



July 5, 2017

Assembly Member Bill Quirk, Chair
Assembly Committee on Environmental Safety & Toxic Materials
1020 N Street, Room 171
Sacramento, CA 95814

Re: SB 623 Oppose unless amended

Dear Chair Quirk, Committee Members, and staff:

This letter reflects our “oppose unless amended” position for Senate Bill 623, the Safe and Affordable Drinking Water Fund (Monning), and reasons why SB 623 should become a two-year bill. We strongly support efforts underway to ensure the full achievement of the human right to water for all Californians, including safe and affordable drinking water for all. We recognize and appreciate the good intent of Senator Monning and environmental justice partners to provide safe, affordable drinking water to disadvantaged California communities and rural residents whose water is polluted by either natural or human-caused pollutants. However, we are concerned that recent amendments to SB 623 create a regulatory framework that could perpetuate, rather than mitigate, practices that result in polluted ground and surface waters. We

have worked with Stanford University Environmental Law Clinic to analyze the possible legal implications of the bill and to offer acceptable alternative language; this is supported by the attached memorandum with relevant legal analysis.

We support a fund for safe and affordable water and we believe all Californians should contribute to that fund. Further, we believe that current law supports the concept of groundwater polluters making a substantial contribution into the fund to mitigate their past and ongoing pollution, while they simultaneously work to reduce and eliminate their impacts. However, the recent amendments to SB 623 create a pay-to-pollute scheme that allows agricultural polluters to continue polluting practices. The focus of these comments is on human-caused pollutants, and specifically nitrates and other pollutants discharged by agriculture.

Our suggested amendment

Our primary concern is with SB 623's § 13278.1, in its entirety, which we cannot accept. After consultation with attorneys familiar with state and federal water pollution law, we believe this section offers polluters a dangerously broad "safe harbor" from enforcement of water pollution laws by the State and Regional Water Quality Control Boards and prevents the enforcement actions that are currently providing safe, clean, and affordable interim drinking water to impacted communities and households.

We oppose SB 623 unless § 13278.1 (and any affected section) is amended.

Proposed language:

An agricultural operation shall not be subject to an enforcement action by the state board or a regional board that arises out of any past discharge of nitrate into groundwater that requires the provision of replacement water under Division 7 of the Water Code or an applicable order adopted pursuant to Section 13263 or 13269, if that agricultural operation demonstrates that it has timely paid any fee assessment or charge into the Safe and Affordable Drinking Water Fund.

This proposed language reflects our recognition that a grower should not be liable for doubly providing replacement water if they are satisfactorily paying into the fund. At the same time, the State and Regional Water Boards should be able to take all other enforcement actions to ensure that dischargers who are not complying with the law do no further harm to water quality and clean up existing pollution.

Current efforts to hold polluters accountable must be preserved.

SB 623's "legislative fix" for agricultural dischargers appears to be in direct response to recent successes in enforcing California's Porter-Cologne Water Quality Control Act and bringing transparency and accountability to this industry for the first time. As detailed in the attached legal memo, SB 623 in its current form offers broad immunity from enforcement of Porter-Cologne and appears to target the sections of the Act that are already being used by State and Regional Water Boards to provide replacement water to disadvantaged communities.

The Regional Water Boards and the courts have recently begun to hold agricultural dischargers accountable for their pollution and to require them to clean up the pollution they have caused. Stepping onto the slippery slope of an enforcement safe harbor and exempting these polluters

from state water quality laws that apply to all other industries, in return for unspecified payments into a drinking water fund, sends the wrong message and undermines decades of ongoing work in courts and by advocacy organizations and water agency employees. Shielding polluters from the tools that are finally working is antithetical to our shared goal of clean water.

Just this year, in the Salinas Valley, the area's largest growers voluntarily signed onto an agreement with the State and Regional Water Boards to organize, distribute, and pay for replacement water while working towards funding of long-term water solutions. Over 120,000 acres of farmland have now been enrolled in the win-win, locally supported program. See: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/sbasg_settlement.pdf .

Until SB 623 was amended, the State Water Board Office of Enforcement had plans to roll-out this same program into the Central Valley. SB 623 would provide growers with an enforcement safe harbor from the "cause or contribute to pollution" provision in California's Water Code that the State and Regional Water Boards are using to catalyze the voluntary response by Salinas Valley growers. Safe harbor is counter-productive to efforts to provide clean water.

Enforcement of clean water laws promote a level playing field in the agriculture industry.

Requirements to curtail pollution and compel some growers to change their practices in reasonable ways are essential so that they do not harm the public or other beneficial uses of water. The Central Coast Regional Water Quality Control Board has extensive data showing that many growers in the most impacted areas of the Central Coast (lower Pajaro, Salinas, and Santa Maria watersheds) apply three to five times the amount of nitrogen fertilizer that can possibly be used by the crop. The Regional Board's data are supported by peer-reviewed science documenting that yields are not reduced when less fertilizer is applied. Given these findings, the Water Boards can and should require growers to reduce excess nitrate application so that these pollutants do not contaminate groundwater and surface waters.

Due to effective lobbying efforts by agriculture, the Regional Board has not included "nutrient balancing" standards and requirements in their Agricultural Order. As already noted, the State and Regional Water Boards are turning to the "cause and contribute to pollution" language in the Water Code to curb overapplication of fertilizers and pesticides and the resulting groundwater and surface water pollution.

As detailed in the attached memo, SB 623 requires compliance with the ineffective Agricultural Orders and offers safe harbor from the effective portions of Water Code.

We can support SB 623 if it fulfills its purpose of delivering adequate supplies of safe and affordable drinking water and effectively reduces the pollution loading that condemns future generations, degrades our environment, and threatens livelihoods. However, the current language of SB 623 relies on language such as "best efforts" and "best practicable treatment and control" (BPTC) to control future pollution, which our state has yet to define, interpret or implement.

SB 623 erodes the integrity of California's Porter-Cologne Water Quality Control Act in a time of attack on America's Clean Water Act and climate change.

A core principle underlying the federal Clean Water Act and California's Porter-Cologne Water Quality Control Act is that dischargers of pollution can be permitted to continue operations if

they mitigate their impacts and make monitored and verifiable efforts to reduce and ultimately end their polluted discharges.

Eliminating the long-standing legal requirement not to pollute water sources in the first place is at odds with the social justice purpose of SB 623 and makes our State less resilient to climate change and more vulnerable to prolonged drought.

Preventing and stopping pollution is critical to protecting the integrity of our state's water resources. This is of particular concern to us given the federal efforts underway to defund, rollback, and dismantle federal environmental protections, a concern we share with our State's leadership. Water pollution does not disappear: it moves downgradient within aquifers or spreads into new aquifers or into surface waters. As it spreads, water pollution injures communities, ecosystems, and estuaries. Ultimately, agricultural pollution concentrates in the ocean, where it harms important fisheries and fishery dependent communities.

The safe-harbor amendments to SB 623 that would shield polluters are against the public interest and the wrong public policy choice that offends the principles of environmental and human health protections that undergird California's laws.

Conclusion

We support the stated goals of SB 623 to provide safe and affordable clean drinking water to communities in need and simultaneously works to reduce and eliminate water pollution. We oppose language that creates a "safe harbor" for ongoing or future agricultural pollution.

The worthy concept of creating a fund to provide safe drinking water was shown to potential supporters for sign-on many months ago when the spot-language of SB 623 was positive and aspirational. SB 623 passed through the Senate Environmental Quality Committee without the safe-harbor language that will perpetuate and exacerbate polluted discharges. SB 623 passed through Senate Appropriations without language specifying who will pay into the fund or how an assessment will be made, or how much each individual or industry will contribute. Now, late in the Session, we must consider significant substantive amendments without language on who will pay and how much. The cost-benefit balance sheet and analysis is the critical information that this committee, stakeholders, and the public have yet to see and the appropriate Senate committees may never see.

More time, analysis, and discussion with experts and a broader set of stakeholders is needed; we request this be made a two-year bill.

We urge the Legislature to pursue an approach that will provide clean drinking water now and into the future, stop ongoing and future pollution, uphold California's strong environmental laws, and maintain the tools that are being used successfully today to protect our shared waters and environment. We look forward to continued work with the leadership, Legislature, and our environmental justice partners and allies to craft an approach that fulfills this vision.

Sincerely,

Steve Shimek
Executive Director
The Otter Project
Monterey Coastkeeper
exec@otterproject.org
831-663-9460

Don McEnhill
Executive Director
Russian Riverkeeper

Jennifer Kalt
Director
Humboldt Baykeeper

Carolee Krieger
Executive Director
California Water Impact Network,

Bill Jennings
Executive Director
California Sportfishing Protection Alliance

Noah Oppenheim
Executive Director
Pacific Coast Federation of Fishermen's
Associations

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Ben Pitterle
Watershed and Marine Program Director
Santa Barbara Channelkeeper

Attached: Stanford Legal Analysis of SB 623

ANALYSIS OF SB 623 (rev. 6/26/2017)

SECTION 1: Revision of Legislative Findings and Definitions (related to small systems covered by the State’s Pure and Safety Drinking Water statutes)

The amended legislative findings and definitional changes expand state oversight and responsibilities to address “individual domestic wells” (serving 1 to 4 connections), in addition to already-covered small water systems (serving 5 to 14 connections), and acknowledge the recently enacted human right to water. The revision also includes clean-up language confirming that responsibility for sampling, testing, and education of local public health officials rests with the State Water Board.

Concerns/Issues: None. These changes expand protections for mostly-rural individual domestic water well users who previously fell outside the testing and monitoring system and are important for operationalizing the new human right to water under Water Code section 106.3.

SECTION 2: Creation of New “Safe and Affordable Drinking Water” Provisions in the Health & Safety Code

These provisions constitute the heart of the bill. They establish a new Safe and Affordable Drinking Water Fund in the State Treasury, with all money in the Fund continuously appropriated to the State Water Board’s Office of Sustainable Water Solutions. The purpose of the Fund is to assist low-income communities and individual domestic water well users whose drinking water is contaminated at levels that exceed drinking water standards. The bill prioritizes expenditures for educating eligible recipients about available assistance, testing of individual wells, the provision of short-term replacement water, and those planning, construction, operation, and maintenance costs associated with replacing, blending, or treating contaminated wells or systems (e.g., wellhead or tap filtration systems) over capital construction costs (pipelines). The bill requires that the State Board prepare and annually update an implementation plan with which all Fund expenditures must be consistent. Unspent funds would not return to the General Fund, but after January 1, 2020, the Drinking Water Fund may not accumulate more money than needed for the next two years.

Concerns/Issues:

1. Section 116768 provides that it is the Legislature's intent "to subsequently amend this section to seek specific funding from agricultural operations to assist in providing emergency, interim, and long-term assistance" to agricultural area communities impacted by nitrate contamination, but there are no provisions in the current bill that provide content for this intention. Section 3 of the bill, as discussed below, merely states that agricultural operators who seek enforcement immunity must pay "any applicable fee." **Under the current language, the public has no idea how much money a farm operation must pay into the Fund in order to obtain broad enforcement immunity or how much funding will be available from this source (as opposed to other sources) to carry out the replacement water objectives.**
2. Section 116767(a) provides that the State Water Board should prioritize "costs other than those related to capital construction costs" and caps accumulation of money in the Fund at the amount that can be expended over a two-year period. **These provisions make it clear that this Fund is not focused on permanent solutions, such as new water pipelines, treatment facilities, groundwater cleanup, or pollution source control and reduction. Thus, the Fund is really a stopgap measure to provide replacement (e.g., bottled) water or individual point-of-use domestic filtration units at the wellhead or tap.**

SECTION 3/4: Amendment of the Porter-Cologne Water Quality Control Act (Cal. Water Code)

This section of the bill contains the "safe harbor" language for "agricultural operations," very broadly defined as any discharger who produces crops or pasture for commercial or nursery purposes or who raises or harvests livestock, as long as that discharger is "enrolled" in an irrigated lands regulatory program adopted through waste discharge requirements or a waiver order. In particular, the bill amends the Porter-Cologne Act to provide that any agricultural operation that (1) "has timely paid any applicable fee, assessment, or charge" into the Fund, (2) "is in compliance with" the provisions of an applicable WDR/waiver under Water Code section 13263 or 13269, and (3) "is in compliance with an applicable program of implementation" under Water Code section 13240 et seq. "shall not be subject to enforcement by the state board or a regional board under Chapter 5" for discharges or threats to discharge that cause/contribute to an exceedance of water quality objectives or a condition of pollution or nuisance for nitrate in or to groundwater. Although what it means to be "in compliance"

with “applicable provisions” of a WDR or waiver is not fully defined, the bill states that these provisions include, but are not limited to, “requirements to implement best practical treatment or control” and “best efforts, monitoring, and reporting requirements.”

Concerns/Issues: These provisions raise a number of specific interpretative concerns, even beyond the overarching general concern that the bill would, for the first time ever, establish a “pay to pollute” exemption from the Porter-Cologne Act. These concerns include:

1. Section 13278(b) confirms that nothing in the bill allows California to understand what it is receiving in return for the sweeping immunity provided to the agricultural industry from water quality protection and cleanup requirements that apply to every other industry and person in the state. Consistent with proposed Section 2 of the bill, as discussed above, Section 3 reiterates in the Water Code that “it is the intent of the Legislature . . . to subsequently amend this article to establish an agricultural assessment to be paid by agricultural operations for a period of 10 years . . .” The current bill does not define applicable fees or provide any indication of what those fees will be. **Thus, legislators voting on the bill, communities affected by the bill, and the interested public have no idea what they are receiving in return for blanket immunity under this pay-to-pollute scheme.**
2. Section 13278.1(a) provides immunity from “enforcement by the state board or a regional board under Chapter 5” if an agricultural operation meets the three specified criteria, including most importantly, if the operation is “in compliance” with applicable provisions of an applicable agricultural WDR or waiver order. Chapter 5 contains all of the water boards’ enforcement tools, including cease and desist orders (Water Code section 13301), cleanup and abatement orders (Water Code section 13304), pollution and nuisance abatement notices (Water Code section 13305), compliance and civil penalty schedules (Water Code section 13308), etc. While the bill does preserve the ability of a regional board general authority to investigate water quality under Water Code section 13267, there is no language in the bill addressing how a water board would or legally could determine that an agricultural operation is not “in compliance” with a WDR/waiver provision without the ability to exercise its statutory enforcement powers. For example, the first basic step in any water board enforcement action is generally an administrative enforcement proceeding (under Water Code section 13300 et seq.) which involves information collection, due process requirements, compliance schedules, and the like. Without these statutory tools, water boards

cannot realistically determine whether an individual discharger is “in compliance” with a permit or order. **By exempting agricultural operations that pay an “applicable fee” and “enroll” under a WDR or waiver, the bill would effectively shield these operations from any realistic possibility of enforcement. This makes the “in compliance” language mere circular window dressing intended to appease concerned stakeholders and the public without any real effect.**

3. This concern is exacerbated by the proposed language in section 13278.1(a)(2), which lists the “applicable provisions” with which exempted operations would need to comply to include “best practical treatment or control” requirements and “best efforts, monitoring, and reporting requirements.” Even in the unlikely event that a water board attempts to investigate an individual discharger, this language allows the discharger to argue that it is following best practices or using its best effort to comply. **Based on past and presently proposed agricultural orders, any future agricultural waiver and WDR is highly unlikely to contain any actual discharge standards. The inclusion of the phrase “best practical treatment or control” requirements is an illusory safeguard because nothing in state law, water policy, or existing agricultural orders defines these words. Thus, while the inclusion of “best efforts” and “best practical” language sounds good, it only affirms that there will be no way for water boards (or third parties) to effectively ensure compliance, leaving covered operations with virtually no regulatory oversight.**
4. Section 13278.1(b)(1), potentially intended to mitigate the blanket liability shield, does not do so; in fact, it arguably does the opposite. This provision states that the foregoing requirement that operators be “in compliance with all applicable provisions” of applicable WDRs or waivers in order to receive immunity “does not include any generalized prohibition on causing or contributing, or threatening to cause or contribute, to an exceedance of a water quality objective for nitrate in groundwater or a condition of pollution or nuisance for nitrate in groundwater.” **Poorly drafted as it is, this language arguably could be interpreted by the industry, the water boards, or a court to mean that in order to receive immunity, qualifying agricultural operations need NOT comply with generalized requirements like state antidegradation or nonpoint source policies. Arguably, this bill not only protects the status quo, but actually immunizes agricultural dischargers against any backsliding claims.**

5. Section 13278.1(b)(2) is likewise a meaningless paper safeguard. It provides that an agricultural operation will not be “in compliance” with the applicable provisions of a WDR or waiver for purposes of receiving enforcement immunity if the operator has been subject to an enforcement action under Chapter 5 within the preceding 12 months. This purported safeguard is entirely tautological and of no practical effect. **Because, as noted above, a water board cannot pursue enforcement against an enrolled operation that has paid the applicable fee, there is no realistic circumstance under which this provision would be triggered. And to ensure that no existing enforcement efforts over the last two years trigger this provision, the bill exempts any enforcement action dating back to January 1, 2016 from triggering even this paper safeguard.**
6. In addition to payment of applicable fees into the Fund and enrollment in an agricultural WDR or waiver, operators seeking enforcement immunity must also be “in compliance with an applicable program of implementation for achieving groundwater quality objectives for nitrates that is part of any water quality control plan.” **Existing water quality control plans, however, do not currently include a program of implementation for control of nitrates in groundwater, making this provision virtually meaningless in most regions.**
7. Section 13278.1(c) further reinforces the blanket and permanent nature of the liability immunity provided to qualifying operators by reiterating that the discharge of nitrogen “shall not be admissible” in any future enforcement action and “shall not be considered” in apportioning responsibility for discharges of nitrogen, regardless of source. **Although the meaning and intent of this language is unclear, it likely will be interpreted to mean that, if a discharge from an agricultural operation occurs during a period when that operator is paying the applicable fee to the Fund and enrolled in a WDR or waiver, the operation is forever exempt from any and all future liability for cleanup of the discharge. Thus, while providing short-term replacement water for communities affected by their discharges, agricultural operators would receive permanent immunity from any cleanup responsibility, ensuring that all future costs are borne by the injured communities and state taxpayers more generally.**
8. Section 13278.2 provides that the State Board shall conduct a review of basin plans by 2027 to evaluate progress toward meeting water quality objectives for nitrates in groundwater and to assess the efficacy of

compliance timelines, monitoring requirements, and “best practicable” control strategies. **This language suggests, and might be so interpreted by a court, that the Legislature intends to establish a ten-year program to experiment with the new pay-to-pollute regime. Thus, the language could well be an obstacle to NGOs, concerned stakeholders, and the public attempting to press water boards for stricter requirements in agricultural WDRs and waivers.**

9. Section 13278.3 purports to preserve other laws, including civil nuisance laws, from the bill’s broad grant of present and future immunity. **This provision is of little value, for two reasons. First, public nuisance and similar civil suits are exceedingly difficult to litigate and, for that reason, are almost never pursued with respect to groundwater contamination; that reality will be exacerbated by shielding such operations from administrative investigation and enforcement proceedings. Second, the proposed Legislative findings and declaration language of section 13278 – which, among other things, acknowledges that for some crops nitrate contamination cannot be prevented – would make it even less likely that a court would make a nuisance finding for any groundwater contamination, when the Legislature has essentially said such contamination is inevitable.**

In sum, despite the inclusion of misleading and sometimes-circular language designed to assuage the fears of those concerned about contaminated groundwater, this bill would: (1) institute and embed a pay-to-pollute scheme that allows agricultural polluters to continue degrading California’s increasingly precious groundwater in return for entirely unspecified “applicable fee”; (2) direct the State Board to use that funding for short term solutions like bottled water and wellhead or at-the-tap filtration systems with no long term plan for cleanup or permanent solutions; (3) tie the hands of water boards with respect to agricultural polluters and prohibit either the boards or the courts from taking any effective action to enforce water quality or cleanup standards, thereby incentivizing farmers to continue the “business as usual” that led to our significant water quality problems; (4) make it even more difficult for concerned, organized members of the public to make agricultural polluters responsible for their ongoing degradation of these public trust resources, undermining recent and ongoing administrative and litigation efforts to hold these polluters accountable; and (5) virtually ensure that our groundwater pollution problems continue or worsen.