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ASSOCIATION OF CENTRAL CALIFORNIA,
6 GROWER-SHIPPER ASSOCIATION OF SANTA
BARBARA AND SAN LUIS OBISPO COUNTIES,
7 and WESTERN GROWERS

8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
11

12 In the Matter of the Petition of Grower-Shipper
Association of Central California, Grower-
13 Shipper Association of Santa Barbara and San
Luis Obispo Counties, and Western Growers for
14 Review of Action and Failure to Act by the
Central Coast Regional Water Quality Control
15 Board.

SWRCB/OCC File No. _____
GROWER-SHIPPER ASSOCIATION OF
CENTRAL CALIFORNIA, GROWER-
SHIPPER ASSOCIATION OF SANTA
BARBARA AND SAN LUIS OBISPO
COUNTIES, and WESTERN GROWERS'
PETITION FOR REVIEW AND
STATEMENT OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
[Wat. Code, § 13320]

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19 The Grower-Shipper Association of Central California, Grower-Shipper Association of
20 Santa Barbara and San Luis Obispo Counties, and Western Growers (collectively, Petitioners)
21 submit this Petition for Review and Statement of Points and Authorities (Petition) to the State
22 Water Resources Control Board (State Water Board) in accordance with Water Code
23 section 13320. Petitioners respectfully request that the State Water Board review the Central
24 Coast Regional Water Quality Control Board's (Central Coast Water Board) actions and inactions
25 related to its adoption of Order No. R3-2012-0011, *Conditional Waiver of Waste Discharge*
26 *Requirements for Discharges from Irrigated Lands* (Conditional Waiver) and Monitoring and
27 Reporting Program Order Nos. R3-2012-0011-01 (Tier 1 MRP), R3-2012-0011-02 (Tier 2 MRP),
28 and R3-2012-0011-03 (Tier 3 MRP) (collectively, MRP Orders).

1 This Petition satisfies the requirements of title 23, section 2050 of the California Code of
2 Regulations. Petitioners request the opportunity to file supplemental points and authorities in
3 support of this Petition once the administrative record becomes available. Petitioners also reserve
4 the right to submit additional argument and evidence in reply to the Central Coast Water Board or
5 other interested parties' responses to this Petition.

6 **1. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF THE**
7 **PETITIONERS**

8 Petitioners are: Grower-Shipper Association of Central California, Grower-Shipper
9 Association of Santa Barbara and San Luis Obispo Counties, and Western Growers.

10 Petitioners' addresses are as follows:

11 Abby Taylor-Silva, Vice President
12 Policy and Communications
13 Grower Shipper Association of Central California
14 512 Pajaro Street
15 Salinas, CA 93901
16 Phone: (831) 422-8844
17 Email: abby@growershipper.com

18 Richard S. Quandt, President
19 Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties
20 245 Obispo Street
21 P.O. Box 10
22 Guadalupe, CA 93434
23 Phone: (805) 343-2215
24 Email: richard@grower-shipper.com

25 Hank Giclas, Senior Vice President
26 Strategic Planning, Science & Technology
27 Western Growers
28 P.O. Box 2130
Newport Beach, CA 92658
Phone: (949) 885-2205
Email: hgiclas@wga.com

In addition, Petitioners request that all materials in connection with the Petition and
administrative record be provided to Petitioners' special counsel:

Theresa A. Dunham, Esquire
Somach Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Phone: (916) 446-7979
Email: tdunham@somachlaw.com

1 **2. PETITIONERS**

2 **A. Grower Shipper Association of Central California**

3 The Grower Shipper Association of Central California is a trade association that includes
4 growers of vegetables, strawberries, mushrooms, and wine grapes operating in Monterey, Santa
5 Cruz, San Benito, and Santa Clara Counties. More than 100 of the Grower Shipper Association
6 of Central California’s grower members are impacted by the Central Coast Water Board’s
7 Conditional Waiver and associated MRP Orders.

8 **B. Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties**

9 The Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties is a
10 trade association representing 65 producers of vegetables and strawberries with farming
11 operations located in the Santa Maria, Lompoc, and Arroyo Grande Valleys along California’s
12 Central Coast. Crops subject to the Orders are produced on over 100,000 acres resulting in over
13 \$1 billion in gross revenue annually to the economy of this region.

14 **C. Western Growers**

15 The Western Growers Association is an agricultural trade association whose members
16 from Arizona and California grow, pack, and ship over 200 commodities which is 90 percent of
17 the fresh fruits, nuts, and vegetables grown in California and 75 percent of those commodities in
18 Arizona. This totals about half of the nation’s fresh produce. Of its more than 2,000 members,
19 approximately 500 are located in the Central Coast of California and are subject to the
20 Conditional Waiver and associated MRP Orders.

21 **3. THE SPECIFIC ACTION OR INACTION OF THE CENTRAL COAST WATER**
22 **BOARD WHICH THE PETITIONERS REQUEST THE STATE WATER BOARD**
23 **TO REVIEW**

24 The Petitioners request that the State Water Board review the Central Coast Water
25 Board’s adoption of the Conditional Waiver and MRP Orders, and other action or inaction related
26 thereto, as more fully described herein. Petitioners are also requesting a stay of certain provisions
27 of Order Nos. R3-2012-0011, R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03. (See
28 Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara
and San Luis Obispo Counties, and Western Growers’ Request for Stay and Memorandum of

1 Points and Authorities in Support Thereof (Stay Request), filed concurrently herewith.) A copy
2 of Order No. R3-2012-0011 (Conditional Waiver) is attached hereto as Exhibit A. A copy of
3 Order No. R3-2012-0011-01 (Tier 1 MRP) is attached hereto as Exhibit B. A copy of Order
4 No. R3-2012-0011-02 (Tier 2 MRP) is attached hereto as Exhibit C. A copy of Order
5 No. R3-2012-0011-03 (Tier 3 MRP) is attached hereto as Exhibit D. Also attached as Exhibit E
6 are copies of the alternatives prepared by the Petitioners and other agricultural organizations that
7 were not properly considered by the Central Coast Water Board.

8 The specific actions and inactions of the Central Coast Water Board, and requirements of
9 the Conditional Waiver and associated MRP Orders that Petitioners request the State Water Board
10 to review are:¹

11 1. The Central Coast Water Board’s failure to proceed in a manner required by law
12 with respect to the adoption of the Conditional Waiver on March 15, 2012;

13 2. The Central Coast Water Board’s failure to proceed in a manner required by law
14 with respect to giving proper consideration to the agricultural alternative proposed by Petitioners
15 and other agricultural organizations;

16 3. Conditional Waiver Provision 11, which was unlawfully adopted by the Central
17 Coast Water Board with no notice or opportunity for dischargers and other parties to provide
18 public comment or rebuttable testimony with respect to its content and application to Petitioners’
19 members (Conditional Waiver, pp. 14-15);

20 4. Conditional Waiver Provisions 13-21 of Part A, Tiers, which arbitrarily classify
21 dischargers based on criteria that are unrelated to the threat and risk of water quality (Conditional
22 Waiver, pp. 16-18);

23 5. Conditional Waiver Provision 22 of Part B, General Conditions and Provisions for
24 All Dischargers – Tier 1, Tier 2, and Tier 3, which requires all dischargers to immediately
25 “comply with applicable water quality standards, as defined in Attachment A, protect the
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27 ¹ In addition to the specific actions and inactions identified here, Petitioners also support review of the actions and
28 inactions that are identified in the Petition filed by the California Farm Bureau Federation, et al., which was timely
filed with the State Water Board on April 16, 2012.

1 beneficial uses of waters of the State and prevent nuisance as defined in Water Code
2 section 13050.” (Conditional Waiver, p. 18);

3 6. Conditional Waiver Provision 23 of Part B, General Conditions and Provisions for
4 All Dischargers – Tier 1, Tier 2, and Tier 3, which requires all dischargers to immediately
5 “comply with applicable provisions of the Central Coast Region Water Quality Control Plan
6 (Basin Plan) and all other applicable water quality control plans as identified in Attachment A.”
7 (Conditional Waiver, p. 18);

8 7. Conditional Waiver Provision 31 of Part B, General Conditions and Provisions for
9 All Dischargers – Tier 1, Tier 2 and Tier 3, which requires all dischargers to install and/or
10 maintain back flow prevention devices for any irrigation system that is used to apply fertilizers,
11 pesticides, fumigants, or other chemicals by October 1, 2012 (Conditional Waiver, pp. 19-20);

12 8. Conditional Waiver Provision 39 of Part B, General Conditions and Provisions for
13 All Dischargers – Tier 1, Tier 2 and Tier 3, which requires all dischargers to immediately
14 “a) maintain existing, naturally occurring, riparian vegetative cover (such as trees, shrubs, and
15 grasses) in aquatic habitat areas as necessary to minimize the discharge of waste; and b) maintain
16 riparian areas for effective streambank stabilization and erosion control, stream shading and
17 temperature control, sediment and chemical filtration, aquatic life support, and wildlife support to
18 minimize the discharge of waste;” (Conditional Waiver, p. 20);

19 9. Conditional Waiver Provision 40 of Part B, General Conditions and Provisions for
20 All Dischargers – Tier 1, Tier 2, and Tier 3, which limits all dischargers from disturbing aquatic
21 habitat, unless it is for a specified purpose (Conditional Waiver, p. 21);

22 10. Conditional Waiver Provision 44 of Part B, General Conditions and Provisions for
23 All Dischargers – Tier 1, Tier 2, and Tier 3, which requires Farm Plans to be given to Central
24 Coast Water Board staff upon request, instead of requiring that they be made available to Central
25 Coast Water Board staff at the farm during an on-site inspection (Conditional Waiver, p. 21);

26 11. Conditional Waiver Provision 44, subsection g, of Part B, General Conditions and
27 Provisions for All Dischargers – Tier 1, Tier 2, and Tier 3, which requires all dischargers to
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1 describe and include results of methods used to verify practice effectiveness and compliance with
2 this Order by October 1, 2012 (Conditional Waiver, p. 22);

3 12. Conditional Waiver Provision 67 of Part E, Additional Conditions that Apply to
4 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as
5 Tier 2 and/or Tier 3 to file by October 1, 2012 (and annually thereafter), an Annual Compliance
6 Form that includes all of the information requested, which is identified in the Tier 2 MRP and
7 Tier 3 MRP (Conditional Waiver, p. 27);

8 13. Conditional Waiver Provision 68 of Part E, Additional Conditions that Apply to
9 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as
10 Tier 2 and/or Tier 3 to file by October 1, 2012, their determination of nitrate loading risk factor(s)
11 in accordance with requirements specified in the Tier 2 MRP and Tier 3 MRP, and to report by
12 October 1, 2012, the nitrate loading risk factors and overall Nitrate Loading Risk level calculated
13 for each ranch/farm or nitrate loading risk unit in the Annual Compliance Form (Conditional
14 Waiver, p. 28);

15 14. Conditional Waiver Provision 69 of Part E, Additional Conditions that Apply to
16 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as
17 Tier 2 and/or Tier 3, and that have farms/ranches that are adjacent to or contain a waterbody
18 identified on the 2010 List of Impaired Waterbodies as impaired for temperature, turbidity, or
19 sediment to, by October 1, 2012, conduct and report photo monitoring of the condition of
20 perennial, intermittent, or ephemeral streams and riparian and wetland area habitat, and
21 demonstrate compliance with erosion and sedimentation requirements identified in Provision 80
22 of Part F (Additional Conditions that Apply to Tier 3 Dischargers), which requires dischargers to
23 show compliance with maintaining a filter strip of appropriate width, and consisting of
24 undisturbed soil and riparian vegetation or its equivalent between significant land disturbance
25 activities and watercourses, lakes, bays, estuaries, marshes, and other waterbodies (Conditional
26 Waiver, pp. 28, 31);

27 15. Conditional Waiver Provision 70 of Part E, Additional Conditions that Apply to
28 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as

1 Tier 2 and/or Tier 3 to record and report the total amount of nitrogen applied for any farm/ranch
2 with a High Nitrate Loading Risk by October 1, 2014, and annually thereafter, or alternatively to
3 propose an individual discharge groundwater monitoring and reporting program for Central Coast
4 Water Board Executive Officer approval that evaluates waste discharges to groundwater from
5 each farm/ranch (Conditional Waiver, p. 28);

6 16. Conditional Waiver Provision 72 of Part F, Additional Conditions that Apply to
7 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 to
8 initiate individual surface water discharge monitoring in accordance with the requirements
9 specified in the Tier 3 MRP by October 1, 2013, or initiate an alternative that is approved by the
10 Central Coast Water Board's Executive Officer (Conditional Waiver, p. 29);

11 17. Conditional Waiver Provision 73 of Part F, Additional Conditions that Apply to
12 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 to
13 submit by March 15, 2014, individual surface water discharge monitoring data and reports as
14 required by the Tier 3 MRP, or submit alternative monitoring reporting program data approved by
15 the Central Coast Water Board's Executive Officer (Conditional Waiver, p. 29);

16 18. Conditional Waiver Provision 74 of Part F, Additional Conditions that Apply to
17 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 and
18 that have High Nitrate Loading Risk farms/ranches to, by October 1, 2013, determine typical crop
19 nitrogen uptake for each crop type produced and report the basis for the determination as required
20 by the Tier 3 MRP (Conditional Waiver, p. 29);

21 19. Conditional Waiver Provisions 75-77 of Part F, Additional Conditions that Apply
22 to Tier 3 Dischargers, which collectively require dischargers meeting the criteria or designation as
23 Tier 3 to develop and implement an Irrigation and Nutrient Management Plan (INMP) that is
24 certified by a named or qualified professional, and to report specific elements from the INMP by
25 October 1, 2015, and annually thereafter, or alternatively to propose an individual discharge
26 groundwater and monitoring program plan for Central Coast Water Board Executive Officer
27 approval that evaluates waste discharge to groundwater from each farm/ranch and assesses the
28

1 waste discharge to see if it is of sufficient quality to not cause or contribute to exceedances of any
2 nitrate water quality standard applied to the groundwater (Conditional Waiver, p. 29);

3 20. Conditional Waiver Provision 78 of Part F, Additional Conditions that Apply to
4 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 and
5 that have High Nitrate Loading Risk farms/ranches to, by October 1, 2015, report progress
6 towards meeting Nitrogen Balance ratios, or implement an alternative that demonstrates an
7 equivalent nitrogen load reduction, of a target of one (1) for crops grown in annual rotation (e.g.,
8 cool season vegetables) and a target equal to 1.2 for annual crops (e.g., strawberries or
9 raspberries) (Conditional Waiver, pp. 29-30);

10 21. Conditional Waiver Provision 79 of Part F, Additional Conditions that Apply to
11 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 and
12 that have High Nitrate Loading Risk farms/ranches to verify the overall effectiveness of the
13 INMP per the requirements in the Tier 3 MRP by October 1, 2016 (Conditional Waiver, p. 30);

14 22. Conditional Waiver Provisions 80-81 of Part F, Additional Conditions that Apply
15 to Tier 3 Dischargers, which require dischargers meeting the criteria or designation as Tier 3 and
16 that have farms/ranches that are adjacent to or containing a waterbody identified on the 2010 List
17 of Impaired Waterbodies as impaired for temperature, turbidity, or sediment, by October 1, 2016,
18 to develop and initiate implementation of a Water Quality Buffer Plan that meets the
19 requirements contained in the Tier 3 MRP (Conditional Waiver, pp. 30-31);

20 23. Conditional Waiver Provision 84 of Part G, Time Schedule, which requires
21 dischargers meeting the criteria or designation as Tier 3, by October 1, 2014, to effectively
22 control individual discharges of pesticides and toxic substances (Conditional Waiver, p. 32);

23 24. Conditional Waiver Provision 85 of Part G, Time Schedule, which requires
24 dischargers meeting the criteria or designation as Tier 3, by October 1, 2015, to effectively
25 control individual discharges of sediment and turbidity (Conditional Waiver, p. 32);

26 25. Conditional Waiver Provision 86 of Part G, Time Schedule, which requires
27 dischargers meeting the criteria or designation as Tier 3, by October 1, 2016, to effectively
28 control individual discharges of nutrients to surface waters (Conditional Waiver, p. 32);

1 26. Conditional Waiver Provision 87 of Part G, Time Schedule, which requires
2 dischargers meeting the criteria or designation as Tier 3, by October 1, 2016, to effectively
3 control individual discharges of nitrate to groundwater (Conditional Waiver, p. 32);

4 27. MRP Orders, Sections A and B of Part 2, Groundwater Monitoring and Reporting
5 Requirements, which requires dischargers to sample private domestic drinking water and
6 agricultural groundwater wells by March 15, 2013, and to report the results to the Central Coast
7 Water Board by October 1, 2013 (Tier 1 MRP, pp. 8-10; Tier 2 MRP, pp. 8-10; Tier 3 MRP,
8 pp. 8-10);

9 28. Tier 2 MRP, Section C of Part 2, Groundwater Monitoring and Reporting
10 Requirements, which requires dischargers meeting the criteria or designation as Tier 2 to
11 calculate the nitrate loading risk factor for each ranch/farm included in their operations, and
12 requires such Tier 2 dischargers with individual farms/ranches that have a HIGH nitrate loading
13 risk to report total nitrogen applied per crop, per acre, per year on the Annual Compliance Form
14 by October 1, 2012, and annually thereafter (Tier 2 MRP, pp. 11-12);

15 29. Tier 2 MRP, Part 3, Annual Compliance Form, which requires dischargers meeting
16 the criteria or designation as Tier 2 to submit by October 1, 2012, and annually thereafter, an
17 Annual Compliance Form that includes, but is not limited to: identification of the application of
18 any fertilizers, pesticides, fumigants, or other chemicals through an irrigation system, proof of
19 proper backflow prevention devices, description of method and location of chemical applications
20 relative to surface water, Nitrate Loading Risk Factors; and, for dischargers meeting the criteria
21 or designation as Tier 2 and that have farms/ranches that contain or are adjacent to a waterbody
22 impaired for temperature, turbidity, or sediment photo monitoring to document conditions of
23 streams, riparian, and wetland area habitat (Tier 2 MRP, pp. 12-13);

24 30. Tier 2 MRP, Part 4, Photo Monitoring and Reporting Requirements, which
25 requires dischargers meeting the criteria or designation as Tier 2 to conduct and submit by
26 October 1, 2012, photo monitoring consistent with yet to be established protocols, and explain
27 and demonstrate compliance with erosion and sedimentation requirements (Tier 2 MRP, p. 14);
28

1 31. Tier 3 MRP, Section B of Part 2, Groundwater Monitoring and Reporting
2 Requirements, which requires dischargers meeting the criteria or designation as Tier 3, by
3 October 1, 2013, and annually thereafter, to electronically submit individual groundwater
4 monitoring data to the Central Coast Water Board (Tier 3 MRP, p. 10);

5 32. Tier 3 MRP, Section C of Part 2, Groundwater Monitoring and Reporting
6 Requirements, which requires dischargers meeting the criteria or designation as Tier 3 to
7 calculate the nitrate loading risk factor for each ranch/farm included in their operations, and
8 requires such Tier 3 dischargers with individual farms/ranches that have a HIGH nitrate loading
9 risk to report total nitrogen applied per crop, per acre, per year on the Annual Compliance Form
10 by October 1, 2012, and annually thereafter (Tier 3 MRP, pp. 10-12);

11 33. Tier 3 MRP, Part 3, Annual Compliance Form, which requires dischargers meeting
12 the criteria or designation as Tier 3 to submit by October 1, 2012, and annually thereafter, an
13 Annual Compliance Form that includes, but is not limited to: identification of the application of
14 any fertilizers, pesticides, fumigants, or other chemicals through an irrigation system, proof of
15 proper backflow prevention devices, description of method and location of chemical applications
16 relative to surface water, Nitrate Loading Risk factors; and, for dischargers meeting the criteria or
17 designation as Tier 2 and that have farms/ranches that contain or are adjacent to a waterbody
18 impaired for temperature, turbidity, or sediment photo monitoring to document conditions of
19 streams, riparian, and wetland area habitat (Tier 3 MRP, pp. 12-13);

20 34. Tier 3 MRP, Part 4, Photo Monitoring and Reporting Requirements, which
21 requires dischargers meeting the criteria or designation as Tier 3 to conduct and submit by
22 October 1, 2012, photo monitoring consistent with yet to be established protocols, and explain
23 and demonstrate compliance with erosion and sedimentation requirements (Tier 3 MRP, p. 14);

24 35. Tier 3 MRP, Part 5, Individual Surface Water Discharge Monitoring and Reporting
25 Requirements, which requires dischargers meeting the criteria or designation as Tier 3 to submit
26 an individual surface water discharge Sampling and Analysis Plan and Quality Assurance Project
27 Plan (QAPP) by March 15, 2013, to monitor individual discharges of waste from their
28 farm/ranch, including irrigation run-off (including tailwater discharges and discharges from tile

1 drains, tailwater ponds, and other surface water containment features); and, which requires
2 dischargers meeting the criteria or designation as Tier 3 to initiate individual surface water
3 discharge monitoring per the Sampling and Analysis Plan and QAPP by October 1, 2013 (Tier 3
4 MRP, pp. 14-16);

5 36. Tier 3 MRP, Part 6, Irrigation and Nutrient Management Plan, which requires
6 dischargers meeting the criteria or designation as Tier 3 and that have farms/ranches with high
7 nitrate loading risk to: (1) develop and initiate implementation of an INMP that is certified by an
8 identified or qualified professional and that includes all of the elements identified in Part 6, A.4 of
9 Tier 3 MRP; (2) evaluate effectiveness of the INMP that is conducted or supervised by a
10 professional engineer, geologist, certified crop advisor, or similarly qualified professional; (3) by
11 October 1, 2015, report specified elements from the INMP; and, (4) by October 1, 2016, submit
12 an INMP Effectiveness Report that evaluates progress in reducing loadings and measuring
13 changes in the uppermost aquifer (Tier 3 MRP, pp. 17-20); and,

14 37. Tier 3 MRP, Part 7, Water Quality Buffer Plan, which requires dischargers
15 meeting the criteria or designation as Tier 3 and that have farms/ranches that contain or are
16 adjacent to a waterbody identified on the 2010 List of Impaired Waterbodies as impaired for
17 temperature, turbidity, or sediment, by October 1, 2016, to prepare and initiate implementation of
18 a Water Quality Buffer Plan that includes a minimum 30 foot buffer, or a functional equivalent
19 that is approved by the Central Coast Water Board Executive Officer (Tier 3 MRP, pp. 20-21).

20 **3. THE DATE ON WHICH THE CENTRAL COAST WATER BOARD ACTED OR**
21 **REFUSED TO ACT**

22 The Central Coast Water Board adopted the Conditional Waiver and MRP Orders, and
23 failed to properly consider the agricultural alternative on March 15, 2012.

24 **4. A STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT IS**
25 **INAPPROPRIATE OR IMPROPER**

26 A full and complete statement of the reasons why the Central Coast Water Board's actions
27 were inappropriate or improper is provided in the accompanying Statement of Points and
28 Authorities.

1 **5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED**

2 The Petitioners are filing this Petition on behalf of their members that are subject to the
3 terms and conditions of the Conditional Waiver and MRP Orders. Petitioners' members are
4 aggrieved by the actions or inactions of the Central Coast Water Board because they will bear the
5 costs of, and risks of potential liability arising from, the Central Coast Water Board's actions and
6 inactions that are the subjects of this Petition.

7 **6. THE SPECIFIC ACTION REQUESTED BY THE PETITIONERS**

8 The Petitioners request that the State Water Board review the record, the Conditional
9 Waiver, MRP Orders, and this Petition, and that the State Water Board issue an order or orders
10 accomplishing one of the following:

11 A. Vacate the Central Coast Water Board's illegal adoption of the Conditional Waiver
12 and the MRP Orders in their entirety (discussed below in section III.A of the Statement of Points
13 and Authorities), use its independent authority under Water Code section 13320(c) to develop a
14 new Conditional Waiver and MRP Orders, and extend the existing 2004 Conditional Waiver in
15 the interim.

16 B. Or, in the alternative,

17 1. Amend the Conditional Waiver to include the agricultural alternative
18 (discussed below in section III.B of the Statement of Points and Authorities), and make related,
19 consistent, and conforming revisions to the Conditional Waiver and MRP Orders as follows:

20 Insert New Part E, which is set forth in "Central Coast Irrigated Lands
21 Presentation of CFBF & Farmers for Water Quality" PowerPoint Presentation (Mar. 14,
22 2012), attached hereto as Exh. E, pp. 20-22 ["Part E. Additional Conditions That Apply to
23 Tier 2 and Tier 3 Dischargers Through Participation in Third-Party Group"]; and,

24 2. Vacate all of the following requirements of the Conditional Waiver and
25 MRP Orders (discussed below in section III.C of the Statement of Points and Authorities), and
26 make related, consistent, and conforming revisions to the Conditional Waiver and MRP Orders:

- 27 • Conditional Waiver Provision 22 (Conditional Waiver, p. 18);
28 • Conditional Waiver Provision 23 (Conditional Waiver, p. 18);

- 1 • Conditional Waiver Provision 39 (Conditional Waiver, p. 20);
- 2 • Conditional Waiver Provision 40 (Conditional Waiver, p. 21);
- 3 • Conditional Waiver Provision 44, subsection g (Conditional Waiver, p. 22);
- 4 • Tier 1 MRP, Section A, paragraphs 1 through 5, and Section B of Part 2
- 5 (Tier 1 MRP, pp. 8-10);
- 6 • Tier 2 MRP, Section A, paragraphs 1 through 5, and Section B of Part 2
- 7 (Tier 2 MRP, pp. 8-10);
- 8 • Tier 3 MRP, Section A, paragraphs 1 through 5, and Section B of Part 2
- 9 (Tier 3 MRP, pp. 8-10); and,

10 C. Or, in the second alternative,

11 1. Vacate all of the following requirements of the Conditional Waiver and

12 MRP Orders (discussed below in section III.C of the Statement of Points and Authorities), and

13 make related, consistent, and conforming revisions:

- 14 • Conditional Waiver Provisions 13-23 (Conditional Waiver, pp. 16-18);
- 15 • Conditional Waiver Provision 39 (Conditional Waiver, p. 20);
- 16 • Conditional Waiver Provision 40 (Conditional Waiver, p. 21);
- 17 • Conditional Waiver Provision 44, subsection g (Conditional Waiver, p. 22);
- 18 • Conditional Waiver Provision 67 (Conditional Waiver, p. 27);
- 19 • Conditional Waiver Provision 68 (Conditional Waiver, p. 28);
- 20 • Conditional Waiver Provision 69 (Conditional Waiver, p. 28);
- 21 • Conditional Waiver Provision 70 (Conditional Waiver, p. 28);
- 22 • Conditional Waiver Provision 72 (Conditional Waiver, p. 29);
- 23 • Conditional Waiver Provision 73 (Conditional Waiver, p. 29);
- 24 • Conditional Waiver Provision 74 (Conditional Waiver, p. 29);
- 25 • Conditional Waiver Provisions 75-77 (Conditional Waiver, p. 29);
- 26 • Conditional Waiver Provision 78 (Conditional Waiver, pp. 29-30);
- 27 • Conditional Waiver Provision 79 (Conditional Waiver, p. 30);
- 28 • Conditional Waiver Provisions 80-81 (Conditional Waiver, pp. 30-31);

- 1 • Conditional Waiver Provision 84 (Conditional Waiver, p. 32);
- 2 • Conditional Waiver Provision 85 (Conditional Waiver, p. 32);
- 3 • Conditional Waiver Provision 86 (Conditional Waiver, p. 32);
- 4 • Conditional Waiver Provision 87 (Conditional Waiver, p. 32);
- 5 • Tier 1 MRP, Section A, paragraphs 1 through 5, and Section B of Part 2
- 6 (Tier 1 MRP, pp. 8-10);
- 7 • Tier 2 MRP, Section A, paragraphs 1 through 5, and Section B of Part 2
- 8 (Tier 2 MRP, pp. 8-10);
- 9 • Tier 2 MRP, Section C of Part 2 (Tier 2 MRP, pp. 11-12);
- 10 • Tier 2 MRP, Part 3 (Tier 2 MRP, pp. 12-13);
- 11 • Tier 2 MRP, Part 4 (Tier 2 MRP, p. 14);
- 12 • Tier 3 MRP, Section A, paragraphs 1 through 5, and Section B of Part 2
- 13 (Tier 3 MRP, pp. 8-10);
- 14 • Tier 3 MRP, Section B of Part 2 (Tier 3 MRP, p. 10);
- 15 • Tier 3 MRP, Section C of Part 2 (Tier 3 MRP, pp. 10-12);
- 16 • Tier 3 MRP, Part 3 (Tier 3 MRP, pp. 12-13);
- 17 • Tier 3 MRP, Part 4 (Tier 3 MRP, p. 14);
- 18 • Tier 3 MRP, Part 5 (Tier 3 MRP, pp. 14-16);
- 19 • Tier 3 MRP, Part 6 (Tier 3 MRP, pp. 17-20);
- 20 • Tier 3 MRP, Part 7 (Tier 3 MRP, pp. 20-21); and,
- 21 2. Amend the Conditional Waiver as follows:
- 22 • Conditional Waiver Provision 44, clarify that Farm Plans must be made
- 23 available at the farm upon request by Central Coast Water Board staff, but
- 24 are not required to be submitted to the Central Coast Water Board's office
- 25 upon request.
- 26 E. Make any other necessary conforming changes consistent with the above or the
- 27 Statement of Points and Authorities, and modify other Findings of the Conditional Waiver
- 28 consistent with the State Water Board's order.

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STATEMENT OF POINTS AND AUTHORITIES

Petitioners file this Petition in accordance with title 23, section 2050(a) of the California Code of Regulations. Petitioners request the opportunity to file a supplemental or reply memorandum after receipt of the administrative record and the Central Coast Water Board’s response.

I. INTRODUCTION

On March 15, 2012, the Central Coast Water Board adopted Conditional Waiver Order No. R3-2012-0011, *Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands* and Tier 1 MRP, Tier 2 MRP, and Tier 3 MRP (Monitoring and Reporting Program Order Nos. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03, respectively) (collectively, MRP Orders). The Conditional Waiver and the MRP Orders contain many new restrictive requirements that will severely affect the agricultural community and the agricultural economy in the Central Coast Region. The Central Coast Region contains approximately 435,000 acres of irrigated land. (Conditional Waiver, p. 1; see J. Bradley Barbeau, Ph.D., California State University, Monterey Bay School of Business, and Kay L. Mercer, M.S., PCA, KMI, *Economic and Cost Analysis of the Proposed Ag Waiver and Ag Alternative* (Aug. 1, 2011) (Barbeau Report), attached as Exh. B to the Stay Request, p. 4.) The estimated total economic impact of the Conditional Waiver and MRP Orders ranges between \$60,063,000 and \$87,932,000 annually.² (Barbeau Report, p. 17.) Of this total estimated cost, the direct impact to the region’s agriculture industry is estimated between \$34,866,000 and \$51,044,000 annually. (Barbeau Report, p. 17.) When considering these economic impacts to agriculture, it is important that the State Water Board understand that growers in the Central Coast and elsewhere are price takers, and have limited ability to pass on higher costs associated with production – including regulatory costs. (Barbeau Report, p. 5.)

² The costs estimated in the Barbeau Report were based on the provisions contained in the March 2011 draft Conditional Waiver. Although the Conditional Waiver and MRP Orders were subsequently revised, the estimates provided in the Barbeau Report are still relevant to indicate the potential scope of the economic impact.

1 Moreover, besides the economic impact that the Conditional Waiver and MRP Orders will
2 have on individual growers and the region in general, the Conditional Waiver and MRP Orders
3 collectively put growers and landowners in immediate jeopardy for not complying with water
4 quality standards. Petitioners, Petitioners' members, and the agricultural community in general
5 understand that there is a need to implement management practices that are protective of both
6 surface and groundwaters. Many in agriculture already are implementing such practices.
7 However, there is general acknowledgment that water quality improvements will take time, and in
8 some instances protective management practices must be developed. Unfortunately, the
9 Conditional Waiver and MRP Orders fail to provide growers with any legal protection for any
10 time period.

11 Conversely, the exorbitant price tag associated with the Conditional Waiver and MRP
12 Orders is unlikely to result in improvements in water quality because it shifts limited grower
13 resources away from investing in new technology and implementing new management practices
14 because of the orders' focus on expensive monitoring and reporting requirements. In response to
15 the Central Coast Water Board's proposed approach, Petitioners and other agricultural
16 organizations presented an alternative that was designed to assist growers in implementing
17 management practices, and included independent audits of all participating growers to ensure that
18 management practices were being implemented, and accountability. However, Central Coast
19 Water Board staff routinely dismissed the merits of the agricultural alternative, and conveyed
20 misinformation to the Central Coast Water Board claiming that the agricultural alternative was
21 illegal.

22 Even more troubling is the fact that the Central Coast Water Board ultimately adopted the
23 Conditional Waiver and MRP Orders because of last minute amendments that were presented by
24 one Board member to the others only *after the close of the public hearing*. Unbeknownst to the
25 Board members (or at least to Petitioners' knowledge unknown to the Board members), these last
26 minute amendments resulted from improper, indirect ex parte communications. This action alone
27 is cause for invalidation.

1 the May 4, 2011 hearing, Central Coast Water Board staff were directed to make changes in a
2 manner consistent with that provided by Central Coast Water Board members taking into
3 consideration Board member comments given at the March 17 and May 4, 2011 hearings. (See,
4 e.g., Transcripts, Central Coast Regional Water Quality Control Board Panel Hearing, March 17,
5 2011, Conditional Waiver of Waste Discharge Requirements for Discharge From Irrigated Lands
6 (March 17, 2011 Transcript), p. 221:10-13 [Dr. Hunter: “Well, I really do appreciate the idea of
7 doing things collectively and trying to maximize resources and then the collaboration that may
8 come in sharing knowledge and experience.”]; Transcript, Central Coast Regional Water Quality
9 Control Board Panel Hearing, May 4, 2011, Volume II, Continuation of the Hearing on the
10 Waiver of Waste Discharge Requirements for Discharged From Irrigated Lands (May 4, 2011
11 Transcript), p. 623:23-24 [Dr. Hunter: “Innovative meaning we need solutions to individual farm
12 operations.”].)

13 This Central Coast Water Board direction resulted in the preparation of a Staff
14 Addendum, and public notice and review with respect to the agricultural alternative. That public
15 comment period closed on August 1, 2011. After August 1, 2011, the Central Coast Water Board
16 considered the written comment period closed and did not allow any more written comments or
17 evidence into the record. (See Chair’s Order on Admission of New Information (Feb. 16, 2012),
18 p. 4 [denies admission of a report prepared by Dr. Marc Los Huertos into the record, and declares
19 that no new written comments or evidence will be accepted into the record prior to the
20 March 2012 hearing].) A revised draft order was issued on August 16, 2011, in anticipation of a
21 September 1, 2011 public hearing. However, there was no quorum for action on this item and the
22 hearing was canceled. After new appointments were made early in 2012, the Central Coast Water
23 Board held a public workshop on February 1, 2012, for the benefit of the new Board members,
24 and scheduled the final public hearing for March 14-15, 2012.

25 At the March 14-15, 2012 hearing, Petitioners and the California Farm Bureau Federation,
26 and other agricultural organizations jointly presented a revised alternative to address criticisms
27 raised in the Central Coast Water Board Staff Addendum. The revised agricultural alternative
28 was presented as New Part E, “Part E. Additional Conditions That Apply to Tier 2 and Tier 3

1 Dischargers Through Participation in Third-Party Group” (New Part E) (“Central Coast Irrigated
2 Lands Presentation of CFBF & Farmers for Water Quality” PowerPoint Presentation (Mar. 14,
3 2012), attached hereto as Exh. E, pp. 20-22.) This presentation occurred early on March 14,
4 2012, and copies of the presentation were provided to the Central Coast Water Board, Central
5 Coast Water Board staff, and any member of the public that requested a copy of the presentation,
6 which included New Part E. Members of the public were encouraged to respond to New Part E
7 during their testimony. (Transcript, Central Coast Regional Water Quality Control Board,
8 March 14, 2012, Continuation of the Hearing on the Waiver of Waste Discharger Requirements
9 Discharged from Irrigated Lands (March 14, 2012 Transcript), p. 158:9-12.)

10 On the same day after the agricultural presentation, Mr. Steve Shimek (Shimek)
11 representing Monterey Coastkeeper and The Otter Project, gave his public testimony that
12 included a PowerPoint presentation. Shimek offered no new proposed language for Central Coast
13 Water Board consideration, and provided limited comment on New Part E. (March 14, 2012
14 Transcript, pp. 260:12-276:24.) By the end of the day on March 14, 2012, all public testimony
15 had concluded except for closing statements and rebuttal from the agricultural community,
16 closing statements from Central Coast Water Board staff, and Central Coast Water Board
17 deliberations.

18 On March 15, 2012, after receiving closing statements from agriculture and Central Coast
19 Water Board staff, the Central Coast Water Board entered into deliberations. Immediately after
20 the matter was turned over to the Central Coast Water Board, Board Member Johnston presented
21 additional amendments for Central Coast Water Board consideration. According to Board
22 Member Johnston, he had prepared these amendments in advance with assistance from the
23 Central Coast Water Board’s Executive Officer Roger Briggs (Executive Officer Briggs) and
24 legal counsel Ms. Frances McChesney (Counsel McChesney). Once these amendments were
25 presented, Board members shifted their focus to them, and declined to independently evaluate the
26 merits of New Part E because in part Central Coast Water Board staff and legal counsel advised
27 the Central Coast Water Board that it did not meet the “legal standard.” (Transcript, Central
28 Coast Regional Water Quality Control Board, March 15, 2012, Continuation of the Hearing on

1 the Waiver of Waste Discharger Requirements Discharged from Irrigated Lands (March 15, 2012
2 Transcript), p. 52:15-17.) Ultimately, after some discussion, the Central Coast Water Board
3 adopted the Conditional Waiver and MRP Orders with Mr. Johnston’s amendments and others.

4 III. ARGUMENT

5 A. The Central Coast Water Board’s Adoption of the Conditional Waiver on March 15, 6 2012, Violated the Due Process Rights of Petitioners’ Members

7 In an unfortunate turn of events, the Central Coast Water Board’s two-year public process
8 for adoption of the Conditional Waiver ended with the adoption of substantial amendments to the
9 Conditional Waiver that had not been publicly disclosed as part of the adoption process until after
10 the public hearing had been closed, and that were developed and conveyed indirectly to Board
11 Member Johnston through improper ex parte communications. The release of such significant,
12 prepared language during Board deliberations on its own violated the due process rights of the
13 agricultural dischargers that are regulated under the terms of the Conditional Waiver. However,
14 the fact that the proposed amendments resulted from improper ex parte communications
15 magnified the violation of the due process rights of Petitioners’ members. Because the Central
16 Coast Water Board’s final action so clearly violated the due process rights of those regulated, the
17 Board’s action is tainted and must be vacated in its entirety. Further, in light of these
18 circumstances, any subsequent action to revise, amend, or rectify the Central Coast Water
19 Board’s unlawful adoption must be remedied by the State Water Board under its own authority.

20 1. The Conditional Waiver Is a Quasi-Judicial Order and Petitioners’ Members 21 Must Be Afforded All Appropriate Due Process Rights Under the Law

22 The Conditional Waiver adopted by the Central Coast Water Board is a quasi-judicial
23 order, and the process for adoption of the Conditional Waiver was quasi-adjudicative in nature.
24 Thus, the Central Coast Water Board was required to comply with the Administrative Procedure
25 Act (APA), the California Administrative Adjudication Bill of Rights, and other related
26 requirements that afford interested members of the public, including Petitioners’ members due
27 process and a fair, transparent process.

1 The Central Coast Water Board may adopt waste discharge requirements for individual
2 dischargers or groups of dischargers. (See Wat. Code, § 13260 et seq.) Water Code
3 section 13269(a) provides that the State and Central Coast Water Boards may waive waste
4 discharge requirements for specific discharges or specific types of discharges “if the state board
5 or a regional board determines, after any necessary state board or regional board meeting, that the
6 waiver is consistent with any applicable state or regional water quality control plan and is in the
7 public interest.” (Wat. Code, § 13269(a)(1).) The Central Coast Water Board proceedings
8 involved in the adoption of the Conditional Waiver are formal hearings designed to allow the
9 Board to receive evidence and determine facts. (See Memorandum from Craig M. Wilson, State
10 Water Board, to Water Quality Attorneys (June 2, 2005) re: *Procedural Requirements and*
11 *Appellate Review of Waivers of Waste Discharge Requirements*, attached hereto as Exh. F.)
12 These proceedings ultimately result in an order which determines a legal right, duty, or other legal
13 interest of a particular group of individuals, in this case, agricultural dischargers. As applied to
14 these individual dischargers, the Conditional Waiver contains detailed and specific requirements
15 as well as significant individual determinations. Thus, the adoption of the Conditional Waiver
16 was a quasi-adjudicative act, and the procedural safeguards attendant to such actions are
17 applicable.

18 One such procedural safeguard governing adjudicative proceedings before the Central
19 Coast Water Board is the APA (Gov. Code, § 11400 et seq.), which includes the California
20 Administrative Adjudication Bill of Rights (Gov. Code, § 11425.10 et seq.). (Cal. Code Regs.,
21 tit. 23, § 648(b).) The California Administrative Adjudication Bill of Rights specifies the
22 minimum due process and public interest requirements that must be satisfied in a hearing that is
23 subject to its provisions. Specifically, as applicable to this Petition, these provisions require that
24 an agency conduct its proceeding while adhering to the following requirements:

25 (1) The agency shall give the person to which the agency action is directed
26 notice and an opportunity to be heard, including the opportunity to present and
rebut evidence.

27 ...

28 (8) Ex parte communications shall be restricted as provided in Article 7
(commencing with Section 11430.10). (Gov. Code, § 11425.10(a).)

1 The Central Coast Water Board failed to satisfy these requirements. Specifically, the
2 Central Coast Water Board failed to adhere to subdivisions (a)(1) and (a)(8) because it failed to
3 provide provide Petitioners' members an opportunity to comment on the significant, new
4 provisions that were presented after the close of the public hearing, and because at least one of
5 these provisions was the result of ex parte communications. In short, the affected dischargers
6 were never afforded the opportunity to present any evidence or comments related to those
7 amendments. Accordingly, the Central Coast Water Board's process violated Petitioners' rights.³

8 Central Coast Water Board decisions must fully comport with due process requirements.
9 (See *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 528.)
10 This due process requirement means that affected parties must have the opportunity to be heard at
11 a meaningful time and in a meaningful manner. (*Natural Resources Defense Council v. Fish &*
12 *Game Com.* (1994) 28 Cal.App.4th 1104, 1126, citing *Mathews v. Eldridge* (1976) 424 U.S. 319,
13 333.) In order for the opportunity to comment to be considered "meaningful" and satisfy due
14 process considerations, the affected parties must receive adequate time to prepare a response.
15 (See generally *Kempland v. Regents of University of California* (1984) 155 Cal.App.3d 644, 649.)
16 By failing to provide agricultural dischargers and other interested members of the public an
17 opportunity to provide any meaningful comment on the adoption of substantial amendments at the
18 March 15, 2012 hearing, the Central Coast Water Board violated this fundamental principle of
19 due process. The revelation and adoption of substantial amendments after the public hearing had
20 been closed provided the affected agricultural dischargers with no meaningful time to comment,
21 and no meaningful manner to prepare a response, clearly violating their due process rights.

22 Moreover, the rules with respect to ex parte communications as applied to the Central
23 Coast Water Board are clear. First, Government Code section 11430.10 states that "[w]hile the
24 proceeding is pending there shall be no communication, direct *or indirect*, regarding any issue in
25

26 ³ The Central Coast Water Board and its legal counsel are fully aware of this legal responsibility. On the previous
27 day when agricultural organizations presented proposed language changes, the Central Coast Water Board and legal
28 counsel discussed the need to provide staff and other parties with additional time to respond. (March 14, 2012
Transcript, pp. 157:18-158:12.) However, no such opportunity was provided after Board Member Johnston
introduced his proposal.

1 the proceeding, to the presiding officer from an employee or representative of an agency that is a
2 party or from an interested person outside the agency, without notice and opportunity for all
3 parties to participate in the communication.” Second, in a memorandum to all State and Regional
4 Board Members, Chief Counsel Michael Lauffer explains the fundamental purposes behind
5 limiting such communications, and states that such rules apply to the adoption of Conditional
6 Waivers, such as the one at issue here. (Memorandum to Board Members, State Water Board and
7 California Regional Water Quality Control Boards from Michael Lauffer, Chief Counsel
8 (Sept. 17, 2008), re: Transmittal of Ex Parte Communications Questions and Answers Document
9 (Ex Parte Q&A), pp. 2, 4.)⁴ Specifically, the rules with respect to ex parte communications “have
10 their roots in constitutional principles of due process and fundamental fairness.” (Ex Parte Q&A,
11 p. 2.) And,

12 Ex parte communications are fundamentally offensive in adjudicative proceedings
13 because they involve an opportunity by one party to influence the decision maker
14 outside the presence of opposing parties, thus violating due process requirements. Ex
15 parte communications are not subject to rebuttal or comment by other parties. Ex
16 parte communications can frustrate a lengthy and painstaking adjudicative process
17 because certain decisive facts and arguments would not be reflected in the record
18 or in the decisions. Finally, ex parte contacts may frustrate judicial review since
19 the record would be missing such communications. (Ex Parte Q&A, p. 2.)

20 In this case, the improper ex parte communication was an indirect communication
21 between Shimek and Board Member Johnston (one of the presiding officers) through Executive
22 Officer Briggs. More specifically (the details and evidence are provided in section 2 below),
23 Shimek presented proposed amendments (hereafter referred to as the Shimek Proposal) for the
24 Conditional Waiver to Central Coast Water Board staff, including Executive Officer Briggs.
25 Executive Officer Briggs took the Shimek Proposal and included it in amendments he prepared at
26 the request of Board Member Johnston. In other words, Executive Officer Briggs acted as a
27 conduit between Shimek and Board Member Johnston. The result is that one interested party
28 influenced the decision makers outside the presence of opposing parties, which violates the law
and principles with respect to limitations on ex parte communications. Whether or not Board

⁴ http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf (as of April 15, 2012).

1 Member Johnston was aware of the origins of the language provided to him by Executive Officer
2 Briggs, the fact is that the prohibited ex parte communication occurred, at minimum due to the
3 actions of Executive Officer Briggs. Such ex parte communications – direct or indirect – are
4 expressly prohibited under the law.

5 **2. Adoption of Amendments to the Conditional Waiver Were the Result of**
6 **Improper Ex Parte Communications, Which Invalidates the Central Coast**
7 **Water Board’s Action in its Entirety**

8 As indicated previously, the Central Coast Water Board’s adoption hearing spread across
9 two days, March 14 and March 15, 2012. The second day was primarily for limited rebuttal from
10 the agricultural community, Central Coast Water Board staff response, and Board deliberations—
11 in that order. After Central Coast Water Board staff provided its responses and proposed
12 changes, the Board Chair transitioned the meeting to Board deliberations. (March 15, 2012
13 Transcript, p. 93:11-15 [“MR. YOUNG: Okay . . . We are at the point where we heard from Staff.
14 And the Board is now at the point where it can begin to deliberate.”]; March 15, 2012 Transcript,
15 p. 93:24-25 [“MR. YOUNG: We’re at the point where it’s in the Board’s hands.”].) Only at this
16 point in the process did Petitioners become aware of alternative language (hereafter referred to as
17 Johnston Proposal) that had been prepared by Board Member Johnston in consultation with
18 Executive Officer Briggs and Counsel McChesney, and potentially other Central Coast Water
19 Board staff. (March 15, 2012 Transcript, p. 94:5-11 [“MR. JOHNSTON: I gather you’re aware,
20 Mr. Chairman, because it was shared with you, although none of the other Board members, is I
21 worked with the Executive Officer and counsel over the last week or two on a couple of different
22 pieces of language. And the principal stuff in there is – well, three things, really.”].)

23 While discussing the Johnston Proposal, the following exchange occurred.

24 MR. YOUNG: I think it's a great proposal. I think what you've done is taken what
25 Staff has always said was achievable as part of what they have been proposing,
26 and essentially put down in writing what it might look like, and make that part of
27 what we're going to incorporate in the Order and the Monitoring Program.
28 So how much of this did you write?

MR. JOHNSTON: About half.

MR. YOUNG: Good. It's great.

MR. BRIGGS: Mr. Chair.

MR. YOUNG: Yes.

1 MR. BRIGGS: Mr. Johnston asked --

2 MR. JOHNSTON: In answer to your question about what I wrote, this was a back
and forth between --

3 MR. YOUNG: I understand.

4 MR. JOHNSTON: -- myself, Roger, Frances. And I would imagine that Roger
was consulting other Staff on it.

5 MR. YOUNG: Right.

6 Is this acceptable to Staff?

7 MR. BRIGGS: That was the reason Mr. Johnston wanted to vet it instead of
8 dropping it here was to see if it would be acceptable. Mr. Johnston asked me to
9 help flesh out some ideas for a technical advisory committee. But I wanted just
10 one -- I think it's a typo type of admission. In the last paragraph that you just
referred to, the second line, that parenthetical -- I think my intent was for that to be
11 an, e.g., for example NRCS, or RCD. And we should spell that out, too, instead of
12 using acronyms. (March 15, 2012 Transcript, pp. 113:18-114:21.)

11 Based on this exchange, it is clear that Central Coast Water Board staff assisted Board Member
12 Johnston in preparing the Johnston Proposal. However, additional emails and phone calls with
13 respect to this issue,⁵ and knowledge from individuals participating in this process, provides
14 significant evidence that demonstrates a significant portion of the Johnston Proposal was the
15 result of improper ex parte communications.

16 The evidence that supports this is as follows. First, phone notes from Executive Officer
17 Briggs and Central Coast Water Board staff person Lisa McCann clearly indicate that they
18 received communications from Shimek regarding meetings that Shimek had with the State Water
19 Board and California Environmental Protection Agency (CalEPA) Undersecretary Gordon Burns
20 and calls with others with respect to the Shimek Proposal. (Exh. G, April 6, 2012 PRA
21 Documents, pp. 1-3 [Roger Briggs Phone Notes, "tc Shimek . . . Steve took draft to Sacto"];
22 "Steve Shimek . . . Here @ Wed. Would like to meet w/ only people re: supplemental"; "Steve
23 Shimek – getting calls, wanted to be sure I'm O.K.>"; *id.*, p. 13 [Lisa McCann Phone Notes,
24 3/8/12, "Shimek re: conversation w/ Rick Tomlinson [and] Gordon Burns."].)

25
26 ⁵ On April 6, 2012, Central Coast Water Board Staff Counsel, Frances McChesney, responded to a Public Records
27 Act (PRA) request from Kari Fisher, Associate Counsel, California Farm Bureau Federation, and provided copies of
28 documents that were responsive to the request. The documents in question are related to this matter and Petitioners
presume are considered to be part of the Administrative Record. (See Exh. G attached hereto (April 6, 2012 PRA
Documents).)

1 Second, there is clear evidence that Central Coast Water Board staff had the Shimek
2 Proposal in hand. Shimek told CalEPA Undersecretary Burns and Rick Tomlinson in a
3 teleconference that he had presented the Shimek Proposal to Central Coast Water Board staff.
4 (Declaration of Rick Tomlinson in Support of Grower-Shipper Association of Central California,
5 Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western
6 Growers' Petition for Review (Tomlinson Decl.), ¶ 4.) Central Coast Water Board staff knew of
7 this conference call. (Exh. G, April 6, 2012 PRA Documents, p. 13 [Lisa McCann's phone
8 notes].) It appears that Central Coast Water Board staff also met with Shimek regarding the
9 Shimek Proposal. (*Id.*, pp. 1-5 [Roger Briggs' phone notes].)

10 Third, emails between Board Member Johnston and Executive Officer Briggs show that
11 Executive Officer Briggs provided edits to Board Member Johnston for the Conditional Waiver,
12 and provided Board Member Johnston a final version with edits in *red* to identify new language
13 after they were reviewed by legal counsel. (Exh. G, April 6, 2012 PRA Documents, pp. 20-24.)
14 Part of the language in red includes new Condition 11, which is essentially the Shimek Proposal.
15 (Exh. G, April 6, 2012 PRA Documents, pp. 15 and 17 [Email from Roger Briggs to Mike
16 Johnston on 3/10/2012, 3:00 PM: "Mike, Here are possible edits for the order (two docs here), . . .
17 [language redacted]"; Email from Mike Johnston to Roger Briggs on 3/12/2012, 9:42 PM,
18 requesting that copies of the language be left at hotel desk for Board Member Johnston]; see also
19 *id.*, p. 18 [Email from Roger Briggs to mjohnston890@gmail.com on 3/13/2012, 8:17 AM,
20 conveying the final language and that copies would also be provided to the Board Chair, Jeff
21 Young].)

22 Further, as indicated above, both Board Member Johnston and Executive Officer Briggs
23 acknowledged that Johnston had only developed about half the language, and that Briggs and
24 others at the Central Coast Water Board helped to develop it more fully. The records provided in
25 response to California Farm Bureau Federation's Public Record Act request did not include the
26 original language conveyed from Board Member Johnston to Executive Officer Briggs before it
27 was revised by Briggs and staff.
28

1 Fourth, the Shimek Proposal as compared to the Johnston Proposal, shows that they are
2 remarkably similar. The Shimek Proposal is as follows:

3 Inserted between Staff Proposal Condition 10 and 11:

4 Groups may form around watersheds or other commonalities to propose creative
5 water quality projects and solutions, and to clarify group efforts which could lead
6 to compliance with this order (i.e. commodity based certification programs such as
7 SIP). At the discretion of the executive officer, groups may be granted down-
8 classifications (i.e. Tier 3 to Tier 2) and project-specific timelines, benchmarks,
9 and monitoring requirements. The purpose of this provision is to encourage
10 innovations, site-specific solutions, and to remove barriers to long-term
11 investments (i.e. engineered wetlands).

12 Projects will be evaluated for, among other things:

- 13 • Scale. Solutions must be scaled to address impairment
- 14 • Chance of success. Projects must demonstrate a reasonable chance of
15 eliminating toxicity within the permit term (5 years) and reducing
16 discharge of nutrients to surface and groundwaters.
- 17 • Commitment to solving the problem. Proposals must address what new
18 actions will be taken if the project does not meet goals and how the project
19 will be sustained through time.
- 20 • Benchmarks and accountability. Proposals must set benchmarks and
21 describe monitoring and measuring methods. Monitoring points must be at
22 the point of discharge but may not always be at the edge-of-field, so long
23 as monitoring results demonstrate water quality improvement and the
24 efficacy of a project.

25 Project proposals will be evaluated by a committee comprised of: [Two?] Three
26 researchers or academics skilled in agricultural practices and/or water quality, one
27 farm advisor (NRCS or RCD), one grower representative, one environmental
28 representative, one environmental justice or environmental health representative,
and one RWQCB staff member. The RWQCB Executive Officer has sole
discretion in giving final approval of any project after receiving project evaluation
results and recommendations from the committee. (See Shimek Proposal, Exh. 1,
Tomlinson Decl.)

29 In comparison, Condition 11 of the Johnston Proposal is as follows:

30 New Condition 11 (all new language):

31 Dischargers may form third party groups to develop and implement alternative
32 water quality management practices (i.e., group projects) or cooperative
33 monitoring and reporting programs to comply with this Order. At the discretion of
34 the Executive Officer, Dischargers that are a participant in a third party group that
35 implements Executive Officer-approved water quality improvement projects or
36 Executive Officer-approved alternative monitoring and reporting programs may be
37 moved to a lower Tier (e.g., Tier 3 to Tier 2, Tier 2 to Tier 1) and/or provided
38 alternative project-specific timelines, and milestones.

1 To be subject to Tier changes or alternative timelines, Projects will be evaluated
2 for, among other elements:

- 3 • Project Description. Description must include identification of
- 4 participants, methods, and time schedule for implementation.
- 5 • Purpose. Proposal must state desired outcomes or goals of the project (e.g.,
- 6 pollutants to be addressed, amount of pollution load to be reduced, water
- 7 quality improvement expected).
- 8 • Scale. Solutions must be scaled to address impairment
- 9 • Chance of Success. Projects must demonstrate a reasonable chance of
- 10 eliminating toxicity within the permit term (five years) or reducing
- 11 discharge of nutrients to surface and groundwater.
- 12 • Long term solutions and contingencies. Proposals must address what new
- 13 actions will be taken if the project does not meet goals and how the project
- 14 will be sustained through time.
- 15 • Accountability. Proposals must set milestones that indicate progress
- 16 towards goals stated as above in “purpose.”
- 17 • Monitoring and reporting. Description of monitoring and measuring
- 18 methods, and information to be provided to the Water Board. Monitoring
- 19 points must be representative but may not always be at the edge-of-farm so
- 20 long as monitoring results demonstrate water quality improvement and the
- 21 efficacy of a project. In addition, monitoring must 1) characterize and be
- 22 representative of discharge to receiving water, 2) demonstrate project
- 23 effectiveness, 3) and verify progress towards water quality improvement
- 24 and pollutant load reduction,

25 Project proposals will be evaluated by a Technical Advisory Committee (TAC)
26 comprised of: Two researchers or academics skilled in agricultural practices
27 and/or water quality, one farm advisor (NRCS or RCD), one grower
28 representative, one environmental representative, one environmental justice or
environmental health representative, and one Regional Board staff. The TAC must
have a minimum of five members to evaluate project proposals and make
recommendations to the Executive Officer. The Executive Officer has discretion
to approve any project after receiving project evaluation results and
recommendations from the committee. If the Executive Officer denies approval,
the third party group may seek review by the Regional Board. As stated in the
NPS Policy, management practice implementation is not a substitute for
compliance with water quality requirements. If the project is not effective in
achieving water quality standards, additional management practices by individual
Dischargers or the third party group will be necessary. (Exh. G, April 6, 2012
PRA Documents, pp. 22-23 [Johnston Proposal]; Conditional Waiver, pp. 14-15.)

22 Clearly, the new Condition 11 in the Johnston Proposal is the Shimek Proposal with some
23 changes. For example, both set forth a very similar process for third party groups, and allow for
24 the lowering of tier designation if approved by the Executive Officer. Both also include almost
25 the same exact elements for projects to be evaluated, and both require review by a Technical
26 Advisory Committee that is composed of the same category of individuals, including the “typo”
27 Executive Officer Briggs described (i.e., failed to spell-out NRCS and RCD). (See March 15,
28 2012 Transcript, p. 114:16-20.) Some of the language between the two is verbatim. The

1 similarities between the Shimek Proposal and Johnston Proposal are far too great to be a
2 coincidence.

3 Considering the fundamental principles associated with due process and the prohibition
4 against ex parte communications, it is patently unlawful – not to mention bad policy – for a
5 regional water board’s Executive Officer to serve as a conduit of information between an
6 interested person and a water board member – whether or not such actions were known by the
7 water board member. Providing language that was developed by an interested party to a Board
8 member who may have been trying to develop his own alternative, clearly allowed one party (i.e.,
9 Shimek) to influence the decision maker (i.e., the Central Coast Water Board) outside the
10 presence of opposing parties. Notably, Shimek could have presented the Shimek Proposal as part
11 of his 24 minute presentation on March 14, 2012, but did not. (See March 14, 2012 Transcript,
12 pp. 260:11-276:24.) Instead, it came in by the back door.

13 Because of the improper ex parte communication, the Central Coast Water Board’s
14 adoption of the Conditional Waiver and MRP Orders was illegal and must be set aside in its
15 entirety. When an improper ex parte communication occurs and the APA is violated, the
16 agency’s action must be invalidated or reversed. (*Dept. of Alcoholic Beverage Control v.*
17 *Quintanar* (2006) 40 Cal.4th 1, 17; see *Rondon v. Alcoholic Beverage Control Appeals Bd.*
18 (2007) 151 Cal.App.4th 1274, 1290 [“. . . based on the violation of statutory protections designed
19 to ensure due process and a fair hearing, we conclude that ‘reversal of the Department’s order is
20 required.’ [citation omitted.]”].) Accordingly, the State Water Board has no option but to
21 invalidate the Central Coast Water Board’s adoption of the Conditional Waiver and the MRP
22 Orders in their entirety. Because the action is invalid, and due to the circumstances that require
23 its invalidation, Petitioners request that the State Water Board utilize its authority to further
24 consider this matter and adopt a new Conditional Waiver and MRP Orders.

25 **B. The Central Coast Water Board Failed to Properly Consider the Agricultural**
26 **Alternative When it Unlawfully Adopted the Conditional Waiver With Improper**
27 **Amendments**

28 As already discussed above, the Central Coast Water Board acted improperly when it
adopted the Conditional Waiver and MRP Orders due to the prohibited ex parte communication.

1 Further, the Central Coast Water Board’s decision to adopt the Johnston Proposal prevented the
2 Central Coast Water Board from properly considering the alternative proposal set forth in New
3 Part E (sometimes referred to by Central Coast Water Board members and staff as the agricultural
4 alternative). The decision to adopt the Johnston Proposal was in large part based on a mistaken
5 belief that the New Part E was not a viable option because it failed to meet “legal standards.”
6 Collectively, these two factors prevented the Central Coast Water Board from engaging in open
7 deliberations regarding the merits of the New Part E and its various components. While the
8 Central Coast Water Board was under no legal obligation to adopt or incorporate New Part E,
9 they were legally required to consider, in an open and transparent manner, all of the information
10 properly put before them as part of the administrative process. New Part E was properly
11 presented and deserved fair consideration as part of the Central Coast Water Board’s deliberative
12 process.

13 **1. New Part E Was Incorrectly Portrayed as Not Meeting Legal Standards**

14 Throughout this process, the agricultural community worked diligently to develop an
15 alternative that would provide growers in the region with an option between complying with the
16 prescriptive Tier 2 and Tier 3 requirements in the Conditional Waiver, or participating in a third
17 party group that would audit Tier 2 and Tier 3 farms/ranches and would work directly with
18 growers to help develop and implement protective management practices. (See *Comments on*
19 *Addendum to Staff Report for an Updated Conditional Waiver of Waste Discharge Requirements*
20 *for Irrigated Agricultural Waste Discharges, Draft Agricultural Order No. R3-2011-0006;*
21 *Evaluation of New Information Provided by Agricultural Industry Representatives on March 17,*
22 *2011 and May 4, 2011*, letter submitted to Mr. Jeffrey S. Young, Chair, from Somach Simmons &
23 Dunn on behalf of the Farmers for Water Quality Coalition⁶ (Aug. 1, 2011) (Farmers
24 August 2011 Comments and Evidence), p. 4.) Based on numerous comments received from
25 Central Coast Water Board members, Central Coast Water Board staff and others, the agricultural
26 community revised its alternative, which ultimately culminated in New Part E. (March 14, 2012

27 _____
28 ⁶ The Farmers for Water Quality Coalition is an informal coalition of agricultural organizations, including all of the
Petitioners.

1 Transcript, pp. 155:19-25, 160:16-24.) However, despite these diligent efforts, the Central Coast
2 Water Board staff repeatedly discounted the agricultural alternative because it did not include the
3 same prescriptive requirements as contained in the then pending Central Coast Water Board draft
4 order. (Staff Addendum, pp. 6-8.) And, Central Coast Water Board staff incorrectly
5 characterized the agricultural alternative as inappropriately allowing third party groups. (Staff
6 Addendum, p. 7.)

7 As explained exhaustively in the Farmers August 2011 Comments and Evidence, the
8 Central Coast Water Board's staff addendum mistakenly characterized the Central Coast Water
9 Board's authority under Water Code section 13269, and the State Water Board's position with
10 respect to the value and legality of third party groups in implementing waivers and other nonpoint
11 source regulatory vehicles. (Farmers August 2011 Comments and Evidence, pp. 5-8; see *In the*
12 *Matter of the Petitions of Agricultural Water Quality Coalition, et al.* (Jan. 22, 2004),
13 Order WQO 2004-0003, pp. 9-10.) The Staff Addendum also claimed that the agricultural
14 alternative was not consistent with the state's Nonpoint Source Policy. Again, complete
15 responses to the Staff Addendum's allegations were provided in the Farmers August 2011
16 Comments and Evidence.

17 Even though Petitioners disagreed with the Staff Addendum's legal characterization of the
18 agricultural alternative that was presented on March 17, 2011, and as revised on May 4, 2011,
19 Petitioners and other agricultural organizations continued to strive to address Central Coast Water
20 Board staff's concerns. This resulted in the New Part E that was presented on March 14, 2012.
21 In its response to New Part E, Central Coast Water Board staff commented before the Central
22 Coast Water Board that, "the language and the approach does not meet the legal standard. We
23 talked to our attorney about this last night and this morning." (March 15, 2012 Transcript,
24 p. 52:15-17.) However, in subsequent comments provided to the Central Coast Water Board from
25 legal counsel, her legal concerns (although not agreed upon by Petitioners) were with respect to
26 proposed Conditional Waiver changes unrelated to New Part E.

27 Specifically, Counsel McChesney conveyed legal concerns with proposed changes that
28 would have incorporated compliance schedule provisions into requirements for complying with

1 water quality standards, and proposed changes with respect to providing the Farm Plan to Central
2 Coast Water Board staff upon request. (March 15, 2012 Transcript, pp. 53:3-55:21, 57:1-12.)
3 Neither of these issues is relevant to New Part E. When discussing New Part E, Counsel
4 McChesney commented that there was “great improvement” but that some areas could be
5 “clarified better.” (March 15, 2012 Transcript, p. 58:12-15.) A statement with respect to better
6 clarification does not support staff’s statement that New Part E “does not meet the legal
7 standard.”

8 Furthermore, staff provided significant other comments on New Part E, but none
9 explained why, in their opinion, New Part E was not consistent with Water Code section 13269 or
10 other applicable statutory authority. (See, e.g., March 15, 2012 Transcript, pp. 46:23-48:10,
11 50:7-15, 52:6-14.)

12 Yet, despite the lack of a clear explanation as to why New Part E was unlawful, Central
13 Coast Water Board members were left with the perception that they could not adopt New Part E
14 because it was fundamentally flawed. (See, e.g., March 15, 2012 Transcript, p. 130:1-8
15 [“MR. JEFFRIES: I have mixed emotions. I was really in favor after I heard all the testimony
16 yesterday ask what the Ag presented and all the testimony. I was really -- after I heard all the
17 testimony because I'm the type of person -- it's a public hearing. I like to hear all the information
18 before I make a decision. I was really leaning toward the Ag Proposal, and then the legality issues
19 came up.”].) Consequently, the Board members grabbed onto the Johnston Proposal as if it was a
20 life preserver instead of properly considering New Part E.

21 **2. The Johnston Proposal Deflected Proper Consideration of New Part E**

22 Besides being left with the impression that New Part E was legally not a viable option, the
23 Johnston Proposal gave the Central Coast Water Board members an “out” from properly
24 considering New Part E. (See, e.g., March 15, 2012 Transcript, p. 117:6-13 [“Well, I do
25 appreciate this last conceptual and also very well-defined and spelled-out opportunity to open the
26 door to the intent New Part E. So I really appreciate that language, and I believe – and I'm glad to
27 know that there was time for Staff and Mr. Briggs and Frances McChesney to also consider the
28 language. Knowing that, I would like to propose that we accept those suggest revisions

1 wholesale.”]; p. 101:14-19 [“. . . I am not in favor of going through the con list and trying to work
2 that in terms of the Ag Alternative. I am in favor of taking the language that I saw that you
3 worked on, I think that that has merit. And I'd like to see that offered up and brought into the
4 recommendation.”].)

5 Unfortunately, this easy-out happened without any comment or feedback from those
6 subject to the Conditional Waiver. As discussed above, much of Condition 11 came directly out
7 of the Shimek Proposal. Presumably then, Shimek supported the concept that was ultimately
8 adopted. Central Coast Water Board staff also appear to have had sufficient opportunity to
9 review and consider the merits of the Johnston Proposal, including Condition 11. (See, e.g.,
10 March 15, 2012 Transcript, p. 114:8-9, 12-14, p. 117:10-12.) However, because the Johnston
11 Proposal, including its new Condition 11, were presented after the close of public comments,
12 agricultural dischargers and other members of the public were given no opportunity to comment
13 on the merits of these changes.

14 Substantively, the Johnston Proposal shifts consideration of third party groups and their
15 role in this process to a Technical Advisory Committee and the Executive Officer to be
16 determined at a later date. Its most significant change was to add Condition 11 to the Conditional
17 Waiver. (Conditional Waiver, pp. 14-15.) Condition 11 was portrayed as a “great compromise”
18 that would provide a process for evaluating proposals by third party groups, including potentially
19 the third party program established in New Part E. (March 15, 2012 Transcript, p. 116:7-15,
20 132:4-5.) However, the language of Condition 11 suggests that a program like the one articulated
21 in New Part E would not qualify for approval because it appears to be more project oriented.
22 (Conditional Waiver, p. 14 [“. . . Projects will be evaluated for, among other elements: . . .”].)
23 Specifically, the criteria for evaluation of projects submitted under this provision severely limit
24 the type of third party program that could be approved. For example, an approvable project must
25 include monitoring results that demonstrate water quality improvement. An approvable project
26 must also demonstrate that it has a reasonable chance of eliminating toxicity within five years or
27 reducing discharge of nutrients to surface and groundwater. Both of these requirements may be
28 appropriate for water quality improvement projects; however, they are not applicable to third

1 party audit programs like that proposed in New Part E, nor do they promote a coalition approach
2 for implementing the goals of the Conditional Waiver. Had the Johnston Proposal been available
3 to all members of the public for review and comment as part of the public hearing, the Central
4 Coast Water Board may have gained insight into the practical application, or impractical
5 application, of Condition 11 before it was adopted.

6 Furthermore, a last minute effort by one board member to engage in a discussion with
7 respect to the differences between New Part E and Condition 11 was thwarted because other
8 Board members argued that it would be unfair to stakeholders to have that discussion. (March 15,
9 2012 Transcript, pp. 142:15-144:25.) In other words, it was okay to adopt language developed
10 outside of the transparent, public process but it was not okay to allow a public discussion with
11 respect to the differences between the Johnston Proposal and agriculture's publicly-presented
12 New Part E. Due to the improper actions of many, New Part E did not receive appropriate and
13 deliberate consideration by the Central Coast Water Board.

14 **C. Conditional Waiver and MRP Orders Contain a Number of Inappropriate and**
15 **Unsupported Provisions**

16 Petitioners challenge a number of the requirements contained in the Conditional Waiver
17 and attendant MRP Orders. For some of these requirements, they are improper because they do
18 not comply with the law. For others, they are not supported by proper findings. And yet for
19 others, they were improperly adopted because the language of the provision is not consistent with
20 the Central Coast Water Board's actual understanding of their impact. To officially address the
21 specifically identified challenged provisions and to avoid duplication of argument, Petitioners
22 have grouped them according to their primary legal deficiency for purposes of this Statement of
23 Points and Authorities.

24 As a preliminary matter, Petitioners take issue with the structure of the Conditional
25 Waiver and MRP Orders as a whole. The Conditional Waiver as adopted includes 43 initial
26 findings and an additional 140 findings in Attachment A, which is incorporated into the
27 Conditional Waiver via Finding 43 in the Conditional Waiver. (Conditional Waiver, p. 12.)
28 However, the adopted findings are not proper findings under the law.

1 In California, the Central Coast Water Board must support its decisions with specific
2 findings based on evidence in the record. Findings must “bridge the analytical gap between the
3 raw evidence and the ultimate decision or order.” (*Topanga Assn. for a Scenic Community v.*
4 *County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*); see also *In Re Petition of the City*
5 *and County of San Francisco, et al.* (Sept. 21, 1995) SWRCB Order No. WQ 95-4, pp. 10, 13.)
6 Further, the findings must be supported by evidence in the record. (*Topanga*, pp. 514-515.) In
7 this case, the findings are numerous, broad and generic, and do not actually explain why the
8 requirements in the Conditional Waiver and MRP Orders are appropriate. Thus, despite the
9 volume of findings, as shown further below, they do not actually bridge any gap between the
10 evidence and the requirements in the Conditional Waiver.

11 **1. The Tiering Criteria in Part A Are Not Associated With Risk to Water**
12 **Quality, and Thus Are Arbitrary**

13 Central to the Conditional Waiver and its requirements is the tiered system proposed in
14 Provisions 13-21. (See Petition, above, section 3, ¶ 4.) The tiering system attempts to equate
15 threat to water quality based on pesticides used, type of crop grown, size of the operation, and
16 physical location as compared to surface waterbodies listed as impaired on the state’s 303(d) list.
17 It fails to recognize or take into account that the implementation of certain management practices
18 and/or certain cultural practices by various commodities may be more effective in protecting
19 water quality than the mere presence of the physical factors identified in the Conditional Waiver.

20 Specifically, under the Conditional Waiver farms/ranches may only be in Tier 1 if they do
21 *not* use chlorpyrifos or diazinon; are located more than 1000 feet from a surface waterbody listed
22 for toxicity, pesticides, nutrients, turbidity, or sediment on the 2010 Clean Water Act
23 Section 303(d) List of Impaired Waterbodies; and, if the farm/ranch grows crops with a high
24 potential to discharge nitrogen to groundwater,⁷ is less than 50 acres, and is not within 1000 feet
25 of a public water system that exceeds drinking water standards for nitrate. Or, if the farm/ranch is

26
27 ⁷ The Conditional Waiver defines crops with a high potential to discharge nitrogen to groundwater to include the
28 following: beet, broccoli, cabbage, cauliflower, celery, Chinese cabbage (napa), collard, endive, kale, leek, lettuce
(leaf and head), mustard, onion (dry and green), spinach, strawberry, pepper (fruiting), and parsley.

1 in a certified program like the Sustainability in Practice (SIP) program and it is approved by the
2 Executive Officer, then it too is categorized as Tier 1. (Conditional Waiver, p. 16.) These criteria
3 are unrelated to water quality because they are not actually related to potential discharges of
4 pollutants of concern. For example, the use of chlorpyrifos or diazinon (or absence thereof) does
5 not automatically determine threat to water quality. There are many agricultural dischargers that
6 use these products and that have no irrigation or stormwater runoff. In those cases, the use of the
7 specified products should not prevent a farm/ranch from being considered Tier 1, which is
8 supposed to represent those operations with the least threat to water quality. Likewise, acreage
9 size (i.e., <50 acres) is also irrelevant. There are probably hundreds of farms/ranches that exceed
10 the 50 acre threshold that are less of a threat to water quality than some small 50 acre parcels.
11 The size and crop type are not determining factors for assessing threat to water quality.

12 In comparison to those farms/ranches in Tier 1, a farm/ranch of any size that uses
13 chlorpyrifos or diazinon, and discharges irrigation or stormwater runoff to an impaired waterbody
14 is automatically designated as Tier 3. This criteria fails to consider the timing of application of
15 the pesticide as compared to when runoff may occur. Thus, it has little correlation to actual threat
16 to water quality. Likewise, categorizing farms/ranches as Tier 3 merely based on crop type and
17 acreage size also has no actual correlation to the threat to water quality. And again, the
18 Conditional Waiver provides no findings that directly support the tier classification as proposed.

19 Also as proposed, the establishment of tiers is somewhat illusory. Specifically,
20 Provision 14 would allow the Executive Officer of the Central Coast Water Board to elevate
21 Tier 1 or Tier 2 dischargers to a higher tier, if the Executive Officer finds the discharger poses a
22 higher threat. However, there are no objective criteria listed to determine when a discharger is to
23 be elevated from one tier to another. Thus, there is nothing in the Conditional Waiver that would
24 provide an agricultural operator and/or landowner with any guidance as to what might trigger
25 their elevation to a higher tier, nor are there any procedural or due process elements included that
26 would allow an agricultural landowner or operator to challenge the Executive Officer's decision
27 before the Central Coast Water Board.

1 Water Code section 13223(a) provides the Central Coast Water Board with the authority
2 to delegate its powers to the Executive Officer with the exception of, among others, the
3 promulgation of any regulation and the issuance, modification, or revocation of any water quality
4 control plan, water quality objective, or waste discharge requirement. The amount of discretion
5 given to the Executive Officer under this provision, and in numerous other provisions within the
6 Conditional Waiver, seemingly delegates to the Executive Officer the authority to revise
7 requirements in the Conditional Waiver. Although revisions to conditional waivers adopted
8 pursuant to Water Code section 13269 are not specifically enumerated in Water Code
9 section 13223(a), revisions to waivers are akin to revisions in waste discharge requirements.
10 Specifically, changing the status of a discharger from a lower tier to a higher tier fundamentally
11 alters the burdens and regulatory requirements placed on that discharger – much like a revision to
12 waste discharge requirements. Considering the potential changing regulatory burden and
13 fundamental due process concerns, such an action should not be delegated to the Executive
14 Officer.

15 Accordingly, the tiering provisions are not based on threat to water quality, are not
16 supported by findings, and therefore are arbitrary. Unless the Petitioners’ other remedies are
17 implemented, the State Water Board must vacate the tiering provisions.

18 **2. Provisions 22 and 23 Require Immediate Compliance With Water Quality**
19 **Standards**

20 Provision 22 states, “[d]ischargers must comply with applicable water quality standards,
21 as defined in Attachment A, protect the beneficial uses of waters of the State and prevent
22 nuisance as defined in Water Code section 13050.” (Conditional Waiver, p. 18.) Provision 23
23 states, “[d]ischargers must comply with applicable provisions of the Central Coast Region Water
24 Quality Control Plan (Basin Plan) and all other applicable water quality control plans as identified
25 in Attachment A.” (*Ibid.*) These provisions collectively require immediate compliance with all
26 water quality standards, without due regard for time schedules or other considerations. It also
27 assumes that management practices exist and if utilized will ensure compliance with water quality
28 standards. However, as repeatedly indicated by agricultural specialists and researchers that is not

1 necessarily the case. For example, in testimony provided by Dr. Timothy K. Hartz, Extension
2 Specialist and Agronomist with the University of California, to the Central Coast Water Board at
3 its July 8, 2010, workshop, he stated that, “[t]here are practical limitations on agriculture that will
4 make control of nitrate losses especially concentration based control down to 10 ppm, very
5 difficult or impossible to reach.” (Central Coast Water Board Workshop to Discuss Preliminary
6 Draft Staff Report Recommendations for an Updated Agricultural Order, Public Comments and
7 Alternative (July 8, 2010) (July 2010 Workshop), Audio 4, 40:30.) Dr. Hartz also testified that,
8 “[c]ertain conservation measures discussed to remove discharge from fields such as vegetative
9 ditches and filter strips may have good effectiveness for certain pollutants, but for nitrates they
10 have very limited effectiveness.” (July 2010 Workshop, Audio 4, 38:30.)

11 Similarly, Mr. Michael Kahn, an Irrigation Water Resource Advisor for the University of
12 California Cooperative Extension, testified that, “UC researchers and advisors like myself
13 participate in evaluation and development of practices that can improve farm water quality.
14 However, although we are developing effective practices, these practices can’t be used in every
15 situation.” (Transcript of pertinent part of July 2010 Workshop, attached hereto as Exh. H,
16 p. 9:8-15.)

17 Representatives for agriculture repeatedly raised this as an issue to the Central Coast
18 Water Board. Further, Central Coast Water Board members agreed that they did not expect
19 immediate compliance to occur. “MR. YOUNG: Before I call for a vote on Dr. Hunter’s motion,
20 I just want to say to the Ag community and the public that I certainly don’t expect to see possibly
21 even immediate, you know, water quality changes I know that this is going to take in some
22 regions -- some part of our regions years and years and years to get to where we want to be.”
23 (March 15, 2012 Transcript, p. 137:8-19.) However, Counsel McChesney advised the Central
24 Coast Water Board that changes were not necessary because “. . . compliance with Water Quality
25 Standards means to implement management practices. If they aren’t effective in reducing
26 discharges to meet Water Quality Standards, that they revise or do new management practices.”
27 (March 15, 2012 Transcript, p. 54:1-5.) Counsel McChesney further stated that the same
28 language is in the Central Valley Order. (March 15, 2012 Transcript, p. 54:6-8.)

1 Unfortunately, Counsel McChesney was mistaken. The Central Valley Regional Water
2 Quality Control Board’s Order No. R5-2006-0053, *Coalition Group Conditional Waiver of Waste*
3 *Discharge Requirements for Discharges from Irrigated Lands* (June 22, 2006), includes a
4 provision that requires, “[d]ischargers who are participants in a Coalition Group shall implement
5 management practices, as necessary, to improve and protect water quality and to achieve
6 compliance with applicable water quality standards.” (Order No. R5-2006-0053, pp. 16-17.) The
7 Central Valley’s provision is equivalent to Conditional Waiver Provision 12, which is not being
8 challenged in this Petition. The language in question here, Provisions 22 and 23, are stand-alone
9 provisions. They are not modified by or subject to any additional language that suggests
10 compliance with these provisions is limited by the ability to implement management practices.

11 Recently, the Ninth Circuit Court of Appeals found that receiving water limitations
12 language, similar to the Conditional Waiver provisions cited above, prescribed in an NPDES
13 Permit for municipal storm water discharges in the County of Los Angeles required strict
14 compliance with water quality standards even though language explaining how compliance with
15 those receiving water limitations would be achieved over time (referred to as the “iterative
16 process”) was included as part of the NPDES Permit. (See *Natural Resources Defense Council v.*
17 *County of Los Angeles* (9th Cir., July 13, 2011, No. 10-56017), 2011 U.S. App. Lexis 14443,
18 at *42.) The court found that without textual support, the receiving water limitations language
19 was an independent requirement regardless of the iterative language. (*Id.* at **43-44.)

20 Likewise, the Conditional Waiver does not appear to contain any additional, enforceable
21 language that “absolves noncompliance,” as was argued (unsuccessfully) in the County of Los
22 Angeles’ NPDES Permit. (See *Natural Resources Defense Council v. County of Los Angeles*,
23 *supra*, 2011 U.S. App. Lexis 14443, at **43-44.) While the Conditional Waiver includes a
24 finding that recognizes immediate compliance may be infeasible, and appears to reference
25 provisions of the Conditional Waiver that provide dischargers with additional time to comply,
26 such findings are not enforceable provisions of the Conditional Waiver, and no timetable for
27 achieving compliance appears to specifically apply to Conditions and Provisions 22 and 23. (See
28 Conditional Waiver, Provision 82 (excluding Table 4 milestones and time schedule for

1 compliance from applicability to Conditions and Provisions); Attachment A, Additional Findings,
2 Applicable Water Quality Control Plans and Definitions, ¶ A.2, p. 41; see also Staff Report for
3 Regular Meeting of September 1, 2011, prepared on July 6, 2011, at p. 18, stating, “[t]he
4 milestones, as described in Table 4 of the Draft Agricultural Order are not in of themselves
5 compliance conditions and are not enforceable. They are targets or goals that staff will use to
6 evaluate effectiveness of implementation efforts and progress improving towards water quality.”)

7 In sum, the Conditional Waiver provisions establish stand-alone, independent applicable
8 requirements that discharges must comply with applicable water quality standards and any other
9 relevant provision of the Central Coast Regional Water Quality Control Plan, those provisions
10 apply to all dischargers who operate under the terms of the Conditional Waiver, and the
11 Conditional Waiver requires monitoring and reporting requirements to determine compliance.
12 (See Conditional Waiver at pp. 13, 18; see also MRP Order No. R3-2012-011-01, at p. 1; MRP
13 Order No. R3-2012-011-02, at p. 1; and MRP Order No. R3-2012-011-03, at p. 2.)

14 Accordingly, monitoring data and information reported to the Central Coast Water Board
15 by regulated entities in accordance with the terms of the Conditional Waiver and MRP Orders
16 could create immediate liability and may be used in immediate enforcement actions against
17 dischargers subject to the terms of the Conditional Waiver, even if the discharger is in compliance
18 with all other provisions of the Conditional Waiver.

19 Considering the uncertainty associated with meeting water quality standards immediately,
20 the State Water Board must vacate these provisions from the Conditional Waiver, or modify them
21 to appropriately recognize time is needed to develop and implement management practices in an
22 iterative process.

23 **3. The Conditional Waiver Includes a Number of Provisions That Constitute**
24 **Dictating the Manner of Compliance**

25 As part of this Petition, Petitioners challenge certain provisions because they unlawfully
26 dictate the manner of compliance. Specifically, Conditional Waiver Provisions 31, 39, 40, 80-81,
27 and Tier 3 MRP, Part 7 (Petition, above, section 3, ¶¶ 7, 8, 9, 22, and 37) require agricultural
28 dischargers subject to the Order to comply in a specific manner. Water Code section 13360 states

1 that the Central Coast Water Board may not specify the manner of compliance with orders of the
2 Central Coast Water Board, but rather that the discharger may comply with the order in any
3 lawful manner. As applied to the Conditional Waiver, the Central Coast Water Board may adopt
4 waiver conditions that identify what must be done, however, the Central Coast Water Board
5 cannot prescribe the methods used to accomplish that objective.

6 For example, Conditional Waiver Provision 31 (Petition, above, section 3, ¶ 7) requires
7 the installation and maintenance of backflow prevention devices to any irrigation system that is
8 used to apply fertilizers, pesticides, fumigants, or other chemicals. It also requires that this be
9 completed for all irrigation systems by October 1, 2012. Although this may be an appropriate
10 practice, the Central Coast Water Board does not have the authority to require agricultural
11 dischargers to implement such specific practices. At most, the Central Coast Water Board can
12 require that irrigation systems be operated in a manner that is protective of water quality, but it
13 cannot dictate how water quality should be protected.

14 With respect to Conditional Waiver Provisions 39, 40, 80-81, and Tier 3 MRP, Part 7
15 (Petition, above, section 3, ¶¶ 8, 9, 22, and 37), the Central Coast Water Board is attempting to
16 dictate buffers between fields and cropland. Collectively, these provisions require maintenance
17 of naturally occurring riparian vegetative cover, aquatic habitat, and for Tier 3 growers, 30 foot
18 buffers. By requiring growers to maintain riparian vegetative cover and 30 foot buffers, the
19 Central Coast Water Board is dictating how someone should protect water quality. Instead of
20 dictating such specific practices, the Central Coast Water Board could have required that
21 management practices to protect from sediment and erosion be implemented – leaving the choice
22 of practice up to individual agricultural operations.

23 Of particular concern is the requirement for a water quality buffer plan that includes a
24 minimum 30 foot buffer, or equivalent if approved by the Executive Officer. The 30 foot buffer
25 requirement constitutes a governmental regulation that may deprive agricultural landowners near
26 streams of the economic benefit of their private property. The state and federal Constitutions
27 guarantee real property owners just compensation when their land is taken for public use.
28 (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1269.) Regulatory takings,

1 though not direct appropriation or physical invasion of private property, are compensable under
2 the Fifth Amendment. (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537.) Courts
3 examining regulatory takings challenges generally analyze three factors to determine whether a
4 taking has been effected, including the economic impact of the regulation on the claimant, the
5 extent to which the regulation has interfered with distinct investment-backed expectations, and
6 the character of the governmental action. (*Penn Central Transp. Co. v. City of New York* (1978)
7 438 U.S. 104.) The requirements in the Conditional Waiver relating to riparian and aquatic
8 habitat protection and the establishment of 30 foot buffers would likely be considered a
9 regulatory taking.

10 The economic impact of 30 foot buffers on Tier 3 farms/ranches is potentially significant
11 given that productive farmland will be forced out of production as a result of the buffer
12 requirements. In addition, this requirement that a landowner or operator essentially dedicate
13 portions of productive agricultural land to the Central Coast Water Board unreasonably impairs
14 the value or use of the property. The land subject to the 30 foot requirement is most likely
15 dedicated to the production of agriculture, a use that would be completely eliminated by these
16 regulatory requirements. Such a buffer also severely interferes with the investment-backed
17 expectations of the landowners who operate under the assumption that these buffers and riparian
18 corridors would be put to productive agricultural use. By depriving landowners of all
19 economically beneficial use of land designated as a riparian area or buffer, the proposed
20 regulation will severely interfere with the investment-backed expectations of landowners.

21 Finally, while the proposed regulation may not constitute a typical physical invasion or
22 appropriation of land, the proposed regulation would effectively appropriate these riparian areas
23 to the Central Coast Water Board for a public use. Even if no such appropriation is found, the
24 severity of the economic impact and the devastation of the investment-backed expectations of the
25 landowners are sufficient to demonstrate a regulatory taking.

26 Accordingly, the State Water Board must vacate the Conditional Waiver provisions
27 identified in section 3 of this Petition in paragraphs 7, 8, 9, 22, and 37 because they improperly
28 dictate the manner of compliance, and may constitute a regulatory taking.

1 **4. Nutrient-Related Requirements for Teir 2 and Tier 3 Farms/Ranches Are**
2 **Inappropriate**

3 Parts E and F of the Conditional Waiver and corresponding Monitoring and Reporting
4 Requirements in the Tier 2 MRP and Tier 3 MRP include significant new requirements applicable
5 to Tier 2 and Tier 3 farms/ranches. Of particular concern are the requirements associated with
6 determining nitrate hazard, certification and submittal of elements of an Irrigation and Nutrient
7 Management Plan (INMP), and application of nitrogen balance ratios. (Section 3, ¶¶ 12, 13, 15,
8 18, 19, 20, 21, 29, 32, 33, and 36.) In general, the approach in the Conditional Waiver looks to
9 individual farms/ranches to determine if there is a risk of nitrate loading to the groundwater.
10 (Conditional Waiver, pp. 28.) To determine risk, agricultural dischargers are required to use one
11 of two methodologies: (1) a Central Coast Water Board staff developed methodology contained in
12 Table 4 of Tier 2 MRP and Tier 3 MRP; or (2) the Nitrate Groundwater Pollution Hazard Index
13 developed by the University of California Division of Agriculture and Natural Resources
14 (UCANR). (Tier 2 MRP, p. 11; Tier 3 MRP, p. 11.) While UCANR’s approach might be slightly
15 better, both are inappropriate for such determinations in a regulatory order that has consequences
16 for noncompliance. Based on the determined risk from these methodologies, Tier 2 and Tier 3
17 farms/ranches are subject to additional requirements. These additional requirements are
18 problematic because they stem from the inappropriate risk determination, and because they are
19 unlawful in their own right.

20 **a. Nitrate Loading Risk Factor Determinations Are Arbitrary**

21 First, with respect to the nitrate loading risk factor criteria and risk level calculation
22 methodology set forth in Table 4 of the Tier 2 MRP and Table 4 of the Tier 3 MRP, it is woefully
23 inadequate. It is not consistent with the nitrate Hazard Index Concept developed by the UCANR.
24 For example, it identifies three criteria for determining nitrate loading risks. (Tier 2 MRP,
25 pp. 21-22; Tier 3 MRP, pp. 21-22.) The three factors include crop type, irrigation system type,
26 and irrigation water nitrate concentration. Missing from the Central Coast Water Board’s
27 proposed criteria is a criterion related to soil type. As indicated in testimony, the elimination of
28 soil is contrary to any appropriate approach for determining risk.

1 [DR. LETEY:] I looked at Appendix B, Table 4, which contains the proposed
2 nitrate loading risk factor criteria. It completely guts the University of California
3 hazard index. The soil factor is completely eliminated. That's just like staying the
4 body doesn't need the heart or lungs

5 Two major factors which contribute to the loading is --one is denitrification,
6 which completely removes nitrogen from the system

7 The other is the water movement through the soil, which carries the nitrogen.

8 Those are the two main factors on the load. Both of those are intimately tied to the
9 soil profile characteristics, and you cannot come up with a reliable index by
10 neglecting the soil. (March 2011 Transcript, pp. 168:21-169:15.)

11 Further, in supporting evidence for the Hazard Index Concept, the UCANR identifies soil and
12 sediment texture as a key factor in the hazard index. The UCANR specifically found that NO₃
13 (nitrate) concentrations were not significantly correlated to the estimated amount of nitrogen
14 fertilizer, and concentrations, therefore, "were most likely affected by factors such as soil and
15 sediment texture." (Supporting Evidence for the Nitrate Groundwater Pollution Hazard Index
16 Concept, Attachment 3, p. 2.) In the same document, the UCANR also notes as follows:

17 Letey et al. (1977) reported the results of an extensive investigation of agricultural
18 tile drain effluents in California. The annual total mass of the NO₃ collected in tile
19 drainage water was inversely correlated to the highest percent of clay in the soil
20 above the tile depth. This is consistent with the hypothesis that clay layers in the
21 soil reduce the hazard index by restricting the rate of water flow and/or causing
22 denitrification. Other studies in California have shown that textural changes in
23 profiles can have significant effects on NO₃ loss below the root zone (Lund et al.
24 1974, Pratt et al. 1972). (Supporting Evidence for the Nitrate Groundwater
25 Pollution Hazard Index Concept, Attachment 3, p. 2.)

26 Considering the UCANR's evidence with respect to soil characteristics and effects on NO₃
27 concentrations, a nitrate loading risk factor determination that ignores soil types and
28 characteristics is seriously flawed. Also, the UCANR does not include irrigation water
concentration in its hazard index concept. Instead, it consists of an overlay and index using soils,
crops and irrigation systems. Accordingly, the Central Coast Water Board's inclusion of
irrigation water nitrate concentration is inconsistent with the UCANR's hazard index concept and
is not supported by evidence in the record.

Second, with respect to the UCANR's nitrate hazard index, although this methodology is
scientifically superior to the Central Coast Water Board's methodology, it too has fundamental
flaws. Most importantly, the purpose of the nitrate Hazard Index Concept developed by the

1 UCANR for Water Resources is “[t]o provide information for farmers to voluntarily target
2 resources for management practices that will yield the greatest level of reduced nitrogen
3 contamination potential for groundwater by identifying the fields of highest intrinsic
4 vulnerability.” (See Hazard Index Concept, Attachment 2, p. 2.) In other words, it is a guideline
5 tool – not a regulatory tool. It was not developed, nor was it intended to be used, for regulatory
6 purposes. Further, its use as a regulatory tool is improper and unlawful for it has not been
7 adopted into the Basin Plan pursuant to relevant Water and Government Code statutory
8 provisions. (See Wat. Code, §§ 13240, 13242, 13244, 13245; see also Gov. Code, § 11353(b).)
9 Moreover, like the Central Coast Water Board’s, it is too simplistic to accurately determine
10 nitrate loading risk to individual farms/ranches. The most important factor in determining risk is
11 site-specific management practices, which are not comprehensively captured in either
12 methodology. (March 17, 2011 Transcript, p. 171:12-17 [“DR. LETEY: . . . -- the thing that’s
13 going to dictate what goes down is the farmer management. And we can, and should, monitor
14 and focus attention on monitoring the farmer management. And -- and induce those management
15 practices that lead to reduced loading.”].)

16 Next, there are no findings in the Conditional Waiver that properly support the use of
17 either methodology for the Central Coast Water Board’s regulatory purposes, and the information
18 to be obtained through the methodologies is not relevant to site-specific risk. Accordingly, to
19 require agricultural dischargers to determine nitrate loading risk for Tier 2 and Tier 3
20 farms/ranches is inappropriate.

21 **b. INMP Elements and the Reporting Thereof Are Improper**

22 Petitioners do not oppose the need for agricultural dischargers to have and implement
23 irrigation and nutrient management plans. Irrigation and nutrient management plans serve an
24 important role to ensure that proper irrigation and nutrient management occurs to protect water
25 quality. However, the Conditional Waiver includes impossible requirements and then makes
26 them public. (See Conditional Waiver, p. 24-25; Tier 3 MRP, p. 19.) Specifically, the Tier 3
27 MRP includes 11 different elements for the required INMP, which includes the following
28 4 elements that would need to be publicly reported: (a) identification of crop nitrogen uptake

1 values for use in nutrient balance calculations; (b) annual balance of nitrogen applied per crop as
2 compared to typical crop nitrogen uptake (nitrogen balance ratio); (c) annual estimation of
3 nitrogen loading to groundwater and surface water; and, (d) annual evaluations of reductions in
4 nitrate loading. (Tier 3 MRP, pp. 18-19.) The Tier 3 MRP also requires agricultural dischargers
5 with Tier 3 farms/ranches to submit an INMP Effectiveness Report that measures progress
6 towards improving groundwater and reducing loadings. This report must be prepared by a
7 registered professional engineer, professional geologist, certified Crop Advisor, or similarly
8 qualified professional. (Tier 3 MRP, p. 19.)

9 The information required to be reported with respect to the INMP, including the
10 Effectiveness Report, is highly speculative. First, as testified to by many, including the California
11 Department of Food and Agriculture, most crops grown in the Central Coast have no
12 scientifically valid uptake values. (See, e.g., May 4, 2011 Transcript, p. 450:18-25
13 [“MR. HARD: This regulation as it currently stands, that’s in all tiers, would have growers trying
14 to figure out what the nutrient uptake values are. There are 52, by our count, crops grown in this
15 region, give or take one [or] two. Of those 52 crops only two have ever had scientifically
16 evaluated uptake values. And those two that have been done are not scientifically valid.”].)

17 Second, as is discussed further below, compliance (or progress towards) the nitrogen
18 balance ratios contained in the Conditional Waiver is likely unrealistic. For crops such as cool
19 season vegetables, the Central Coast Water Board presumes that producers can effectively and
20 efficiently grow these types of crops by applying only the exact amount of nitrogen that the crop
21 takes up. (Conditional Waiver, p. 30.) However, there is no information or findings in the record
22 that support this requirement. To the contrary, the lack of scientifically evaluated and valid
23 information with respect to crop nitrogen uptake makes it impossible for producers to actually
24 calculate a ratio for their farms/ranches.

25 Third, as testified to by Professor John Letey, it is not possible to quantify the load
26 discharged to surface water and groundwater. (March 17, 2011 Transcript, pp. 170:18-171:3
27 [“DR. LETEY: . . . the main thing to understand, because very often we are hearing nitrate load
28 and concentration being presented synonymously. They are not. The nitrate load is the

1 concentration times the water flow. And what we can measure, the concentration, we cannot
2 quantitatively measure water flow. That is extremely difficult, very expensive and, therefore, we
3 cannot quantitatively measure the thing we really want to have. What we'd like to do is quantitate
4 the load, but we can't do it."].) Supporting Professor Letey's professional opinion is that of
5 Professor Marc Los Huertos. With respect to the INMP requirements, he testified as follows:

6 The nitrate management plan in the Draft Order is so vague. It's so hard to
7 interpret what it means, that the implementation of those two things alone will
8 create an avalanche of reports that the Staff are not one -- they are very qualified in
9 a lot of areas, but interpreting agronomic use of agricultural products, like
10 fertilizer, and making a reasonable assessment that the pollution load, based on the
11 reports is impossible. I cannot do it. I don't know anyone that can do it from the
12 academic standpoint, and I know, in terms of a regulatory context, you're going to
13 generate a lot of paperwork to prioritize a lot of farms, people are going to make a
14 lot of visits and they're going to say, what happened? These reports didn't tell us
15 anything. And I'm absolutely sure of that. (March 14, 2012 Transcript, pp. 214:25-
16 215:15.)

17 Fourth, it is impossible to evaluate and quantify reductions in load considering that
18 producers are unable to quantify loads in the first place.

19 Due to the speculative nature with respect to the information requested as part of the
20 INMP, it is inappropriate to then require that it be publicly-reported annually. It has no value in
21 determining potential impacts to water quality and could be misused, or misinterpreted.
22 Accordingly, the specific requirements for the INMP, and these publicly-reported elements must
23 be vacated by the State Water Board. Further, Petitioners oppose any mandate that makes INMPs
24 a public document. Such information is proprietary and not appropriate for release in the public
25 domain.

26 **c. Certification of INMPs Is Impractical and An Unnecessary Expense**

27 The Conditional Waiver further requires that the INMP be certified by a Professional Soil
28 Scientist, Professional Agronomist, or Certified Crop Advisor. (Conditional Waiver, p. 29; Tier 3
MRP, p. 17.) While many growers consult and work with such professionals, it is not necessary
for an INMP to be certified in order to be an effective management tool. Many growers have in-
depth practical experience as well as formalized training in irrigation and nutrient management
techniques and are able to develop effective INMPs without professional assistance. Also, the
requirement creates an unnecessary costly burden.

1 **d. Nitrogen Balance Ratios Are Improper Regulatory Compliance**
2 **Standards**

3 The Conditional Waiver requires Tier 3 dischargers to report progress towards achieving
4 certain nitrogen balance ratios. (Conditional Waiver, pp. 29-30.) As indicated above, the
5 nitrogen balance ratios as contained in the Conditional Waiver are improper. By mandating a
6 specific ratio, the Conditional Waiver is over-simplifying crop nutrient needs as compared to the
7 amount of nutrients (i.e., nitrogen) applied. For example, while a nitrogen balance ratio of 1.2
8 may sound appropriate, in reality it is not always possible or practical. (See Comment Letter
9 dated Jan. 3, 2011, from California Strawberry Commission to Central Coast Water Board
10 regarding Draft Order No. R3-2011-0006, Conditional Waiver of Waste Discharge Requirements
11 for Discharges From Irrigated Lands and p. 1 to Attachment 5 thereto, “Dynamics of Nitrogen
12 Availability and Uptake” [“The temporal supply of plant available N must match the temporal N
13 demand by the crop to achieve the goal of ‘provide adequate, but not excessive levels of soil
14 nitrogen throughout the growing season.’ Achieving this goal may not always be possible or
15 practical, but one should strive to do so to the extent possible.”].) Further, for most crops in the
16 Central Coast, insufficient information exists to determine if the adopted ratios are appropriate
17 and valid.

18 Moreover, compliance with such ratios does not correlate to the actual threat to water
19 quality. The largest threat to groundwater is more closely related to intrinsic vulnerability
20 associated with physical factors versus actual agricultural operations. Basing nitrogen
21 management on a strict requirement on the amount of nitrogen applied per crop fails to take into
22 account the many factors that influence the potential for nitrogen leaching, such as soil type,
23 timing of application, method of application, etc. It is undoubtedly more important to apply
24 nitrogen at the correct time for the crop and in the correct manner than to focus a grower’s efforts
25 on the total amount applied. For this reason, the development and implementation of
26 management practices that minimize nitrogen leaching would provide better management of
27 nitrogen leaching than N ratios that fail to consider a number of other factors. Accordingly, the
28 requirements for showing progress towards meeting nitrogen balance ratios are arbitrary and

1 capricious. Further, the Conditional Waiver and its record fail to include any findings or
2 supporting evidence that indicate the ratios proposed are appropriate for rotational and annual
3 crops. Many commodity organizations are currently conducting research to collect information
4 necessary for determining nutrient sufficiency needs for successful production across all varieties,
5 production systems, and locations. Without a more complete research basis for establishing such
6 requirements, they are arbitrary and unlawful.

7 **5. Monitoring and Technical Report Requirements Exceed Central Coast Water**
8 **Board's Authority**

9 Parts E and F include a number of provisions that would require monitoring and submittal
10 of technical reports for Tier 2 and Tier 3 farms/ranches. (Section 3, §§ 11-21, 27-37.) These
11 proposed provisions are inappropriate as they exceed the Central Coast Water Board's authority
12 to require such information and/or require the submission of confidential, proprietary information.
13 In general, the Central Coast Water Board's authority to require monitoring and technical reports
14 is not without constraints. Under section 13267 of the Water Code, the legal authority to require
15 such information, the Central Coast Water Board has the burden of explaining to the discharger
16 the need for the information and for identifying substantial factual evidence that supports
17 requiring the reports, i.e., demonstrates a nexus between the requested information and the
18 Central Coast Water Board's statutory authority to investigate water quality. Further, the burden,
19 including cost, of providing the information must be reasonable in light of the Central Coast
20 Water Board's stated need for the information. (Wat. Code, § 13267(b)(1).) Mere assertions that
21 such a nexus exists are insufficient to support requests pursuant to Water Code section 13267.
22 Most of the monitoring and technical report requirements in Parts E and F, as well as the specific
23 groundwater and individual surface water monitoring requirements in the MRP Orders, fail in
24 whole or part to meet the Central Coast Water Board's statutory burden. Further, many of the
25 monitoring and technical report requirements include practical constraints that make compliance
26 difficult if not impossible for many dischargers.

1 **a. Conditional Waiver and MRP Orders Improperly Require Individual**
2 **Groundwater Monitoring**

3 The Conditional Waiver and MRP Orders require all agricultural dischargers to sample
4 private groundwater wells on each farm/ranch. (Section 3, ¶ 27.) The stated purpose for
5 requiring such information is so that, “the Central Coast Water Board can evaluate groundwater
6 conditions in agricultural areas, identify areas at greatest risk for waste discharge and nitrogen
7 loading and exceedances of drinking water standards, and identify priority areas for nutrient
8 management.” (Conditional Waiver, p. 23; see Tier 1 MRP, pp. 8-9; Tier 2 MRP, pp. 8-9; Tier 3
9 MRP, pp. 8-9.) We have concerns with this requirement for several reasons. First, sampling
10 information from private domestic wells and agricultural supply wells may be useful for
11 management purposes; however, such information is not appropriate for determining compliance
12 with the Conditional Waiver or prioritizing Central Coast Water Board actions. For example,
13 levels of nitrate in such wells may be unrelated to current management activities occurring on the
14 farm/ranch. Current operations of the farm/ranch in question may be implementing all known
15 management practices that are designed to protect groundwater from nitrate leaching. Yet, nitrate
16 concentrations in the well sample might suggest otherwise. As indicated by Dr. Letey,
17 “. . . measuring that concentration is not even an index whether the farm management is good or
18 bad, for the purposes that we’re intending it, and that is, to reduce nitrate load to the groundwater.
19 Therefore, dictating multitudes of dollars that are required to measure this concentration, which
20 has really almost no meaning to what we’re trying to achieve, I consider economic folly.”
21 (March 17, 2011 Transcript, p. 170:10-17.)

22 Second, the burden of providing the information is not reasonable as compared to the need
23 for the information. As indicated by Dr. Letey, the information obtained from sampling private
24 domestic and agricultural irrigation wells will not provide the Central Coast Water Board with
25 useful information regarding farm/ranch management. (March 17, 2011 Transcript,
26 p. 170:10-17.) Because the information is meaningless, the burden associated with obtaining and
27 reporting the information is not reasonable, and the Central Coast Water Board’s requirement
28 fails to comply with the dictates of Water Code section 13267.

1 Accordingly, the State Water Board must vacate the requirements for individual
2 groundwater monitoring identified in section 3, paragraph 27 of this Petition.

3 **b. Conditional Waiver and Tier 3 MRP Improperly Require Individual**
4 **Surface Water Discharge Monitoring**

5 Under the Conditional Waiver and Tier 3 MRP, Tier 3 farms/ranches are subject to
6 individual surface water discharge monitoring requirements. (Conditional Waiver, p. 29; Tier 3
7 MRP, pp. 14-17; see section 3, §§ 16, 17, 35.) These are unnecessary requirements that exceed
8 the Central Coast Water Board’s authority under Water Code section 13267. Section 13267
9 requires that the Central Coast Water Board’s request for technical information be reasonable as
10 compared to the burden of compiling the information, including the cost. Further, the request for
11 such information must be supported by evidence as to why the information is necessary.

12 In this case, the Conditional Waiver and Tier 3 MRP collectively fail to identify why such
13 information is necessary from Tier 3 farms/ranches, and fail to identify evidence in the record that
14 supports such a requirement for all Tier 3 farms/ranches. In particular, as discussed in
15 section III.C.1 above, the criteria for categorizing farms/ranches into Tier 3 are arbitrary and are
16 not related to an individual farm/ranch’s actual threat to surface water quality. Thus, the
17 Conditional Waiver assumes that farms/ranches meeting Tier 3 criteria are a threat to surface
18 water quality to such an extent that individual discharge monitoring is required. However, there
19 is no specific evidence that links the proposed criteria to actual water quality threats and therefore
20 there is no evidence to support the requirement for individual discharge monitoring.

21 Moreover, the burden of complying with this requirement is not reasonable in comparison
22 to the Central Coast Water Board’s need for the information. The Conditional Waiver does not
23 include any specifically articulated findings that explain why such individual surface water
24 monitoring is necessary. At most, the Conditional Waiver’s Attachment A includes a generic
25 finding that merely states all technical and monitoring reports contained in the Conditional
26 Waiver and MRP Orders are reasonable because those subject to the Order discharge waste from
27 irrigated lands. (Conditional Waiver, Attachment A, p. 43.) This generic finding does not
28 constitute a proper finding that bridges the analytical gap between the evidence and the Order.

1 (Topanga, supra, 11 Cal.3d at p. 515.) Nor does it provide a proper explanation as to the Central
2 Coast Water Board's need for the information. Without this, the Central Coast Water Board has
3 failed to comply with Water Code section 13267(b)(1). Further, evidence in the record indicates
4 that the individual surface water monitoring being required is useless to characterize on-farm
5 water quality.

6 DR. LOS HUERTOS: . . . The assumption is that we can use on-farm monitoring
7 to characterize water quality, and then use that to prioritize which farms to visit
8 and then, maybe, make some enforcements of the problem areas. The problem is
9 that the on-farm monitoring, four samples per year, cannot adequately describe
10 water quality on the farm. It doesn't describe water quality. It doesn't describe
11 practice effectiveness and it doesn't describe any kind of trend analysis. To do
12 those things, it's a very different kind of sample. A sampling that kind of -- I like
13 to use the student, it costs 30- or 40,000 dollars a year. You have your APs, and
14 you have your statistics, anthem program, et cetera, et cetera." (March 14, 2011
15 Transcript, p. 214:6-23.)

16 Accordingly, the requirements in the Conditional Waiver and Tier 3 MRP for individual
17 surface water monitoring are unlawful and must be vacated.

18 IV. CONCLUSION

19 Based on this Petition and the evidence in the record, Petitioners respectfully request that
20 the State Water Board grant the remedies as requested in section 6 of this Petition.

21 SOMACH SIMMONS & DUNN
22 A Professional Corporation

23 DATED: April 16, 2012

24 By: 

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28 Barbara and San Luis Obispo Counties, and
Western Growers