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10 **WILLIAM ELLIOTT**

11 **CALIFORNIA WATER RESOURCES CONTROL BOARD**

12 **In re: Jensen Family Farms, Inc., and**
13 **William Elliott,**
14 **Petitioners**
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) **PETITION TO REVIEW MARCH 15,**
) **2012 ADOPTION BY THE REGIONAL**
) **WATER QUALITY CONTROL BOARD,**
) **CENTRAL COAST REGION, OF**
) **ORDER No. R3-2012-0011**
) **(CONDITIONAL WAIVER OF WASTE**
) **DISCHARGE REQUIREMENTS FOR**
) **DISCHARGES FROM IRRIGATED**
) **LANDS)**

1 Pursuant to Water Code §13320, Jensen Family Farms, Inc.¹ and William Elliott² (as
2 stakeholders and residents of Monterey and San Luis Obispo County, respectively) hereby
3 petition the State Water Resources control Board (“State Board”) to review the March 15, 2012
4 enactment by the Central Coast Regional Water Quality Control Board (“Regional Board”) of
5 Order No. R3-2012-0011 which adopted a “Conditional Waiver of Waste Discharge
6 Requirements for Discharges from Irrigated Lands” (“Conditional Ag Waiver”) that
7 significantly modified and replaced a Conditional Waiver adopted by the Regional Board in
8 2004 and extended by the Regional Board and twice by the Board’s Executive Officer.
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10 **I. NAME AND CONTACT INFORMATION OF PETITIONER**

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12 ¹ Jensen Family Farms, Inc., is a family-owned farming corporation that owns and/or
13 operates six (6) separate farms in the Salinas Valley located between Chualar and Salinas which
14 total approximately 1140 acres currently in production. Those farms are located on (1) Spence
15 Road (which farm abuts Highway 101 as well as the Salinas River for over one mile and, in fact,
16 straddles both sides of the River; (2) Somavia Road (which abuts Highway 101 as well as the
17 Salinas River); (3-4) two farms on Old Stage Road; (5) Esperanza/Old Stage Road (which abuts
18 Highway 101 and is intersected by Esperanza Creek, an impaired water body); (6) Potter Road
19 (which abuts Highway 101); and (7) Blanco Road. It irrigates those farms from well water
20 pumped to the surface and by rain water. Various row crops consisting of iceberg lettuce,
21 romaine lettuce, red leaf lettuce, broccoli and asparagus are grown on the respective farms.
22 Jensen is the present corporate manifestation of what is a fourth-generation family farming
23 operation in the Salinas Valley that dates back more than 100 years. It is among the leaders of
24 “new” farming practices, having been among the first farming entity to engage in large-scale
25 organic farming (in this instance of asparagus) in the Salinas Valley As a non-multinational non-
vertical agribusiness it thus has close ties to the Salinas Valley and, in fact, is preparing for the
next generation to carry on family traditions of nurturing the land. Owned, in great part, by
hunters, fishermen, and life-long farmers, it is dedicated to not only maintaining economically
viable farming in the Salinas Valley but also in taking actions consistent with necessary
reasonable environmental concerns about air, water, and the human environment as a whole.

22 ² It must be noted that Petitioner currently has pending before this Board a Petition seeking
23 review of the Regional Board’s Executive Officer (Roger Briggs) September 30, 2011 renewal
24 and extension, by Executive Officer Order R3-2011-0017 of the termination date of the 2004
25 Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands and
the Executive Officer’s concurrent Update[d] Monitoring and Reporting Program No. R3-2011-
0018 timely filed on or about October 29, 2011, that remains open and concerning which the
270-day “deemed denied” period has not yet lapsed.

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13 **II. REGIONAL BOARD ACTION BEING PETITIONED**

14 This Petition seeks review of the California Regional Water Quality Board, Central
15 Coast Region, Order No. R3-2012-2011, a true copy of which is Exhibit 1 hereto and is
16 incorporated herein by reference (as to the statements made rather than the truth of such
17 statements). As set forth below, a stay of the Order is being requested and is appropriate due to
18 a number of factors, including the proscribed ex parte communications between Regional Board
19 member Michael Johnston and the Regional Board Staff which led, in whole or in part, to
20 modifications in the Order and its adoption, as well as the patent violation of California law,
21 including the Porter-Cologne Water Quality Control Act, California's Environmental Quality
22 Act, and the constitutional right of Petitioners to due process and equal protection under the
23 United States and California constitutions, respectively.

24 **III. THE DATE THE REGIONAL BOARD ACTED**

25 March 15, 2012.

IV. STATEMENT OF REASONS THE REGIONAL BOARD'S ADOPTION OF ORDER NO. R3-2012-0011 WAS INAPPROPRIATE, IMPROPER, AND ILLEGAL

1 In addition to the reasons contained in other Petitions filed by stakeholders with this
2 Board concerning Order No. R3-2012-0011 (which insofar as they are not inconsistent with the
3 issues presented herein for review are incorporated herein by reference), Petitioners state the
4 following reasons establish that adoption of Order No. R3-2012-0011 was inappropriate,
5 improper, illegal, exceeded the statutory authority of the Regional Board, and otherwise violates
6 the constitutional rights of Petitioners:

- 7 1. Illegal and unauthorized ex parte communications were made by Regional Board
8 Member Michael Johnston ("Johnston") with the Regional Board's Executive
9 Director and other members of the Regional Board's staff (all of whom acted as
10 "advocates" of the Staff's proposal that was adopted as the Order) concerning,
11 among other things, the language of specific amendments Johnston wanted to
12 (and did) make to the Staff's proposal adopted by the Regional Board as Order
13 No. R3-2012-0011 without any input or discussion by the public or interested
14 members thereof, and indeed which were introduced and offered up by Member
15 Johnston only after the close of public comment;
- 16 2. The Regional Board failed to comply with the requirements of the Porter-Cologne
17 Water Quality Control Act, Cal. Water Code § 13000 et seq., and specifically §
18 13241 thereof, by failing to conduct, prior to the Order's adoption or at all, the
19 requisite study and consideration of economic considerations impacting the
20 Region as a result of the Order as well as housing development in the Region;
- 21 3. The Order -- in creating a 3-tier system which divides operations (farms,
22 vineyards, and other agricultural related entities such as nurseries) into three
23 categories for purposes of monitoring and administrative convenience depending
24 on the acreage, use of pesticides and fertilizers (chlorpyrifos or diazinon), and
25 proximity to a water body listed for toxicity, pesticides, nutrients, turbidity or
sediment on the 2010 List of Impaired Water Bodies ("3-tier system") -- violates
the due process rights of owners/operators of the tier-classified land by failing to
factor into the definition of which operations goes into which tier matters relating
to levels of sedimentation contained in run-off or other waters leaving the specific
farm or agricultural entity;
4. The Order, by providing the Regional Board's Executive Director with
unrestricted authority to reclassify operations of, for instance, a farm from one tier
to another without specific guidelines that inform the owner/operator of that farm
of the specific bases for reclassification or an appeal mechanism for such
reclassification, violates the due process rights of owners/operators;

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5. The 3-tier system, by failing to take into consideration the geology of the soil and subsoil strata of individual farms or other operations assigned to a given tier as well as the mechanism for return of water used for irrigation to the aquifer or surface bodies of water, is overbroad and overinclusive in violation of the Due Process and Equal Protection rights guaranteed by the United States and California constitutions, respectively;
6. The 3-tier system adopted by the Order is based on an unjustifiable and illegal expansion of the Regional Board's authority under the Porter-Cologne Act to, among other things, groundwater;
7. The Order, by mandating at minimum 30-foot buffer zone relative to impaired bodies of water without setting forth the initial point of measurement (*i.e.*, the middle of the impaired body, the mean high tide level of the impaired body, the bank or other feature of the body of water), is vague, ambiguous, overinclusive, and overbroad in violation of the Due Process rights guaranteed by the United States and California constitutions, respectively;
8. The Order, by creating a minimum 30-foot buffer zone relative to impaired bodies of water, affects a taking of real property in violation of the United States and California constitutions, respectively;
9. The Order, which necessarily requires the installation of infrastructure (for purposes of delivery and actual purification of water by mechanical means such as reverse osmosis) or the set-aside of land for purposes of creating catchment basins, affects a taking of real property in violation of the United States and California constitutions, respectively; and,
10. The Regional Board failed to adequately comply with the requirements of the California Environmental Quality Act by adopting a negative declaration for the Order, thereby failing to accurately or adequately assess and consider the possible significant impacts of the Order to the environment as a whole, including the steps necessary for compliance therewith. Rather than assess or even recognize significant impacts to the environment as whole (including such things as air quality, aesthetics, and agricultural resources), the Regional Board had a hydro-central focus that considered only impacts to water and found that the Order actually beneficially impacted that particular aspect of the environment. A copy of the environmental analysis conducted relative to the Order is Exhibit 2 hereto. Further, the Regional Board's determination that the findings contained in the negative declaration existing relative to the 2004 Conditional Waiver were

1 binding on the 2012 Order as a result of 14 C.C.R. § 15126(a) is wrong as a
2 matter of law and denies owners/operators of land within the Region their right to
3 due process.

4 **V. STATEMENT OF POINTS AND AUTHORITIES**

5 **A. Factual Background**

6 The factual background is fully set forth in the Order, Exhibit 1, and, with regard to the
7 facts only rather than the characterizations contained therein, is incorporated herein by reference
8 for purposes of convenience and to control the length of the Petition.

9 **B. Discussion Of The Order's Infirmities And Illegalities That Require 10 This Board To Refuse To Adopt The Order**

11 **1. Regional Board Member Michael Johnston Engaged In 12 Proscribed Ex Parte Communications With Members of the 13 Regional Board's Staff**

14 Ex parte communications between an advocate and a decision maker in the adjudicatory
15 proceeding is fundamentally at variance with accepted conceptions of due process and, further,
16 violates not only the Rules of this Board but also the California's Administrative Procedure Act
17 and precedents arising thereunder. The determination to adopt the Conditional Ag Waiver was
18 an "adjudicatory" proceeding in which proscribed ex parte communications may not occur
19 between the "advocates" for the waiver (the Regional Board's Staff assigned to the project,
20 including its Executive Director)³ and the "decision makers" (the Regional Board members).
21 However, in spite of this proscription and the inapplicability of any exception to the rule against
22 such communications taking place, Regional Board Member Johnston revealed the existence of

23 ³ A point should be noted concerning the actions and physical placement of the Executive
24 Director during in the actual public hearing on this matter. Unlike most (or, likely, all) other
25 governmental boards, the Executive Director sits on an equal plain with the Board and, in fact, is
surrounded by members of the Board sitting on both sides of him, a position which allows him
from time-to-time to speak sub voce to members of the Board without having his comments
made part of the record. However, at other times, he speaks for the Staff and makes
presentations and representations on behalf of the Staff of which he is the head.

1 ex parte communications between himself and members of the Regional Board Staff concerning
2 certain amendments to findings he wanted to present and upon which adoption of the Conditional
3 Ag waiver was based: e.g.,

- 4 1. On March 14, 2012 during the first day of hearings of the latest Staff proposal
5 for the Conditional Ag waiver, Member Johnson stated that he had “consulted
6 with the Staff” regarding the proposal;⁴ and,
- 7 2. On March 15, 2012, just quite literally moments before a final vote was taken
8 by the Board adopting the Staff Proposal, as amended, Member Johnston
9 further revealed the nature of this prior “consultation” with the Staff
10 (including the Executive Officer) and that it included consultation on an
11 amendment he wanted to offer to Finding No. 11 of the Staff’s Proposal to
12 assure that his amendment was acceptable to the Staff (a conversation that
13 must necessarily have been with staff members advancing the adoption of the
14 proposed Order since who else would have the knowledge needed to reach the
15 determination of whether Johnston’s amendatory suggestions were consistent
16 with what the Staff wanted). The hearing transcript of the March 15 hearing
17 (the relevant portions of which are attached as Exhibit 3 hereto) provides:

19 “I gather you’ve, Mr. Chairman, because it was shared with you,
20 although none of the other Board members, is I have worked with
21 the Executive Officer and counsel over the last week or so on this
22 on a couple of different pieces of language [amending Finding No.
23 11]” [March 15 Hearing Transcript at 94:5-9, 110: 13-15].

24 “MR. YOUNG: I think it’s a great proposal ... **So how much of**
25 **this did you write?**

24 ⁴ A transcript of the March 14, 2012 hearing has not yet been prepared by the Regional
25 Board. Petitioners will supplement this petition with a copy of the relevant pages of that
transcript when it becomes available.

1 MR. JOHNSTON: **About half** ... [March 15 Hearing Transcript
113: 18-25 (emphasis supplied)]

2 “MR. JOHNSTON: In answer to your question about how much I
3 wrote, this was a back and forth between ... myself, [Executive
4 Officer] Roger [Briggs], Frances [McChesney, counsel]. **And I
would imagine that Roger was consulting other Staff on it**

5 MR. YOUNG: Right. **Is this acceptable to Staff?**

6 MR. BRIGGS: **That was the reason Mr. Johnston wanted to
vet it instead of dropping it here to see if it would be
7 acceptable...** “ [March 15, 2012 hearing Transcript 114:5-14
(emphasis supplied)].

8 In other words, the “decision maker” consulted with the “advocate” on the terms and
9 language the “decision maker” wanted to include and adopt as the “final decision” in order to
10 assure himself that the terms he wanted to adopt were acceptable to the “advocate”⁵ while, at the
11 same time, not allowing any notice to the public that such an amendment would be made and,
12 resultantly, precluding any “public” input into the process and contents of the Finding prior to
13 the time it was presented. See ,e.g., English v. City of Long Beach (1950) 35 Cal.2d 155, 158.
14 That is the paradigm of a proscribed ex parte communication. To put it bluntly, such contacts do
15 not pass the “smell test” and taint the entirety of the final adoption of the Order. Indeed, as
16 addressed elsewhere herein, the presence of such proscribed communications and taint require
17 the entry of an immediate stay of the Order pending a final determination by this Board on the
18 present (and other) petitions.

19 _____
20 ⁵ The existence of such ex parte communications and Johnston’s stated reasons for making
21 them – i.e., “Mr. Johnston wanted to vet it instead of dropping it here to see if it would be
22 acceptable [to the Staff]” – raises a real concern about the entirety of the procedures leading up
23 to the Order’s adoption of the Proposal prepared by and otherwise approved by the Regional
24 Board’s staff (including its Executive Officer). That concern, simply stated, is that the Regional
25 Board simply accepted at face value and rubber-stamped what the Staff wanted, proposed, and
wanted to have approved that would greatly increase their power over the agricultural
community in the Region. If the situation were otherwise, why would an independent Regional
Board member feel the necessity of obtaining the pre-approval by the Staff of changes he wanted
to make in the Order as proposed by the Staff. That most certainly is a situation not envisioned
by Porter-Cologne and clearly taints the public perception of the procedural fairness and
constitutional compliance attending the adoption of the Order.

1 California's Administrative Procedure Act ("APA"), Govt. Code § 11430.10 et seq.,
2 broadly prohibits ex parte contacts between agency parties and decision makers during
3 administrative adjudicative proceedings:

4 "While the proceeding is pending there shall be *no communication, direct or*
5 *indirect, regarding any issue in the proceeding*, to the presiding officers from an
6 employee or representative of an agency that is a party ... without notice and
7 opportunity for all parties to participate in the communication."

8 Govt. Code § 11430.10(a)(italics added). A "presiding officer" is defined as an officer or
9 officers who preside over a hearing, [id at § 11405.80], but other provisions of the
10 Administrative Procedure Act expressly extend this prohibition to all decision makers, including
11 agency heads and their delegees, whether or not they preside over an evidentiary hearing:

12 "Subject to subdivision (b) [governing ratemaking proceedings], the provisions of
13 this article governing ex parte communications to the presiding officer also cover
14 ex parte communications in an adjudicative proceeding to the agency head or
15 other person or body to which the power to hear or decide in the proceeding is
16 delegated."

17 Id. at § 11430.70(a). The proscription against ex parte communications thus most assuredly
18 extends to communications with the Executive Officer as well as the lower-level members of the
19 Regional Board's Staff.

20 It is, of course, true that other provisions of the APA slightly narrow section 11430.10
21 prohibitions. As relevant here, communications are permitted regarding uncontroversial
22 procedural matters. See Section 11430.20(b). Further, an agency decision maker may receive
23 advice from **nonadversarial** agency personnel. That is, an otherwise prohibited ex parte
24 communication will be allowed if it is
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26 "for the purpose of assistance and advice to the presiding officer from a person
27 who has not served as investigator, prosecutor, or advocate in the proceeding or
28 its preadjudicative state. An assistant or adviser may evaluate the evidence in the
29 record but shall not furnish, augment, diminish, or modify the evidence in the
30 record."

1 Section 11430.30(a). However, neither of these exceptions permit adversarial agency Staff or
2 employees to have off-the-record contact about substantive issues with the agency head or other
3 persons or bodies to having the power to decide the issue such as members of the Regional
4 Board. Thus, as the California Supreme Court held in Department of Alcoholic Beverage
5 Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.4th 1, 10,

6
7 “the APA sets out a clear rule: An agency prosecutor cannot secretly
8 communicate with the agency decision maker or the decision maker’s adviser
9 about the substance of the case prior to issuance of a final decision.”

10 The APA’s proscriptions and exceptions have been adopted by this Board as well as the
11 Regional Board as evidenced by the September 17, 2008 Memorandum from the Office of the
12 Chief Counsel To this Board and the Regional Boards re. “TRANSMITTAL OF EX PARTE
13 COMMUNICATIONS QUESTIONS AND ANSWERS DOCUMENT.” As relevant here, this
14 Board defines an ex parte communication as being

15 “a communication to a board member from any person about a pending water
16 board matter that occurs in the absence of other parties to the matter and without
17 notice and opportunity for all parties to participate in the communication. People
18 often refer to these communications as ‘one-sided,’ ‘off-the-record,’ or private
19 communications between a board member and any person concerning a matter
20 that is pending or impending before the applicable water board.”

21 Id. at p. 1 (Question 1). This Board has determined that certain staff members may communicate
22 with board members without violating the ex parte rules:

23 “Certain staff may communicate with the board members without violating ex
24 parte rules. Staff may communicate with water board members about a pending
25 adjudicative proceeding under three circumstances. Staff and legal counsel will
generally be responsible for knowing their assignments on specific proceedings,
and will only contact board members if appropriate pursuant to one of the
following circumstances. ...

- (1) *Staff Assigned to Assist and Advise the Board:* In virtually all circumstances there are some staff (including at least one attorney) assigned to assist and advise a water board. **These staff**

1 **members are not advocates for a particular action, and in fact,**
2 **cannot have served as ... advocates in the proceeding or its**
3 **pre-adjudicative stage for the ex parte exception to apply.**
4 **These staff members may evaluate the evidence in the record**
5 **but shall not furnish, augment, diminish, or modify the**
6 **evidence in the record....**

7 (2) *Staff Advising the Board on a Settlement Offer*

8 (3) *Staff Advising the Board in Nonprosecutorial Proceedings...*

9 Id. at pp. 8-9 (Question No. 22)(emphasis supplied, italics in original). As relevant here, the
10 Board has recognized that included amongst the consequences for violating the ex parte
11 communication prohibition are disqualification of the board member, and/or having the
12 communication “be used as a basis for a subsequent legal challenge to the board’s adjudicative
13 action, especially if the communication is not properly disclosed and the board member
14 participates in the proceeding.” Id. at p. 10 (Question No. 25).

15 It must also include the rejection of the Order and a remand of it to the Regional Board,
16 which remand could allow it to proceed without the taint of Johnston’s participation. Indeed, the
17 remedy for Member Johnston’s violation of the ex parte communication rules and the APA is
18 remand of the Resolution to the Regional Board for consideration of the matter untainted by such
19 conduct and, frankly, recusal of Member Johnston from any further consideration of the
20 Resolution or of the Conditional Ag. Waiver. Application of these remedies, however, does not
21 require or rest on the existence of prejudice to Petitioners from the ex parte communication. See
22 Rondon v. Alcoholic Beverage Control Appeals Bd. (2007) 151 Cal.App.4th 1274, 1290
23 (generally a violation of an unqualified prohibition on ex parte communication requires no
24 showing of prejudice to invoke the appropriate remedy.)
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1 The bottom line on all of this is that the Petitioners' right to due process under both the
2 United States and California Constitutions has been violated.⁶ See, e.g., RZS Holdings AVV v.
3 PDVSA Petroleo S.A. (4th Cir. 2007) 506 F.3d 350, 357. Without rejection and reversal of the
4 Resolution, robust civil rights claims can and will be made against the Board for such violations.
5 After all, as the United States Supreme Court held in Morgan v. United States (1938) 104 U.S. 1,
6 18:

7 "The right to a hearing embraces not only the right to present evidence, but also a
8 reasonable opportunity to know the claims of the opposing party and to meet
9 them. The right to submit argument implies that opportunity; otherwise the right
may be but a barren one."

10 That obviously did not occur. Even though both Member Johnston and the Staff knew of the
11 amendment that Johnston would be introducing before the meeting and, indeed, during the public
12 comment section of it, no disclosure was made of the amendment or the facts pertaining to the
13 Staff's involvement until after the public comment period had closed (which was, in fact, long
14 after the ability to submit any new matter or comment by the public had been ended by the
15 Regional Board.

16 **2. The Order Is Illegal Since It Fails To Comply With The**
17 **Requirements Of Water Code § 13241 Due To The Pre-Enactment**
18 **Failure By The Regional Board To Consider, Among Other Things,**
19 **Various Economic Considerations Relating To The Impact Of The**
20 **Order**

20 ⁶ See Morongo Band of Mission Indians v. State Water Resources Control Bd. (2009) 45
21 Cal.4th 731, 736:

22 "Under the Fifth Amendment to the United States Constitution, '[n]o person shall
23 ... be deprived of life, liberty, or property, without due process of law.' (See also
24 U.S. Const., 14th Amend. ['[n] state shall ... deprive any person of life, liberty, or
25 property, without due proves of law.']) In almost identical words, the California
Constitution likewise guarantees due process of law. (Cal. Const., art. I, §§ 7,
subd. (a) ['A person may not be deprived of lie, liberty or property without due
process of law'], 15 ['Persons may not ... be deprived of life, liberty or property
without the due process of law.'])"

1 The Order violates the Porter-Cologne Water Quality Control Act, Cal. Water Code §
2 13241.⁷ Section 13241 is of great import since it defines the duties of the regional boards and
3 provides, in pertinent part,

4 “Each regional board shall establish such water quality objectives in water quality
5 control plans as in its judgment will ensure the reasonable protection of beneficial
6 uses and the prevention of nuisance; however, it is recognized that it may be
7 possible for the quality of water to be changed to some degree without
unreasonably affecting beneficial uses. Factors to be considered by a regional
board in establishing water quality objectives shall include, but not necessarily be
limited to, all of the following: ...

8 **(d) Economic considerations.**

9 **(e) The need for developing housing within the region.**

10 **(f) The need to develop and use recycled water.”**

11 (Emphasis supplied). A review of the Order and its accompanying record reveals that the
12 Regional Board did not adequately, if at all, address these matters (a consideration or discussion
13 that is necessarily separate and apart from any discussion of such factors under a California
14 Environmental Quality Act analysis, particularly since economic considerations under CEQA are
15 relevant only insofar as they have a direct relationship to environmental effects.) This sort of

16 ⁷ As is noted in City of Burbank v. State Water Resources Control Bd., 35 Cal.4th 613, 619
17 (2005)(fns. omitted):

18 “In California, the controlling law is the Porter-Cologne Water Quality Control
19 Act.... [Citation.] Its goal is ‘to attain the highest water quality which is
20 reasonable, considering all demands being made and to be made on those waters
21 and the total values involved, beneficial and detrimental, economic and social,
22 tangible and intangible.’ (§ 13000) The task of accomplishing this belongs to the
23 State Water Resources Control Board (State Board) and the nine Regional Water
24 Quality Control Boards; together the State Board and the regional boards
25 comprise ‘the principal state agencies with primary responsibility for the
coordination and control of water quality.’ (§ 13001.) ... [¶] Whereas the State
Board establishes statewide policy for water quality control (§ 13140), the
regional boards ‘formulate and adopt water quality control plans for all areas
within [a] region’ (§ 13240). The regional boards' water quality plans, called
‘basin plans,’ must address the beneficial uses to be protected as well as water
quality objectives, and they must establish a program of implementation. (§
13050, subd. (j).)”

1 patent violation of the statutory basis for the Board taking any action at all not only affects a
2 great embarrassment to the Board itself but, more importantly, also negatively impacts the
3 legality of the Board's actions as a whole since it renders its adopted Order categorically
4 arbitrary, unreasonable, and capricious.

5 Before proceeding with the economic impact of the Proposal, it should be noted that a
6 loss of production that would be associated with lands being set aside for the 30-foot buffer zone
7 conflicts with the California Leafy Green Marketing Agreement (see www.ccof.org/leafygreens)
8 and the "super metrics" adopted by the California food production industry to address food
9 safety concerns. Neither of these matters were, of course, discussed or even addressed by the
10 Staff in its Proposal or by the Regional Board in its enactment of the Order.

11 That the Order (just as the Proposal made by the Staff which was wholesale adopted by
12 the Regional Board) will have and has an enormous impact on the agricultural economy of the
13 Region – which is by far the largest segment of the Region's economy – is obvious to anyone
14 willing to look at the situation with open eyes and a non-hydrocentered focus. Indeed, it is not at
15 all speculation that the 30-foot buffer zone will cause literally thousands of acres of farmland
16 now under cultivation to cease being under cultivation. The direct economic impact of that is
17 obvious and non-speculative: fewer crops will be grown resulting in fewer crops being sold and
18 otherwise being made available to the public which lowers profits and the funds available for use
19 by the owner/operator to "grow" the Region's economy. All of these are a surefire means of
20 affecting economic stagnation in an industry which is now just about the only California industry
21 successfully working its way out of the current recession and economic downturn.
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23 The economic market place reaction alternative to lower profits for the farmer is, of
24 course, an increase by the farmer in the sale price of his produce. That increase directly results
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1 in higher food costs to the public (which, like higher gasoline costs) further contributes to
2 inflation and economic stagnation. That such would have a great effect on the ever-increasing
3 rate of inflation in the domestic economy and, particularly, in its food sector is obvious and was
4 ignored by the Staff (initially) and by the Regional Board in adopting the Order.

5 Further, the amount and a decrease in the value of the land currently under cultivation
6 which the Order affects due to the 30-foot buffer zones under the Order is the inexorable result
7 of having to let the buffer area lay fallow in terms of crop production. That will necessarily
8 result in a significant decrease in land values and accompanying property taxes paid which, in
9 turn, impacts the amounts of money available to local, county, and state governmental units
10 (including this Board). Such “economic considerations” was also overlooked, ignored, and
11 played no role in the decision to adopt the Order. Just as a decrease in property taxes will result
12 in further layoffs and furloughs of public employees, cutbacks in the number of laborers
13 necessary to service the agricultural industry in the Region occasioned by having significantly
14 fewer acres available for cultivation will occur: the results of that will be a reduction in the
15 monies being spent in the Region’s economy, an increase in governmental benefits being paid to
16 the unemployed, a movement of individuals out of the region, increased foreclosures of homes
17 now being purchased by unemployed laborers, and the resulting impact on the taxes that may be
18 collected by the local and state governments. Indeed, a cascading detrimental economic effect
19 and impact is likely to occur as a result of the Order. But that apparently was of no moment,
20 concern, or of sufficient weight for the Board to consider prior to its enactment of the Order.

22 Other aspects of the Order (including the costs attendant to purchasing, maintaining, and
23 operating the technologies necessary to comply with the pollution control guidelines)⁸ will have
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25 ⁸ As addressed below, the conducting of the study of the economic considerations
emanating from enactment of the Order cannot be explained away or evaded by the statutory

1 a similar economic impact: farmers will have to charge more for their products in order to
2 maintain their presently slim profit margins, the cost of living and inflation will increase due to
3 the rising cost of agricultural products, laborers will either not be hired or will be terminated as
4 cost-savings measures necessary to maintain the economic integrity of the farms (the effect of
5 which will be the same as that mentioned above). A variety of other dire economic results will
6 also obtain. In other words, the “butterfly effect” poses a serious economic result to the Region
7 and, indeed, to the country’s economy as a whole (noting that, for instance, the CPI increased
8 approximately 1% in 1995 when, due to widespread flooding in the Salinas Valley, few crops
9 were harvested and the costs of vegetables/lettuce/berries, both domestic and imported,
10 increased).

11 These types of economic considerations were overlooked, ignored, and did not in any
12 way factor into setting the terms of the Order or in consideration of its impact on the farming,
13 viticulture, and nursery industries in the Region. See, e.g., City of Arcadia v. State Water
14 Resource Control Bd. (2006) 135 Cal.App.4th 1392, 1416-1418. That is a blatant violation of

16 limitation contained in Water Code § 13360(a) of the Regional Board’s authority to order
17 farmers, for instance, to acquire a given piece of machinery or other means necessary to comply
18 with the Order’s wastewater purification requirements:

19 “No waste discharge requirements or other order of a regional board shall
20 specify the design, location, type of construction, or particular manner in which
the compliance may be had with the requirement, order, ... “

21 However, the fact that the Regional Board may not specify which given technology must be used
22 in order to affect compliance with the discharge requirements does not mean that in conducting
23 either the “economic consideration” analysis required by Section 13241 or, for that matter, the
24 environmental impact analysis required under CEQA that such available means may be ignored
25 so as to avoid conducting the required analysis in a legally sufficient way. That is, for purposes
of example only, if the only technologically available means for purifying tail water to drinking
water purity level is reverse osmosis, then the economic impact attending the purchase,
operation, and maintenance of reverse osmosis machinery is an “economic consideration” that
must be investigated just as the installation of such a machinery has a possibly significant
environmental impact that must be factored into any CEQA analysis as discussed below.

1 Section 13241 which, without more, requires rejection of the Order by this Board and a remand
2 to the Regional Board with instructions to comply with the statute's requirements.

3 Indeed, the failure to comply with the requirements of Section 13241 is so blatant and has
4 such a pervasive impact that such a failure supplies more than an adequate basis for issuance of
5 an immediate stay of the Order pending final review by this Board.

6 **3. The Order's Creation Of A 3-Tier System Into Which All Irrigated**
7 **Lands Are Classified But Which Does Not Factor Into Its Parameters**
8 **The Release Of Sediment As A Definitional Matter For Tier Assignment**
9 **Renders The Order Arbitrary, Unreasonable, And Capricious And**
10 **Violates The Due Process Rights Of Owners/Operators**

11 The primary operational monitoring mechanism created by the Order is a 3-tier system
12 under which all owners/operators lands are categorized. The categorization factors are: (1) the
13 size of the farm (50 acres or under fall into Tier 1 while farms having greater than 500 acres fall
14 within Tier 3); (2) the use of chlorpyrifos or diazinon; (3) proximity to an impaired water body
15 (being at least 1000 feet from a surface body of water places it in Tier 1 while closer proximity
16 to surface bodies places it in Tier 3). The focus of the tier system is thus on the use of proscribed
17 pesticides or fertilizers since, after all, the environmental impact of nitrates is the primary target
18 of the Order. In creating these various tiers, however, the risk and amounts of sediment that
19 would be released by, for instance, Tier 1 farms is generally overlooked and, when addressed, is
20 addressed singularly as an afterthought. The failure to factor the threat of sedimentation in to the
21 definition of, for instance, Tier 1 is thus a fatal flaw since it excuses such a threat for farms
22 falling within that category while placing restrictions on farms falling into Category 3 (which
23 does deal with the sedimentation threat in terms of defining whether the land fits within that
24 category). Such uneven and disparate treatment renders the Order unreasonable and provides a
25 sound basis for its rejection.

1 **4. The Order Provides An Unrestricted Authority To The Executive**
2 **Director To Categorize Or Recategorize Land Into Different Tiers In The**
3 **Absence Of Any Specified Standards Or Acceptable Means Of Review**

4 A review of the Order reveals that almost total authority over agriculture, viticulture, and
5 nurseries in the Region is vested in the Executive Director. The Executive Director can, for
6 instance, decide whether a given farm should be recategorized from a Tier 1 status to a Tier 2 or
7 3 status. He may do so even though the Order does not specify the standards he is to apply in
8 making such a determination since whether the given farm – say one that is classified as a Tier 1
9 farm – has taken some action that informs his belief that it must be recategorized at his fiat and
10 without adequate review by the Regional Board. That falls within the paradigmatic definition of
11 what constitutes a deprivation of the due process rights of the owner/operator and serves as basis
12 for the rejection of the Order by this Board.

13 **5. The 3-Tier System Categorization Factors Do Not Take Important**
14 **Factors Into Account – Such As The Geology Of A Given Farm’s Soil Or**
15 **Subsurface Strata – In Assigning A Given Farm To A Given Tier**

16 In a purported effort to avoid having “one size fits all” rules for all areas within the
17 Central Coast Region to eradicate nitrates from the Region’s waters, the Order creates the above-
18 noted 3-tier system. However, in creating that system, the Order overlooked a key factor which
19 renders that system fatally flawed and violative of the due process rights of owners/operators of
20 agricultural land. That overlooked and unprocessed factor is the geology and subsurface strata
21 underlying the various areas within the Region as well as the mechanisms for return of water
22 used for irrigation to the aquifer or surface bodies of water. Failure to make such considerations
23 factors for determining into which Tier a given farm falls renders the Order so flawed and
24 deficient that it violates the constitutional rights of the property owner.
25

1 In an effort to punish all owners/operators for the abusive practices of only a few
2 owner/operators, the Order's 3-tier regime fails to take into account the assimilative capacity of
3 soil. There is considerable treatment of water that occurs as the water makes its way through the
4 soil profile. In many areas it can be reasonably expected that there will be significant dilution
5 and attenuation of constituents prior to reaching any groundwater extraction or egress point. In
6 addition, the Order fails to consider that the assimilative capacities of lands covered under the
7 Order vary greatly and that such capacities strongly define the threat to the environment that the
8 Order seeks to address and cure. Indiscriminately using first encountered zone measurements
9 may produce inconsistent and inaccurate results. Because there is a significant possibility that
10 dilution of constituents will occur before discharge reaches the level at which it is put to
11 beneficial use, and a substantial likelihood that groundwater data collected at the first
12 encountered zone will bear little relationship to the actual impact on beneficial uses in that area,
13 determining compliance with water quality objectives in the first encountered zone is
14 inappropriate.
15

16 Moreover, crop, soil, vadose zone, and/or groundwater uptake of potential contaminants
17 effectively mitigates pollution in many cases and are factors which the tiering system does not
18 take into account. As an example, clay layers exist in many parts of the groundwater system in
19 the Salinas Valley – such as Chualar clay which is uniquely located north of Chualar in
20 Monterey County⁹ – that prohibit or greatly inhibit the downward movement of water in many
21 areas, and thus isolate deeper waters with beneficial uses from contamination by possible
22 percolating water from irrigated lands. It cannot be – but was by the Order -- further overlooked
23 that water moves through soil due to two types of forces – gravity and capillary tension.
24

25 ⁹ See National Cooperative Soil Survey, "Chualar Series" (03/2003), which may be found
at http://socialseries.sc.egov.usda.gov/OSD_DOCS/C/Chualar.

1 Capillary forces pull water from wet areas into dry areas in any direction. Gravity pulls water
2 downward. Capillary forces vary greatly in magnitude depending on the water content in a given
3 soil and by soil texture. Capillary forces dominate flow conditions in unsaturated soils, while
4 gravity only governs flow in saturated soil conditions. See Gardner, Dr. W.H., How Water
5 Moves in Soil (University of Washington 1979). Thus,

- 6 1. Surface evaporation and transpiration can create extremely dry near-surface soil
7 conditions in more arid areas, such as many areas within the Central Coast region;
- 8 2. Soil moisture content generally increases with depth, so capillary forces can tend
9 to wick water from moist, deep percolation areas toward the adjacent near-surface
10 dry soils rather than downward. This is more likely where more thickness of
11 unsaturated sediments is present between the surface and deep groundwater.
- 12 3. Similarly, alternating layers of coarse- and fine-grained sediments can serve as
13 capillary breaks that also act to retard downward movement of groundwater.

14 The Order does not factor in such differentials and treats all dirt the same for purposes of
15 compliance and monitoring. That is an overwhelmingly flawed approach which renders the
16 Order and its central tiering feature totally arbitrary and an abuse of discretion.

17 **6. The Three-Tier Approach Is Based On An Unjustifiable And Illegal**
18 **Expansion Of The Regional Board's Authority As Set Forth In Porter-**
19 **Cologne.**

20 The Order rests on an unjustifiable and illegal expansion of the Regional Board's
21 authority. That authority includes surface water but does not extend to groundwater which the
22 Order most certainly includes within its proscriptive limits. The Order wrongfully assumes that
23 virtually all irrigated agricultural lands, including those that do not drain to surface waters of the
24 State, must be considered as discharging to groundwater (e.g., those lands falling into Category
25 1). That is a factually incorrect assumption. For example, lands that are farmed many hundreds
of feet above groundwater and use drip irrigation constituting only a few inches of irrigation

1 water during the summer months coupled with annual winter rainfall of less than ten inches – a
2 situation existing in large areas of the southern Salinas Valley -- have absolutely no percolation
3 or discharge to groundwater whatsoever, and much less have the capability of carrying a
4 contaminant from the surface many hundreds of feet to underlying underground water, which
5 itself may be decades or hundreds of years old, and may have originated dozens of miles away.
6 And yet, such lands fall within the Order.

7 This erroneous conclusion that all irrigated lands discharge to groundwater leads to the
8 erroneous conclusion that the Regional Board even has jurisdiction over all lands and under that
9 alleged jurisdiction the Regional Board has regulatory authority over all irrigators.¹⁰ That
10

11

¹⁰ This is particularly so, for instance, with regard to cattle ranches which abound in number
12 and acreage within the Central Coast Region. These ranchers were faced with an economic
13 burden to comply with the 2004 regime which has actually been increased by the Order even
14 though the Board has failed in the administrative record or at all to demonstrate that their
15 operations have any a significant effect on water quality. Despite this, the Board's past and
16 present actions have presumed that the presence of cattle and grazing on irrigated pasture results
17 in a discharge of water that affects water quality. Additionally, the idea that the natural flow of
18 stormwater from non-irrigated land is presumed to constitute a discharge of waste to the waters
19 of the State and that irrigation of any portion of a parcel has rendered entire parcels – including
20 un-irrigated sections – subject to the Proposal's presumptions is without any factual support in
21 the Record. Thus, the Order should have – but did not – avoid the presumption that water
22 running off of irrigated pasture inherently constitutes a discharge of pathogens or other
23 constituents of concern. As stipulated by Porter-Cologne, only activities that discharge or
24 propose to discharge wastes that affect water quality must be covered by regulatory regimes
25 authorized by the Water Code.

20 Further, pursuing enforcement actions or sending Section 13267 letters based on the
21 broad assertion that, by irrigating a landowner is also discharging and therefore is subject to
22 restrictions and compliance under the Order is inconsistent with the law. Section 13267 of the
23 Water Code specifically states that “in requiring those reports, the regional board shall provide
24 the person with a written explanation with regard to the need for the reports, and shall identify
25 the evidence that supports requiring that person to provide the reports.” Requiring all irrigators
to comply with the Order without the Regional Board providing sufficient evidence
inappropriately shifts the burden of proof to the farmer or rancher where state law indisputably
requires the Regional Board to present evidence of a discharge prior to requiring compliance
under the Order. The Order should – but does not – recognize that not all irrigators within the
Region discharge and thus not all are subject to the regulation and categorization in to one of the
3 categories.

1 assertion of jurisdiction and the requirement that all irrigators must comply with the Proposal's
2 restrictions and mandates ignores the Regional Board limited authority relative to discharges that
3 affect the water quality of waters of the state. See Water Code § 13000 et seq.. This assumption
4 of discharge attempts also to shift the burden of proof from the Regional Board to the farm
5 owner or land operator to disprove the erroneous postulation that all irrigated lands discharge
6 water to groundwater. This is also inconsistent with the burden expressly outlined in Water
7 Code § 13267(b)(1), which states that the Regional Board "shall provide a written explanation of
8 the need for such reports and shall identify the evidence that support requiring reports."

9
10 A fundamental limitation of the Regional Board's authority to regulate irrigation
11 practices is that the activity must result in a "discharge of waste" that impacts water quality.
12 Simply because it would be "difficult" or would be "administratively inconvenient" to determine
13 whether individual irrigated lands are creating a discharge of waste does not eliminate the
14 Regional Board's statutory obligation to only regulate activities that actually create a discharge
15 of waste. The general notion underlying the Order is of groundwater's vulnerability, and that
16 notion is not a surrogate to establishing jurisdiction and cannot be used as the basis for (1)
17 assuming discharge to groundwater aquifers or (2) placing virtually all parcels in Tier 2 or 3. To
18 do so would be unreasonable because landowners would be faced with the burden of trying to
19 "prove" a negative, which if achievable at all, could only be done at unreasonably great expense.
20

21 **7. The Order's Imposition Of A 30-Foot Buffer Zone Adjacent To Impaired**
22 **Bodies Of Water Is Unconstitutional And Is Otherwise Defective Since**
23 **The Order Fails To Define The Incepting Point Of Measurement**

24 The Order mandates that each farm, vineyard, or nursery having irrigated lands abutting a
25 water body listed in the 2010 List of Impaired Water Bodies must create a 30-foot buffer zone
adjacent to the water body in which no cultivation can occur. However, the Order does not

1 specify whether measurement of that buffer begins at the bank (defining some definite bank as
2 opposed to one that changes with the rate of flow of the water), in the middle of the body of
3 water, or at the historic high or low water point. That makes it impossible for owners/operators
4 of such lands to know where they must place the buffer. That water bodies change course or
5 banks is too well-known to require elaboration. Indeed, writing relative to the Salinas River (a
6 river of greatest concern to the Regional Board), John Steinbeck described this particular feature:

7 “From both sides of the valley little streams slipped out of the hill canyons and
8 fell into the bed of the Salinas River. In the winter of wet years the streams ran
9 full-freshet, and they swelled the river until sometimes it raged and boiled, bank-
10 full, and then it was a destroyer. The river tore the edges of the farm lands and
11 washed whole acres down ... Then when the late spring came, the river drew in
12 from its edges and the sandbanks appeared. And in the summer the river didn't
13 run at all above ground. ... The Salinas was only a part-time river. The summer
14 sun drove it underground. It was not a fine river at all, but it was the only one we
15 had, and so we boasted about it – how dangerous it was in the wet winter and how
16 dry it was in a dry summer. You can boast about anything if it's all you have.
17 Maybe the less you have, the more you are required to boast.”

18 John Steinbeck, East of Eden at 1 (Viking Press 1952).

19 The result of this inexactness is that the Order affects a violation of the owner/operator's
20 constitutional right to due process. Without having been told of what is expected of them
21 relative to placement of the buffer zone, the owner/operator may not comply with the Order, a
22 paradigmatic situation long-recognized by the Courts as affecting a deprivation of the right to
23 due process.

24 **8. The Order's Requirement That Owner/Operators Create A 30-Foot
25 Buffer Zone Adjacent To Impaired Bodies Of Water Results In A
Regulatory Taking Of Real Property In Violation Of The United States
Constitution**

The Order's requirement that owner/operators create a 30-foot buffer zone from what is
now cultivated land having a value commensurate with its productivity is also unconstitutional

1 since it affects a regulatory takings of real property in violation of the Fifth Amendment to the
2 United States Constitution, made applicable to the States by the Fourteenth Amendment.

3 The Fifth Amendment of the United States Constitution, made applicable to the States
4 (and its political subdivisions such as the Board by the Fourteenth Amendment) specifically
5 protects private property from governmental incursions by preventing “private property [from]
6 be[ing] taken for public use without just compensation.” U.S. Constitution, Amend. V.¹¹ The
7 “Fifth Amendment's guarantee that private property shall not be taken for a public use without
8 just compensation was designed to bar Government from forcing some people alone to bear
9 public burdens which, in all fairness and justice, should be borne by the public as a whole.”
10 Armstrong v. United States, 364 U.S. 40, 49 (1960). Indeed, James Madison, often described as
11 “the Father of the Constitution,”¹² explained that such protection is government's chief
12 responsibility,¹³ because, in the words of Arthur Lee, a Founding Father from Virginia, property
13 is the “guardian of all rights.”¹⁴

15 _____
16 ¹¹ Yet, rather than the barrier of a property rule, the Constitution protects private property
17 by placing in front of the government the hurdle of a liability rule. See Preseault v. I.C.C. (1990)
18 494 U.S. 1, 11 (“[the Fifth Amendment] is designed ‘to secure *compensation* in the event of
19 otherwise proper interference amounting to a taking’ ” (emphasis in original)). See generally
20 Guido Calabresi & Douglas A. Melamed, Property Rules, Liability Rules and Inalienability:
21 One View of the Cathedral. 85 Harv.L.Rev. 1089 (1972)(discussing property rules and liability
22 rules).

23 ¹² See, e.g., Gonzales v. Raich, (2005) 545 U.S. 1, 57 (2005)(’Connor, J., dissenting); West
24 Lynn Creamery, Inc. v. Healy (1994) 512 U.S. 186, 193 n. 9; Nelson v. Carland (1843) 42 U.S.
25 265, 273. See generally Irving Brant, James Madison: Father of the Constitution, 1787-1800
(1950).

¹³ Thus, in a 1792 essay on property published in the National Gazette, James Madison
contended that because private property is the foundation of a civil society, property, “being the
end of government, that alone is a just government, which impartially secures to every man,
whatever is his own.” James Madison, Property, in James Madison: Writings 515 (Jack Rakove
ed.1999).

1 Over the years, the law has distinguished three broad categories of takings: those defined
2 by the governments' powers of eminent domain,¹⁵ those resulting from a "physical invasion" by
3 the government without bringing an eminent domain proceeding,¹⁶ and those resulting from the
4 impact of regulation.¹⁷^{FN34} The first two, having an older lineage, could be referred to as
5 "traditional takings," and the latter two require a landowner to file an "inverse condemnation"
6 suit seeking just compensation. "While the typical taking occurs when the government acts to
7 condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse
8 condemnation is predicated on the proposition that a taking may occur without such formal
9

10 ¹⁴ Indeed, Arthur Lee, a Virginia delegate to the Continental Congress, observed that "the
11 right of property is the guardian of every other right, and to deprive a people of this, is in fact to
12 deprive them of their liberty." James W. Ely, Jr., The Guardian Of Every Other Right: A
13 Constitutional History Of Property Rights 26 (2d ed.1998) (quoting Arthur Lee).

14 ¹⁵ "Eminent domain refers to a legal proceeding in which a government asserts its authority
15 to condemn property," in exchange for payment of just compensation to the landowner. Agins v.
16 City of Tiburon (1980) 447 U.S. 255, 258 n. 2. "At the time of the writing of the Constitution
17 and for many years thereafter a government taking meant exactly that-the Government would
18 physically occupy the land." Hendler v. United States (Fed.Cir. 1991) 952 F.2d 1364, 1371.
19 Before the Civil War, most constitutional issues concerning private property and economic rights
20 and liberties arose under the Commerce Clause and the Contracts Clause. The federal
21 government "undertook relatively few projects"; accordingly, it did not make much use of
22 eminent domain. Due to its relative rarity, "the use of eminent domain to take private property
23 did not receive much attention from the federal courts" during this period. Yet when the
24 government did use eminent domain, it was clear that the Constitution required the government
25 to pay the landowner just compensation. See Calder v. Bull (1798) 3 U.S. (Dall.) 386, 400
(concluding that when landowners must give up their land for public use, "justice is done by
allowing them a reasonable equivalent"). In fact, "[m]uch of the law of eminent domain-both
statutory and case-developed for the purpose of providing the procedural structure for
government takings; the main issue in the cases was what compensation was just." Hendler, 952
F.2d at 1371.

22 ¹⁶ See, e.g., Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 441.
23 The aftermath of the Civil War, coupled with industrialization and the growth of corporate
24 enterprise, transformed economic life in America. Land became more valuable as the country
25 became more prosperous and more settled; the states began to take a much more active role in
regulating economic affairs and uses of property.

¹⁷ See, e.g., Penn Central Transp. Co. v. New York (1978) 438 U.S. 104.

1 proceedings.” First English Evangelical Lutheran Church v. County of Los Angeles (1987) 482
2 U.S. 304, 316. Traditionally, all three categories covered interference with private property “to
3 an extent that, as between private parties, a servitude is taken.” United States v. Dickson (1947)
4 331 U.S. 745, 748.

5 Of application here, of course, is regulatory takings. Although subject to a long period of
6 evolutionary growth which may prove important in litigation (rather than here), such takings
7 does apply to Jensen. It is settled now that Government regulation goes “too far,” and affects a
8 total or “categorical” taking, when it deprives a landowner of all economically viable use of his
9 “parcel as a whole.” See Palm Beach Isles Assocs. v. United States (Fed.Cir. 2000) 231 F.3d
10 1354, 1259-1360 (differentiating categorical takings from partial ones). If the taking is not of the
11 entire parcel as a whole, either temporally or by its metes and bounds, government regulation can
12 still effect a partial taking pursuant to the fact-intensive Penn Central balancing test: i.e.,

13
14 “a court determines when regulation goes “too far” and effects a taking by
15 balancing: (1) the “economic impact of the regulation on the claimant”; (2) “the
16 extent to which the regulation has interfered with distinct investment backed
expectations”; and (3) “the character of the governmental action.”

17 Penn Central Transportation Co. v. New York, 438 U.S. at 124. And, once an uncompensated
18 taking has occurred, the remedy is for government to provide just compensation for what it has
19 taken, even if the government action causing the taking is later rescinded, discontinued, or
20 abrogated. Further, for a court to find an unconstitutional taking by applying either the per se rule
21 or the Penn Central balancing test, the property owner must establish a legitimate property
22 interest that is detrimentally affected by the governmental action. See, e.g., Air Pegasus of D.C.,
23 Inc. v. United States (Fed.Cir. 2005) 434 F.3d 1206, 1212 (observing that only those with a valid
24 property interest are entitled to just compensation).
25

1 Applying these factors to owners/operators of agricultural land falling within the Order's
2 ambit, the owner obviously possesses the requisite property interest protected by the Fifth
3 Amendment: a fee simple in agricultural lands subject to the Order. So the inquiry then moves
4 on to whether the Board's action constitutes a taking" of that interest. The so-called "categorical
5 test" – which applies only in those instances where government action has eliminated "all value"
6 from the land may or may not apply here, depending on whether some vestigial value remains
7 for the 30-foot buffer zone (although more likely than not, all value has been eliminated).
8 Regardless, the Order will deprive the property owner of the "highest and best use" of all the
9 property (highly producing agricultural farm land). The takings still occurs and the only affected
10 thing is the amount of compensation that needs to be paid. The regulatory character of the
11 Board's action – based as it allegedly is a myopically narrow concern only with water pollution
12 (even though, as noted below, more significant negative impacts arise from the implementation
13 of the Order than are affected by the Order) – does serve as an adequate excuse or preventative
14 measure that overcomes the partial takings that is affected by the Order. See, e.g., Tahoe-Sierra
15 Pres. Council v. Tahoe Reg'l Planning Agency (2002) 535 U.S. 301..

17 . The takings that will occur extends to the width and breadth of the Central Coast Counties
18 and implicates some of the most valuable farmland in the United States, having values from
19 approximately \$20,000 an acre to \$50,000 per acre (even in these times of depressed real estate
20 prices). With the legal sufficiency of the Order being as tenuous as it is due to the un- and non-
21 considered significant environmental impacts that may be affected by it, the additional risk that a
22 takings – even if temporary and lasting only one growing season – will occur should cause the
23 Board to reject the Order. The alternative is a myriad of takings lawsuits and verdicts against the
24 Board amounting to many millions of dollars (a result that will have a far-reaching effect on the
25

1 Regional Board's ability to maintain itself and its staff or, for that matter, to its ability to affect
2 its statutory mandates).

3 **9. The Unconstitutional Takings Of Real Property That Will Occur As A**
4 **Result Of The Order Includes A Takings Arising From The Necessity To**
5 **Take Land Currently Under Cultivation Out Of Cultivation In Order To**
6 **Place The Mechanisms Necessary To Comply With The Water**
7 **Purification Ordered By The Board**

8 Under the same law set forth above, a further takings of real property will result due to
9 the necessity for the owner/operator to take land that is currently under cultivation out of
10 cultivation in order to install the infrastructure (such as evaporation catchment pools, piping, and
11 reverse osmosis (or other) purification machines on that land.

12 **10. The Requirements Of California's Environmental Quality Act Were Not**
13 **Complied With Prior To And Coterminous With The Order's Enactment**

14 The Record underlying enactment of the Order reveals the underlying belief of the
15 Regional Board and its Staff that major modifications of the 2004 Conditional Waiver by
16 enactment of the 2012 Order was required due to great and significant deleterious impacts on the
17 waters of the Region that occurred between 2004 and the current Order's enactment caused by
18 farming practices (e.g., the use of nitrate fertilizers). The Record, in fact, is larded with
19 statements to that effect. Indeed, the length of time and myriad of Staff proposals which led to
20 the 2012 Order belies the Order's simplistic conclusion that "substantial changes" were not made
21 to the 2004 Order by the 2012 Order. However, the Board essentially adopted a negative
22 declaration identical to that adopted relative to the 2004 Conditional Waiver (and, in fact, took
23 the position that the 2004 negative declaration and "evidence" was determinative and binding in
24 2012):

25 "The Central Coast Water Board concludes that adoption of and compliance with
the Preliminary Draft irrigated Ag Order will not have a significant negative

1 impact on the environment.”

2 Such a conclusion contains an intrinsic inconsistency which leads inexorably to the conclusion
3 that the adequate environmental review required by CEQA relative to the 2012 Order was not
4 done and, accordingly, the Order failed to comply with California law. That inconsistency is that
5 it simply cannot be the case that such a purported drastic impact on the water aspect of the
6 environment could take place but that (1) the technology necessary to meet the water purification
7 standards mandated by the 2012 Order had not evolved or been created anew since the seven (7)
8 public comments concerning the 2004 Order’s environmental impact were initially considered,
9 (2) that the Central Coast Region has not changed a great deal since 2004, and (3) such matters
10 would have no significant impact on the non-water aspects of the environment. Thus, the
11 Regional Board’s assertion at page 10 of the 2012 Order that all that it entails is a “renewal” of
12 the 2004 Order “with clarifications and new conditions” so that a subsequent environmental
13 impact report (“SEIR”) is not needed under 14 C.C.R. § 15162(a)¹⁸ is belied by the facts. Quite
14 simply, just because the Regional Board says that it is so does not make it so in the real world
15 where new technologies have been created or modified by which the water purification standards
16

17 ¹⁸ Section 15162(a) provides that no SEIR shall be prepared due to the 2004 adoption of a
18 negative declaration if one or more of the following exists:

19 “(1) if substantial changes are proposed in the project which will require major
20 revisions of the previous ... negative declaration due to the involvement of new
21 significant effects or a substantial increase in the severity of previously identified
22 effects; or,

22 (2) If substantial changes occur with respect to the circumstances under which the
23 project is undertaken which will require major revisions of the previous ...
24 negative declaration due to the involvement of new significant impacts or a
25 substantial increase in the severity of previously identified significant effects; or

(3) If new information of substantial importance which was not known and could
not have been known with the exercise of reasonable diligence at the time the
previous ... negative declaration was adopted, becomes available.”

1 can be met¹⁹ and where the circumstances have greatly changed (a conclusion established by the
2 Regional Board's very reasons for enactment of the 2012 Order.

3 **a. CEQA Requirements Were Not Met By The Regional Board**

4 Appreciation of the conclusion that the Regional Board did not comply with CEQA's
5 requirements relative to the Order arises from establishing what those requirements are. As the
6 California Supreme Court noted in Sierra Club v. State Bd. Of Forestry (1994) 7 Cal.4th 1215,
7 1233, "CEQA compels government first to identify the environmental effects of projects, and
8 then to mitigate those adverse effects through the imposition of feasible mitigation measures or
9 through the selection of feasible alternatives." If a project – such as the Conditional Waiver and
10 its implementation – does not have feasible alternatives or mitigation measures that can
11 substantially lessen or avoid those effect, the project should not be approved. See Mountain
12 Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 134. CEQA is implemented
13 through initial studies, negative declarations and EIR's. It requires a governmental agency – such
14 as the Board in its capacity as Lead Agency on his particular "project" -- to prepare an EIR
15 whenever it considers approval of a proposed project that "may have a significant effect on the
16 environment." Quail Botanical Gardens Foundation, Inc. v. City of Encinatas (1994) 29
17 Cal.App.4th 1597, 1601 (1994); Cal. Pub.Res. Code § 21100. Thus, if there is no substantial
18 evidence a project "may have a significant effect on the environment" or the initial study
19 identifies potential significant effects, but provides for mitigation revisions which make such
20

21 ¹⁹ For that matter, the success of the 2012 Order rests on the existence of technologies
22 sufficient to allow owners/operators to meet the water purification standards imposed upon them.
23 That is, the 2012 Order's promulgation must rest on the concept of "technological feasibility."
24 That is, technology must exist or will exist in the timeframe set for compliance to begin by which
25 compliance with the regulation's guidelines can be accomplished. See, e.g., Vigil v. Leavitt (9th
Cir. 2004) 381 F.3d 826; International Harvester Company v. Ruckelshaus D.C.Cir. 1974) 478
F.2d 615; In re. Operation of the Missouri River System (D.Minn. 2004) 363 F.Supp.2d 1145;
Kandra v. United States (D. Ore. 2001) 145 F.Supp.2d 1192. If it does not then the regime is
arbitrary, unreasonable, and capricious.

1 effects insignificant, a public agency must adopt a negative declaration to such effect and, as a
2 result, no EIR is required. Cal.Pub.Res. Code §§ 21980(d), 21064. However, the Supreme
3 Court has repeatedly recognized that an EIR must be prepared and a negative declaration cannot
4 be certified :whenever it can be fairly argued that the project **may** have significant environmental
5 impact. No Oil Co. v. City of Los Angeles (1974) 13 Cal.3d 68, 75 (1974). The evidence
6 necessary to this determination can be anecdotal or a matter of opinion (such as the value of real
7 property or loss thereof may be established by the “opinion” of the land’s owner). CASE

8 What constitutes a “significant effect on the environment” is has a common regulatory
9 definition:

10 “Significant effect on the environment; means a substantial, or potentially
11 substantial, adverse change in any of the physical conditions within the area
12 affected by the project including land, air, water, minerals, flora, fauna, ambient
13 noise, and objects of historic or aesthetic significance. An economic or social
14 change by itself shall not be considered a significant effect on the environment. A
social or economic change related to a physical change may be considered in
determining whether the physical change is significant.”

15 14 C.C.R. 15382. A “significant effect on the environment’ is thus “limited to substantial, or
16 **potentially substantial**, adverse changes” in physical conditions which exist within the area as
17 defined in Cal. Pub.Res. Code § 21060.5 (emphasis supplied). Pub.Res. Code § 21060.5 defines
18 ‘environment’ as ‘the physical conditions which exist within the area which will be affected by a
19 proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or
20 aesthetic significance.’ See also Lighthouse Field Beach Rescue v. City of Santa Cruz (2005)
21 131 Cal.App.4th 1170, 1180.

22 The failure to comply with CEQA’s requirements is fatal to the Order. As was noted in
23 State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 723:
24

25 “In a mandate proceeding to review an agency's decision for compliance with

1 CEQA, we review the administrative record to determine whether the agency
2 abused its discretion. ‘Abuse of discretion is shown if (1) the agency has not
3 proceeded in a manner required by law, or (2) the determination is not supported
4 by substantial evidence.’ ‘When the informational requirements of CEQA are not
5 complied with, an agency has failed to proceed in “a manner required by law” and
6 has therefore abused its discretion.’ Furthermore, ‘when an agency fails to
7 proceed as required by harmless error analysis is inapplicable. The failure to
8 comply with the law subverts the purposes of CEQA if it omits material necessary
9 to informed decisionmaking and informed public participation. Case law is clear
10 that, in such cases, the error is prejudicial.’ (Internal citations omitted)

11 See also County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931,
12 945-946. This same principle applies to consideration of CEQA compliance by this Board.

13 **b. A Review Of The Regional Board’s Negative Declaration**
14 **Underlying The Order Establishes That CEQA’s Requirements**
15 **Have Not Been Met And That An SEIR Must Be Prepared**

16 Giving life to the unacceptable and ultimately self-defeating bureaucratic philosophy that
17 “the ends justify the means,” the Order is based on an environmental quality analysis that flaunts
18 both the purpose and requirements of the California Environmental Quality Act, Pub. Res. Code
19 § 21000 et seq. It focuses entirely on only the purported “direct” impact of the proposal itself
20 without factoring in the Proposal’s implementation by the agricultural community in order to
21 comply with the guidelines set by the Board relative to purification of irrigation water running
22 off the land to drinking water purity. It thus creates its own little world where the water is pure
23 but, in the cause of such purity, the remainder of the environment is left to go to hell.

24 Under the rubric of Water Code § 13360 that since the Regional Board may not specify
25 the manner of compliance with the orders of the Board to be chosen by owner/operators, it would
be too speculative and thus unnecessary for it to assess the reasonably foreseeable significant
environmental impacts that use of available technology necessary to meet purification standards
would have. This contravenes its duty to consider the “reasonably foreseeable indirect physical
changes in the environment which may be caused by the project,” [CEQA Guidelines, §

1 15064(d)] arising from the owner/operator's use of known technological means. Since
2 "technological feasibility" is a requisite for the very existence of the Order's regulatory regime,
3 the Board is obviously aware (particularly since it was told by owner/operators of this fact prior
4 to adoption of the Order) of the existence of the 3 primary technological means by which
5 compliance might be achieved: i.e., (1) reverse osmosis, (2) reverse ion exchange, and (3)
6 catchment basins located on each farm into which all water drains and from which no water is
7 released that will flow into rivers and other bodies of water of concern to the Board.

8 The Regional Board, however, ignored the existence of these technologies as well as the
9 fact that they are the only means by which the mandated purification standards can be achieved.
10 That was an abuse of discretion since the size, energy source, and other matters relating to those
11 machines (including removal of the extracted chemicals and residues) pose an obvious
12 significant impact on the non-water aspects of the environment. As relevant here, current
13 technology presents, as noted, two different types of equipment necessary to purify tail water: a
14 reverse osmosis unit or a reverse ion exchange unit. Siemens Water Technology Corp.
15 ("Siemens") is one of the prominent manufacturers and distributors of that type of equipment. A
16 review of the various reverse osmosis equipment sold by it – all of which can be located at its
17 official Internet website at www.Siemans.com/water – reveals that the units necessary to meet
18 the purification standards (and, particularly in view of the need under the Order for the farmer to
19 err on the side of having equipment that has too large a volume than that which has a smaller
20 volume in terms of the amount of water purified per minute) are diesel-fuel powered and quite
21 sizeable.
22

23 One of the Siemens unit models that appear to be a prime candidate for agricultural use
24 (since it has a flow rate of 25 to 150 gallons per hour, respectively) is described as having the
25

1 overall dimensions (width x depth x height in inches) as follows:

2 168 x 40 x 78

3 201 x 41 x 78

4 196 x 56 x 90

5 277 x 56 x 91

6 277 x 58 x 91

7 In other words, these units generally are at least 14 (and as large as 23) feet wide, 3.5 feet to 5.75
8 feet deep and 6.33 (to 7.6) feet high. Since such a unit would be needed at each discharge point
9 (and since there are multiple discharge points per field), it can be easily comprehended (but
10 certainly was not by the Board's environmental review) that literally tens of thousands of these
11 units would be placed on farm land in the Region. In each instance, operation of the equipment
12 would produce by-products consisting of chemicals, salts, minerals, and other substances
13 extracted from the water (which would likely have to be stored at least temporarily on site either
14 in large metal storage containers or in lined open air pits in order to avoid leeching into the soil).

15 Of course, the number of units might be marginally reduced by the construction of
16 infrastructure on each farm (such as above-ground pipes) that would more centralize the
17 discharge points. The purified water produced in the process could also be allowed to run off the
18 land or could be retained and stored for sale as bottled water by the owner/operator of the
19 irrigated lands. (A review of bottled water sold in stores and markets in California reveals that a
20 large amount of it, according to the mandated label notation, is the product of reverse osmosis.
21 A trip to Costco and inspection of the Kirkland brand bottled water reveals this to be so.) Since
22 each is a relatively sophisticated piece of equipment, each would require on-site maintenance (on
23 both a routine and special-needs basis) which would increase vehicle traffic. That increase in
24 traffic would, of course, be made manifold by the increase in traffic occasioned by vehicles
25 removing all of the by-products and sludge produced in the purification process (a particular

1 need in order to avoid any untoward leakage back into the soil or discharge water). The
2 cascading significant environmental impact caused by each unit – and, of course, the cumulative
3 thousands of such units spread all over the 400,000 acres presently in production (although such
4 acreage will be markedly reduced by the 30 foot set off) – was simply overlooked by the Board
5 in its environmental analysis.

6 It must be and is reasonably foreseeable that the owners or operators of agricultural lands
7 will use one or more of the just-delineated three technologies. That is all that is required for
8 them to be included in the analysis of significant environmental impacts. It is obvious that the
9 decision to not consider them arose from the realization of the immensely significant negative
10 impacts on the environment that the use of one or more of these technologies create. After all,
11 “In evaluating the significance of the environmental effect of a project, the lead agency shall
12 consider direct physical changes in the environment which **may be** caused by the project and
13 **reasonably foreseeable indirect physical changes in the environment** which **may be** caused
14 by the project.” State CEQA Guidelines, § 15064(d) (emphasis supplied). “An indirect physical
15 change in the environment is a physical change in the environment which is not immediately
16 related to the project, but which is caused indirectly by the project. If a direct physical change in
17 the environment in turn causes another change in the environment, then the other change is an
18 indirect physical change in the environment. Id. § 15064(d)(2). Thus, the failure to analyze the
19 foreseeable impacts of the three technologies dooms the Order based on the insufficiency of its
20 CEQA compliance.
21

22 The conclusion of the Order’s Initial Study and Environmental Checklist as adopted is
23 inconsistent with and violates CEQA. That conclusion, of course, is that the Order is good for
24 the hydro-environment and, in “fact” is so “good” that it will not have any negative impact on
25

1 anything. Ignoring the use of the only technologies by which compliance with the Board's
2 guidelines can be conceivably met, the Order is based on a determination, made with regard to
3 the 79 (excluding subparts) sections appearing on the CEQA Environmental Checklist (which is
4 composed of 17 separate categories), that the impact runs the gamut from "no impact" on 75 of
5 them and "less than significant impact" on the remaining 4. Those four deal with the conversion
6 of farmland to non-agricultural use and the effect on the riparian habitat or wetlands. As a result
7 of that conclusion, no post-2004 SEIR is required in the opinion of the Board. Such a conclusion
8 is both factually and legally incorrect. Indeed, it either fails to recognize or take into account the
9 actual or potential significant environmental impacts on 11 of the 17 categories listed in the
10 CEQA checklist including, notably the following numbered items:

- 11
12 (1) Aesthetics (impacts on scenic vistas and resources through, among other things, the
13 construction of numerous and sizeable water treatment facilities (such as large
14 reverse osmosis equipment) on lands abutting or otherwise adjacent to major scenic
15 thoroughfares such as Highway 101, Highway 1 (Pacific Coast Highway),
16 Highway 46 (in San Luis Obispo County), River Road (in Monterey County),
17 Halcyon Road (in San Luis Obispo County), Vineyard Drive (in San Luis Obispo
18 County), and Highways 154 and 246 (in Santa Barbara County);
- 19
20 (2) Agricultural resources (the imposition of a 30 foot buffer zone replacing
21 agricultural lands abutting such things as the Salinas River and all streams and
22 sloughs discharging water into the river or Monterey Bay that are on the list of
23 endangered water bodies translates directly into the loss of literally thousands of
24 acres of now-fertile and producing agricultural lands);
- 25
26 (3) Air quality (additional air pollution arising from the introduction of literally
27 thousands of agricultural land-sited diesel-fueled water treatment facilities, as well
28 as from additional vehicle traffic arising from the need to service such facilities
29 (including the removal of the water purification chemical byproducts as well as the
30 purified water [the latter being available for bottling and commercial sale as
31 drinking water], pollution caused by the construction and working of local
32 facilities to treat the chemical byproducts and to-be-bottled water);
- 33
34 (4) Biological resources (the potential loss of discharged water draining into the rivers

1 and bodies of water in the Coastal Region due to the sale, by the farmers either
2 independently or cooperatively, of the drinking-water pure water produced on their
3 lands would directly impact the amounts of water in which protected or "of
concern" species live);

4 (7) Hazards and Hazardous Materials (arising from the transport, use or disposal of
5 chemicals and other by-products of the water purification process by famers either
independently or cooperatively);

6 (8) Hydrology and Water Quality (including those items discussed with regard to
7 biological resources ante, depletion of ground water resources or interference with
ground water discharge, alteration of the existing drainage patters);

8 (11)Noise (the addition of noise from the operation of the treatment facilities, traffic-
9 related-to the maintenance and care of those facilities as well as transportation of
10 by-products);

11 (12)Population and Housing (including the loss of population that would result from
12 the loss of land presently used for agricultural purposes from imposition of the
various buffers and setbacks which would thus displace substantial numbers of
13 people, necessitating the construction of replacement housing elsewhere);

14 (15) Transportation/Traffic (increase in the number and frequency of vehicle usage of
15 the highways and roads due to the need for servicing of the treatment facilities,
construction of those facilities, the removal of by-products, and other related
matters);

16 (16)Utilities and Service Systems (construction of numerous new water treatment
17 facilities on each farm or tract of land within the Region that presently
"discharges" water that will produce the significant environmental effects
18 discussed herein); and,

19 (17)Mandatory findings of significance (cumulative considerable impacts on the
20 environment which will cause substantial adverse effects in terms of income and
other matters relating to the human environment).

21 Air pollution caused by running the diesel-powered osmosis machines is, according to
22 rules adopted by the California Air Resources Board ("CARB") and the Monterey Bay Unified
23 Air Pollution Control District, a matter having a significant impact on the environment.
24 Concerned with the amount of emissions being released into the atmosphere by diesel-fueled
25 engines used in agricultural operations throughout California (including the Salinas Valley),

1 CARB issued regulations limiting such emissions. As set forth in CARB Resolution 3-30
2 (February 26, 2004, CARB had studied the effect of such emission and found:

3 “Excessive diesel exhaust particulate matter emissions for stationary
4 compression-ignition engines, most of which are diesel-fueled, are a significant
5 source of toxic air contaminants which contribute significantly to serious air
6 pollution in communities and across the State.”

7 This and other documents providing studies and the views of CARB concerning pollution caused
8 by diesel-fueled engines used in agricultural operations may be found at the CARB’s official
9 Internet website at www.arb.ca.gov. Issued pursuant to Cal. Health & Safety Code § 39666,²⁰ 17
10 C.C.R. § 93115 sets fuel and emissions standards for and applies to “any person who owns or
11 operates” “stationary CI engine in California with a rated brake horsepower greater than 50 (>50
12 bhp).” Section 93115.2(b). The Monterey Bay Unified Air Pollution Control District, acting
13 pursuant this authority, adopted and issued Rule 1010 which is entitled “Air Toxic Control
14 Measure for Stationary Compression Engines,” has as its stated purpose:

15 “to reduce diesel particulate matter (PM) from stationary diesel-fueled
16 compression ignition (CI) engines and consistent with California Health and
17 Safety Code Section 39666(d) is a replacement rule for 17 California Code of
18 Regulations Section 93116 [sic], Airborne Toxic Control Measure for Stationary
19 Compression Ignition Engines.”

20 Rule 1010.1.1. It applies to, among others, “any person who owns or operates a stationary CI
21 engine in the District with a rated brake horsepower greater than 50 (> 50 bhp).” While Rule
22 1010, subpart 1.3, specifically exempts agricultural CI engines from the operation of certain
23 emission and fuel requirements and standards (including those for emergency standby diesel-
24 fueled CI engines (> 50 bhp), [subpart 3.2], stationary prime diesel-fueled CI engines (>50 bhp),
25

²⁰ H & S Code §39666, in pertinent part, provides: “(a) Following a noticed public hearing, the state board [CARB] shall adopt airborne toxic control measures to reduce emissions of toxic air contaminants from nonvehicular sources.”

1 [subpart 3.3], and certain record-keeping, reporting and monitoring requirements, [Subpart
2 4.1.1]), it specifically imposes fuel and emission standards on diesel engines used in agricultural
3 operations. I.e.:

4 "No person shall sell, purchase, or lease for use in the District any new stationary
5 diesel-fueled engine to be used in agricultural operations that has a rated brake
6 horsepower greater than 50, or operate any new stationary diesel-fueled engine to
be used in agricultural operations that has a rated brake horsepower greater than
50, unless the engine meets all of the follow emission performance standards..."

7 Rule 1010.3.4.1. Serious penalties attach for the failure to register such engines and to otherwise
8 comply with the emission standard. In other words, CARB and the Monterey Bay Unified Air
9 Quality etc. Board have found and taken action pertaining to diesel-fueled engines used in
10 agricultural operations throughout all, or most, of this Region.

11 These regulations and rules were issued due to documented concerns with the air
12 pollution particularly caused by diesel-fueled engines used in agricultural operations (which will
13 now as a result of the Order's adoption, include water purification technologies). While those
14 engines were traditionally used solely for purposes of pumping irrigation water (and were
15 generally limited to a centralized engine per farm), the water purification reverse osmosis
16 engines which each farmer must now install in multiple numbers on his farmland (and which are,
17 in fact, of greater horsepower than generally exists with regard to pump engines) exacerbates the
18 air pollution problem the CARB and Monterey Bay Unified etc. Board believed it necessary to
19 limit by means of their respective regulations and rules. In light of this already patent concern by
20 the California agencies charged with controlling air pollution and the significant impacts thereon
21 of diesel-fueled engines used in agricultural operations, it defies both common sense and belief
22 that the Regional Board overlooked this and found no significant impact to exist.
23
24

25 **VI. PETITIONERS ARE AGGRIEVED**

1 Petitioners are aggrieved by the Order as a stakeholder and/or as residents of the Central
2 Coast Region. As such, they have an interest in assuring that the actions taken by the Regional
3 Board to protect the environment and meet its mandate under the Water Code are done in a legal
4 fashion best designed to serve the interests of the residents of the Region and, of course, fulfill
5 the mandate of the Regional Board in a legal, ethical fashion.

6 **VII. A STAY OF THE ORDER SHOULD BE IMMEDIATELY ENTERED**

7 The Order, by its terms, takes effect immediately upon its enactment (March 15, 2012).
8 It sets various target dates by which certain required actions must be undertaken by the
9 owners/operators of irrigated agricultural lands, the earliest of which is October 2012 (a date
10 falling well within the statutory 270 days this Board has to review the present Petition (as well as
11 other Petitions filed challenging the Order). The dates for compliance as well as the points
12 raised above – particularly Johnston’s ex parte communications, and the patent failure by the
13 Board to comply with the requirements of Water Code §13241 – create a sufficient risk of
14 irreparable harm to Petitioners and others located in the Region.
15

16 **VIII. REQUESTED STATE BOARD ACTION**

17 Petitioners request the State Board to issue an order: (1) finding that Regional Board Order
18 No. R3-2012-0011 is invalid and enacted in excess of the authority of the Regional Board; (2)
19 that a proscribed ex parte communication by Johnston was made which requires invalidation of
20 the Order as enacted; and, (3) an award of attorneys fees as allowed by law be made to
21 Petitioners.
22

23 **IX. STATEMENT OF COPIES SENT TO THE REGIONAL BOARD**

24 Copies of this petition are being sent to the Regional Board at the following addresses:

25 (By personal delivery)

1 Roger Briggs, Executive Officer
2 Central Coast Regional Water Quality Control Board
3 895 Aerovista Place, Ste. 101
4 San Luis Obispo, California 93401

5 (By personal delivery)
6 Chairman
7 Central Coast Regional Water Quality Control Board
8 895 Aerovista Place, Ste. 101
9 San Luis Obispo, California 93401

10 (By e-mail)
11 Frances McChesney
12 Senior Staff Counsel
13 State Water Resources Control Board
14 1001 I Street, 22d Floor
15 Sacramento, California 94418
16 fmchesney@waterboards.ca.gov

17 X. ISSUES RAISED BEFORE REGIONAL BOARD

18 Petitioners certify that with the exception of the issue concerning Johnston's proscribed
19 ex parte communications each of these issues have been previously presented, both orally and in
20 writing, during the hearings leading up to the March 15, 2012 adoption of the Order. No
21 Regional Board meeting has occurred since the adoption of the Order at which the ex parte
22 communication could be presented to the Regional Board and no opportunity existed at the
23 March 15, 2012 meeting to raise the matter since the actions complained of occurred after the
24 period for any public comment had ended.

25 Respectfully submitted,

Date: April 13, 2012

Matthew S. Hale, Esq.,
Counsel for Petitioners