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7 OBISPO AND SANTA BARBARA COUNTIES, and  
WESTERN GROWERS  
8

9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
11

12 In the Matter of Adoption of Order No. R3-2012-  
0011, by the Central Coast Regional Water  
13 Quality Control Board for the Conditional  
Waiver of Waste Discharge Requirements for  
14 Discharges from Irrigated Lands.

SWRCB/OCC File No. A-2209(a)

Grower-Shipper Association of Central  
California, Grower-Shipper Association of  
Santa Barbara & San Luis Obispo Counties,  
and Western Growers' Response to Monterey  
Coastkeeper, Santa Barbara Channelkeeper,  
and San Luis Obispo Coastkeeper's Petition  
Requesting Review of California Regional  
Water Quality Control Board Order  
No. R3-2012-0011

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19 The Grower-Shipper Association of Central California, Grower-Shipper Association of  
20 Santa Barbara & San Luis Obispo Counties, and Western Growers (herein collectively referred to  
21 as "Grower-Shippers") hereby respond to the Petition Requesting Review of California Regional  
22 Water Quality Control Board Order No. R3-2012-0011 filed by the Monterey Coastkeeper, Santa  
23 Barbara Channelkeeper, and San Luis Obispo Coastkeeper (collectively referred to as  
24 "Coastkeeper Petitioners"). The Grower-Shipper response is filed in accordance with the State  
25 Water Resources Control Board's (State Water Board) September 17, 2012 communication, as  
26 revised by the State Water Board's communication dated September 25, 2012. Coastkeeper  
27 Petitioners challenge the Central Coast Regional Water Quality Control Board's (Central Coast  
28 Water Board) decision to revise a proposed staff requirement. Specifically, the Coastkeeper

1 Petitioners challenge the Central Coast Water Board's adoption of Nitrogen Balance ratios as  
2 targets versus regulatory endpoints. (Order No. R3-2012-0011, *Conditional Waiver of Waste*  
3 *Discharge Requirements for Discharges from Irrigated Lands* (Conditional Waiver), p. 30.) The  
4 Coastkeeper Petitioners provide no legal or regulatory support with respect to why Nitrogen  
5 Balance ratios are required for adoption by the Central Coast Water Board. Accordingly, their  
6 Petition should be dismissed in its entirety by the State Water Board.

7 **1. The Challenged Provisions**

8 The provisions at issue here are as follows:

9 Dischargers producing crops in annual rotation (such as cool season vegetable in a  
10 triple cropping system) must report progress towards a Nitrogen Balance ratio  
11 target equal to one (1). A target of one (1) allows a Discharger to apply 100% of  
12 the amount of nitrogen required by the crop to grow and produce yield for every  
13 crop in the rotation. (Nitrogen applied includes any product, form or  
14 concentration, including but not limited to organic and inorganic fertilizers, slow  
15 release products, compost, compost teas, manure, extracts, nitrogen present in the  
16 soil and nitrate in irrigation water.)

17 Dischargers producing annual crops occupying the ground for the entire year (e.g.,  
18 strawberries or raspberries) must report progress towards a Nitrogen Balance ratio  
19 target equal to 1.2. A target of 1.2 allows a Discharger to apply 120% of the  
20 amount of nitrogen required by the crop to grow and produce a yield. (Conditional  
21 Waiver, p. 30.)

22 According to the Coastkeeper Petitioners, having the requirements as progress goals rather  
23 than regulatory endpoints is inconsistent with the biostimulatory substance objectives and  
24 domestic drinking water standards contained in the Water Quality Control Plan for the Central  
25 Coast (Basin Plan), and therefore the requirements as progress goals are inconsistent with the  
26 Basin Plan, and by extension, Water Code section 13269. Such arguments fail for a number of  
27 reasons, including that the Basin Plan does not mandate, or even mention, that Nitrogen Balance  
28 ratios are required to implement water quality objectives contained in the Basin Plan. More  
importantly, the Nitrogen Balance ratios as contained in the Conditional Waiver (as either a  
progress goal or regulatory endpoint) are inappropriate because they are not supported by  
evidence in the record, and because such ratios are impractical to implement.

1     **2.     The Basin Plan Does Not Require the Central Coast Water Board to Adopt Nitrogen**  
2     **Budget Ratios**

3             The Basin Plan sets forth a number of water quality objectives for various constituents, as  
4 is required by the Porter-Cologne Water Quality Control Act (Porter-Cologne). (Wat. Code,  
5 §§ 13050(j), 13240.) Water quality objectives are defined by Porter-Cologne to mean “the limits  
6 or levels of water quality constituents or characteristics which are established for the reasonable  
7 protection of beneficial uses of water or the prevention of nuisance within a specific area.” (*Id.*,  
8 § 13050(h).) When it adopts water quality objectives, the regional water quality control board is  
9 also required to adopt a program of implementation for achieving the objectives. The program of  
10 implementation is required to include:

- 11             (a) A description of the nature of actions which are necessary to achieve the  
12                 objectives, including recommendations for appropriate action by any entity,  
13                 public or private.
- 14             (b) A time schedule for the actions to be taken.
- 15             (c) A description of surveillance to be undertaken to determine compliance with  
16                 objectives. (Wat. Code, § 13242.)

17             Coastkeeper Petitioners essentially allege that Nitrogen Balance ratios as regulatory  
18 endpoints are necessary to ensure that the Conditional Waiver is consistent with the Basin Plan.  
19 Grower-Shippers disagree. The Basin Plan includes a narrative water quality objective for  
20 biostimulatory substances and a numeric water quality objective for nitrate based on the primary  
21 maximum contaminant level (MCL). (Basin Plan, pp. III-3, III-5.) With respect to a program of  
22 implementation, the Basin Plan does not include specific identified actions for meeting these  
23 water quality objectives. Rather, the Basin Plan includes broader program language for the  
24 various types of discharges in the Central Coast region. For irrigated agriculture, which is  
25 considered to be a nonpoint source pollution, the Basin Plan includes a discussion with respect to  
26 best management practices, a Nonpoint Source Program, and agricultural water and wastewater  
27 management. (Basin Plan, pp. IV-5 to IV-7, IV-46.) Nowhere does the Basin Plan identify or  
28 require that Nitrogen Balance ratios must be met by dischargers that are considered to be irrigated  
agriculture to implement the nitrogen related water quality objectives.

1       **3.       The Central Coast Water Board Is Prohibited From Dictating the Manner of**  
2       **Compliance**

3               Moreover, the Central Coast Water Board is prohibited from dictating the manner of  
4 compliance in any order. (Wat. Code, § 13263.) Rather, a discharger may comply with the order  
5 in any lawful manner. (*Ibid.*) The Conditional Waiver includes several provisions that require  
6 compliance with applicable water quality standards. (See, e.g., Conditional Waiver, Provision 22  
7 [“Dischargers must comply with applicable water quality standards, as defined in Attachment A,  
8 protect the beneficial uses of waters of the State and prevent nuisance . . . .”].) According to the  
9 Central Coast Water Board, it is understood that compliance with such standards will be achieved  
10 through the implementation of management practices, and that it will take years to achieve such  
11 compliance. (See, e.g., Transcript, Central Coast Water Board, March 15, 2012, Continuation of  
12 the Hearing on the Waiver of Waste Discharger Requirements Discharged from Irrigated Lands,  
13 p. 54:1-4 [statement of Frances McChesney: “. . . for nonpoint sources, compliance with Water  
14 Quality Standards means to implement management practices. If they aren't effective in reducing  
15 discharges to meet Water Quality Standards, that they revise or do new management practices.”];  
16 see also *id.*, p. 137:8-19 [statement of Chair Jeff Young: “MR. YOUNG: Before I call for a vote  
17 on Dr. Hunter’s motion, I just want to say to the Ag community and the public that I certainly  
18 don’t expect to see possibly even immediate, you know, water quality changes . . . . I know that  
19 this is going to take in some regions -- some part of our regions years and years and years to get  
20 to where we want to be.”].) However, although it is understood that management practices will  
21 need to be implemented, the Central Coast Water Board is limited in its ability to prescribe which  
22 management practices must be implemented. (See *In the Matter of the Petition of the United*  
23 *States Department of Agriculture, Forest Service*, Order No. WQ83-3 (April 21, 1983) (“Forest  
24 Service Order”), pp. 5-6 [“BMPs 9, 23, 13 and 14 [which prescribed erosion control provisions]  
25 go beyond the Regional Board’s authority to limit discharges by specifying details on  
26 compliance.”].) Requiring compliance with a specified Nitrogen Balance ratio to meet water  
27 quality objectives would likely constitute “dictating the manner of compliance,” because it limits  
28

1 discharges by specifying the details of compliance (e.g., apply only 100% of nitrogen required by  
2 the crop).

3 Rather than being a strict regulatory endpoint (or a specified progress goal in the  
4 Conditional Waiver itself), it is more appropriate that growers be required to generally develop  
5 and implement management practices that minimize runoff and leaching of nitrogen applied.  
6 (Forest Service Order, pp. 4-5.) Nitrogen Balance ratio guidelines might be part of such  
7 management efforts at a growers' discretion, but are inappropriate as provisions in the  
8 Conditional Waiver.

9 **4. Nitrogen Balance Ratios As Proposed Are Impractical and Unsupported by Evidence**  
10 **in the Record**

11 To calculate Nitrogen Balance ratios, there must be scientifically valid uptake values  
12 established for the crops in question. At this time, such information does not exist. Specifically,  
13 as testified to by many, including the California Department of Food and Agriculture, most crops  
14 grown in the Central Coast have no scientifically valid uptake values. (May 4, 2011 Central  
15 Coast Water Board Transcript for Hearing on Conditional Waiver, p. 450:18-25 [“MR. HARD:  
16 This regulation as it currently stands, that’s in all tiers, would have growers trying to figure out  
17 what the nutrient uptake values are. There are 52, by our count, crops grown in this region, give  
18 or take one [or] two. Of those 52 crops only two have ever had scientifically evaluated uptake  
19 values. And those two that have been done are not scientifically valid.”].) Accordingly, the lack  
20 of scientifically evaluated and valid information with respect to crop nitrogen uptake makes it  
21 impossible for producers to actually calculate a ratio for their farms/ranches.

22 Because such information does not exist, compliance with (or even progress towards) the  
23 Nitrogen Balance ratios contained in the Conditional Waiver is unrealistic, which makes the  
24 requirements impractical. Moreover, e.g., for crops such as cool season vegetables, the Central  
25 Coast Water Board presumes that producers can effectively and efficiently grow these types of  
26 crops by applying only the exact amount of nitrogen that the crop takes up. (Conditional Waiver,  
27 p. 30.) However, there is no information or findings in the record that support this requirement.  
28 Further, such an approach fails to consider many factors that influence the potential for nitrogen

1 leaching. Such factors include, but are not limited to, soil type, timing of application, and method  
2 of application. As a practical matter, with respect to application of nitrogen in agricultural  
3 systems, it is more important to apply nitrogen at the correct time for the crop using an  
4 appropriate method rather than focusing on total nitrogen applied.

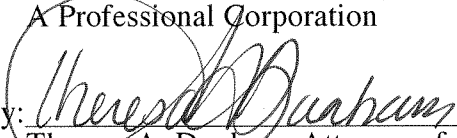
5 Thus, not only are the Nitrogen Balance ratios impractical as a strict regulatory  
6 compliance endpoint, they are also inappropriate as an identified target within the Conditional  
7 Waiver. Accordingly, Coastkeeper Petitioners' allegations must be dismissed.

8 **CONCLUSION**

9 Based on the foregoing, the State Water Board must dismiss the Petition and its claims as  
10 filed by Coastkeeper Petitioners. Further, the State Water Board needs to invalidate the  
11 challenged provisions as requested in the Petitions as filed by Grower-Shippers, as well as Ocean  
12 Mist and the California Farm Bureau Federation.

13 SOMACH SIMMONS & DUNN  
14 A Professional Corporation

15 DATED: October 31, 2012

16 By:   
17 Theresa A. Dunham, Attorneys for Petitioners  
18 Grower-Shipper Association of Central California,  
19 Grower-Shipper Association of San Luis Obispo and  
20 Santa Barbara Counties, and Western Growers  
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**PROOF OF SERVICE**

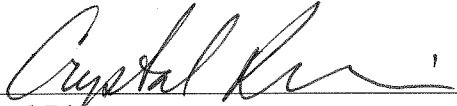
I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On October 31, 2012, I served a true and correct copy of the following documents:

**Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara & San Luis Obispo Counties, and Western Growers' Response to Monterey Coastkeeper, Santa Barbara Channelkeeper, and San Luis Obispo Coastkeeper's Petition Requesting Review of California Regional Water Quality Control Board Order No. R3-2012-0011**

XXX (electronically) On October 31, 2012, at approximately 2:00 p.m., by electronically transmitting a true copy to the person(s) at the electronic mailing addresses as set forth in the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 31, 2012, at Sacramento, California.

  
\_\_\_\_\_  
Crystal Rivera

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