/water_issues/programs/agriculture/docs/ILRP_expert_panel_final_report.pdf).

on the 2012 Order to justify the current monitoring scheme as appropriately designed and implemented to meet the Program's goals. Again, the Program's goals are flawed as expressed by the State Water Board's 2018 Order. To resolve this problem, we have three recommendations:

- First, the Expert Panel should add a finding that “the current ESJ monitoring program CANNOT determine whether a grower is causing or contributing to exceedances of applicable water quality objectives in surface water.”
- Second, the Expert Panel should add a finding that “the current ESJ monitoring program does not pursue exceedances with increasingly focused monitoring to detect the source of the problem.”
- And third, the Expert Panel should remove Section 4.1.1. because the justification that the monitoring program meets the goals articulated in the 2012 Order are irrelevant. What matters is whether the ESJ monitoring program meets the policy goals articulated by the 2018 State Water Board Order.

### **3. The Expert Panel should review 2018 data to determine whether representative sites are representative of core sites.**

The Expert Panel needs to review and answer the specific questions the State Water Board raised in 2018. First, the State Water Board wanted to know “is there information to support the premise that when the core site and the represented sites have similar hydrology, crop type, land use, soil type, and rainfall, and are assumed to be managed similarly, a water quality problem at a core site would be indicative of an exceedance at a represented site?”<sup>5</sup> The reason the State Water Board asked this question is because their “review of the data found monitoring at represented sites can reveal exceedances for a different set of constituents than those found at the core sampling sites, even where the physical characteristics are similar.”<sup>6</sup> Respectfully, CCKA raised this exact quote from the State Water Board in all three of our presentations over the course of this Expert Panel.<sup>7</sup>

If the Expert Panel has not reviewed the data that the State Water Board had concerns with in 2018 to come to the conclusion that representative sites were not representative of core sites, we suggest the Expert Panel do so or at the least state in the final Report that the Expert Panel did not review data to determine whether representative sites were representative of core sites. Further, on page two of the draft Report the Expert Panel states “core sites represent the zone as a whole, while represented sites represent one or more sub-watersheds within the zone; water quality at represented sites and cores sites is expected to be similar.” Given the likelihood that the Expert Panel did not review the data of concern in 2018, we would recommend that this statement be removed from the final Report.

To resolve the State Water Board's 2018 concerns with regard to their first core question of whether representative sites are actually representative, we offer the following recommendations and changes to the final Report:

- First, the Expert Panel should contact Darrin Polhemus, Deputy Director, Division of Drinking Water at the State Water Board to help the Expert Panel understand the validity and pervasiveness of the State Water Board's concerns regarding representative sites not being representative of core sites. He was the one who conducted the 2018 data review.
- Second, if time does not allow for a review of the data to verify the State Water Board's concerns,

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<sup>5</sup> ESJ 2018 Order pg. 55

<sup>6</sup> *Id.*

<sup>7</sup> Meeting One: <https://sccwrp.org/wp/wp-content/uploads/2020/01/Bothwell.pdf>; Meeting Two: <http://ftp.sccwrp.org/pub/download/DOCUMENTS/RB5ExpertPanel/BothwellClosing.pdf>; Meeting Three: <http://ftp.sccwrp.org/pub/download/DOCUMENTS/RB5ExpertPanel/BothwellNovember.pdf>.

the Expert Panel should state that “*The Expert Panel did not review the core and representative data to determine whether representative sites were representative of core sites.*”

- And third, the Expert Panel should remove the statement that “*core sites represent the zone as a whole, while represented sites represent one or more sub-watersheds within the zone; water quality at represented sites and cores sites is expected to be similar.*”

**4. The Expert Panel should state that the core and represented monitoring sites are not able to reasonably identify exceedances throughout the watershed.**

The second key concern of the State Water Board’s was whether “the core and represented monitoring sites, collectively, of sufficient spatial density or distribution<sup>139</sup> to be able to reasonably identify exceedances throughout the watershed?”<sup>8</sup> First, let me flag 2018 Order footnote 139, where the State Water Board dismissed the Third Party’s excuse that they cannot do more monitoring sites because of public access concerns. The State Water Board did not accept that excuse, instead stating that:

*The Third Party indicated in comments that there were a limited number of monitoring sites with public access. This is an artificial limitation because access to the growers’ private roads for access to water bodies to conduct surface water quality monitoring is a reasonable requirement for membership in any third party-based program.*<sup>9</sup>

Given this statement by the State Water Board, we recommend the Expert Panel remove the sentence that justifies less sites do to access issues on page 22 of the draft Report: *The number of potential suitable sampling sites is further limited by site access issues.*”

The State Water Board went on to state that “the problem is that a [Surface Water Quality Monitoring Plan] SQMP may not be triggered until an exceedance is detected at a core or represented site, and water quality exceedances upstream or in an adjacent portion of the watershed to that of the core and represented sites *may go undetected in the interim.*”<sup>10</sup>

The Expert Panel supports the overall monitoring design on page 27 of the draft Report because the “Panel believes that altering the design to include a larger number of sampling sites would only be needed if the Program were *addressing a different monitoring goal* – one that prioritizes farm-specific compliance, rather than regional compliance (see Section 4.2).” As we discuss at length in Section 2 above, the State Water Board wanted this Expert Panel addressing a different monitoring goal. Not one that necessarily prioritizes farm-specific compliance, but at least one that pursues exceedances in upstream channels and narrow down the sources of the exceedance. Therefore, we recommend the Expert Panel re-asses this statement on page 27.

The State Water Board wanted to know whether the core and represented monitoring sites, collectively, of sufficient spatial density or distribution to be able to reasonably identify exceedances throughout the watershed. Given the limited hydrologic connectivity and the 2012 Order’s goal to only assess regional compliance, the Panel should answer the State Water Board’s question in the negative, and the Expert Panel should state that “*the core and represented monitoring sites are NOT able to reasonably identify exceedances THROUGHOUT the watershed.*”

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<sup>8</sup> ESJ 2018 Order, pg. 56.

<sup>9</sup> ESJ 2018 Order, pg. 56. Foot note 139.

<sup>10</sup> ESJ 2018 Order, pg. 56.

**5. The Expert Panel should recommend that before closing a pesticide related management plan, the Regional Board should require a multi-species toxicity test (or two quarters of clean, no toxicity results).**

First, we are greatly appreciative of your recommendations and insight as they pertain to toxicity testing. We do have one constructive recommendation to consider adding to the final Report. We recommend that before closing out a pesticide related management plan, the coalition should perform a multi-species toxicity test (or better yet, two quarters of clean, no-toxicity results). For example, let us say the Coalition finds toxicity, they then determine what chemical is causing the toxicity, and then a management plan is built around that chemical. What too often happens is that a grower simply changes away from that chemical, and maybe continues management practices that lead to toxicity with another pesticide. By following up with a toxicity test, the Coalition can better determine if the problem has been solved or if growers simply switched chemicals.

**6. The Expert Panel should address Biostimulatory issues.**

Lastly, we know the panel was instructed to not analyze Biostimulatory issues. But we recommend the Panel reference the appropriate literature and make a suggested range of Nitrate values to consider. We would also recommend the Coalition stop reporting nitrate results less than 10 to be a no exceedance. And lastly, we would recommend the Panel add a footnote that states you were directed to not review Biostimulatory issues.

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Again, we would like to sincerely thank the Expert Panel and Mr. Weisberg for your thoughtful coordination and consideration of all stakeholders in regard to surface water monitoring in the ESJ region. We know this issue is contentious and not easy, but we appreciate your willingness to listen to our concerns.

Sincerely,



Sean Bothwell  
Executive Director  
California Coastkeeper Alliance