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### **Water Quality Groups and Fishermen Oppose Giving Polluters Enforcement Immunity in SB 623 (Monning) Proposed Drinking Water Bill**

Today, a coalition working to clean up pollution from California's irrigated agriculture expressed its "oppose unless amended" position to Senate Bill 623, the Safe and Affordable Drinking Water Fund (Monning), in its current form. The bill would create a fund to provide safe and affordable drinking water to communities in need so that they would not have to rely on unsafe groundwater wells that exceed drinking water standards. The coalition strongly supports the creation of the fund, which would give some meaning to California's human right to water law. Everyone has the right to safe and affordable water for consumption and other uses.

But the coalition opposes the part of SB 623 that would give polluters an out. What started as a sound idea – ensuring that even poor communities get clean water – has now been hijacked with language that would immunize agricultural polluters who pay an unspecified "fee" into the new fund from enforcement of the state's basic water quality law. That means that for a fee, these polluters will escape responsibility for past, present, and future pollution. Noah Oppenheim, Executive Director of the Pacific Coast Federation of Fishermen's Associations said, "Agricultural pollution has downslope impacts that don't just harm disadvantaged communities' drinking water supplies, they harm our state's public trust resources. SB 623 can be fixed by eliminating this alarming, precedent-setting 'safe harbor' for polluters, and it should be."

The coalition opposes this pay-to-pollute scheme for several reasons. First, it would undermine enforcement efforts under way that are holding polluters accountable for the harm they have caused. Growers of over 120,000 acres of farmland in the Salinas Valley have agreed, under the state's strong water quality law, to pay for replacement water for affected communities while working on a long-term solution to clean up the polluted water. SB 623 would undercut those efforts at the very moment that we need states like California to stand up against proposed federal rollbacks and protect our public waters. "There is no legal right to pollute and a safe harbor would eliminate present incentives to stop polluting thereby adversely impacting all beneficial uses of water for fisheries, the environment and people," said Bill Jennings, Executive Director of the California Sportfishing Protection Alliance.

Second, California law has never created a pay-to-pollute scheme for water pollution. By giving agricultural operations a pass on pollution that is largely responsible for contaminated drinking water in the first place, the legislature would for the first time move away from the "polluters pay" principle that rightly requires all polluters to reduce ongoing water pollution and clean up existing pollution. Shielding agricultural polluters for a fee not only undercuts this basic principle, but also incentivizes industrial farms and concentrated livestock feedlots to keep polluting rather than find innovative ways to reduce their pollution discharges. "Once the State establishes a pay-to-pollute scheme for agriculture, what industry would want to be next in line to pay to pollute, as it is less expensive than reducing pollution to our waterways." said Garry Brown, Executive Director of Orange County Coastkeeper, "We must stop this proposed pollution scheme."

Finally, SB 623 provides no basis for determining how much agricultural operations would be paying into the fund. The bill states that it will be amended later to seek a funding mechanism from agricultural operations. Thus, there is no way to know how much money SB 623 will actually generate for safe and affordable drinking water. One thing is clear, however: SB 623 will provide short-term replacement water to communities, not long-term solutions, in return for permanent relief for cleanup liability.

In short, the creation of a safe and affordable drinking water fund is an idea that all Californians should get behind. But while we figure out a more permanent solution to the contamination caused by ongoing agricultural practices, California should not be shielding these polluters from compliance with water quality and cleanup requirements.

"California can create a safe drinking water fund without weakening what Californians should be proud of – strong protections in the law to clean up agricultural pollution. Communities drinking harmful water deserve relief," said Steve Shimek, Executive Director of Monterey Coastkeeper.

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Link to SB 623 (Monning):

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB623](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB623)

Attached: Stanford Environmental Law Clinic 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.

The following is an updated analysis of SB 623, as amended on 7/3/17. The 7/3 version is compared with the prior 6/26 version previously analyzed. There are no changes to the Health & Safety Code sections of the bill, only to the Water Code sections. Most of the changes are very minor “cleanup”-type revisions. The substantive differences are as follows, with the **bolded** conclusions intended to evaluate the changes from a strictly environmental perspective:

1. Definitions: The prior exclusions from the definition of what constitutes an “agricultural operation” that may qualify for the safe harbor have been narrowed. Under the old 6/26 language, a “facility” that processes crops or livestock or that manufactures, synthesizes, or processes fertilizer was not eligible for immunity; now, entities engaged in those practices, as well as in the storage of fertilizer, are eligible for the safe harbor unless those practices take place at an “off-farm facility.” That means that on-farm processing, manufacturing, synthesizing, and storing is now eligible for the safe harbor. **Thus, the bill is slightly worse in this regard.**
2. Legislative Findings/Declarations are amended in a few ways:
  - a. Deletes the finding that: *“The Safe and Affordable Drinking Water Fund is established pursuant to Section 116766 of the Health and Safety Code in consideration of and in furtherance of the human right to water that has previously been codified as an established policy of the state”* and replaces it with the finding that: *“Nitrate contamination of groundwater impacts drinking water sources for hundreds of thousands of Californians and it is necessary to protect current and future drinking water users from the impacts of nitrate contamination.”* **The bill thus deletes any reference to implementing the human right to water. The impact of this change is unclear or neutral from a strictly environmental perspective.**
  - b. Revises the previous findings stated that “dischargers will pay for mitigation of past and ongoing pollution by funding replacement water for affected communities” by deleting the words “past and ongoing.” **The reason for this change is not entirely clear, but it appears to give the industry more leeway to claim permanent immunity for any future cleanup liability, as proposed in Water Code section 13278.2(c). The bill thus appears to be slightly worse in this regard.**
  - c. Amends the final Legislative declaration in the bill as follows: “To limit ~~certain~~ **administrative** enforcement actions that a regional board or the state board could otherwise initiate during that ~~10-year~~ **15-year** period against an agricultural operation paying the ~~nitrate mitigation~~ **agricultural** assessment . . . .” **Each of these changes seemingly broadens the scope of the safe harbor protections, making the bill slightly worse in this regard.**
3. Basic Safe Harbor Provision: Amends this core language as follows: “An agricultural operation shall not be subject to enforcement *undertaken or initiated* by the state board or a regional board under Chapter 5 (commencing with Section 13330) for causing or contributing to an exceedance of a water quality objective for nitrate in groundwater or for causing or contributing to a condition of pollution or nuisance *for nitrates in groundwater. . .*” **These amendments clarify that the enforcement immunity applies only to water board actions and only to nitrates in groundwater, making the bill is slightly better in this regard.**

4. General Prohibitions: Both the original and the amended bill provide that an agricultural operation is immune from water board enforcement if it satisfies three “mitigation requirements”: (1) pays an “applicable fee”; (2) is “in compliance with” applicable provisions (including “best efforts” and “best practicable treatment or control” requirements) in an applicable agricultural order; and (3) is “in compliance with” an applicable program of implementation (of which there are none). The 6/26 version of the bill provided that these “mitigation requirements” do not include “any generalized prohibition” (such as general anti-degradation requirements that apply to all dischargers in the state), arguably meaning that an ag operator need not comply with generalized requirements in order to receive enforcement immunity. The 7/3 revised language states: “The mitigation requirement contained in paragraph (2) of subdivision (a) does not include any generalized prohibition *contained in an order adopted under Section 13263 or 13269* 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.” This amendment seems intended to clarify that even when general statewide prohibitions are expressly included in an applicable ag order, they still need not be satisfied to obtain enforcement immunity. **The bill is thus slightly worse in this regard.**
  
5. Additional 5-year Period: The original 10-year immunity has been expanded to 15 years, but during the additional 5 years, the agricultural operator would receive safe harbor only from Water Code section 13304 cleanup and abatement actions initiated by a water board, not from all enforcement actions under Chapter 5 (e.g., cease and desist orders). As is true for the original 10-year period, however, the discharger is still immune from any future enforcement action under Chapter 5 for discharges made during this 5-year extension period. **The bill is worse in this regard because it adds another 5 years of immunity.**

**In conclusion, with one exception, the clarifying and substantive changes between the 6/26 and 7/3 versions make the bill WORSE from an environmental perspective.**