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December 28, 2010

Howard Kolb, Agricultural Order Project Lead Staff  
Lisa McCann, Supervisor, Watershed Planning & Protection Section  
Roger Briggs, Executive Officer  
Jeffrey Young, Chairman  
California Regional Water Quality Control Board  
Central Coast Region  
895 Aerovista Place, Suite 101  
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Re: Central Coast Ag Waiver - Comments on Behalf of Ocean Mist Farms and RC Farms in  
Response to Staff Proposal

Dear Mr. Kolb, Ms. McCann, Mr. Briggs and Chairman Young:

The following comments are advanced by Ocean Mist Farms and RC Farms, leading artichoke and vegetable farmers in Monterey and neighboring counties within the Central Coast Region 3. Ocean Mist Farms and RC Farms and their related operations are major farm operations based in the Salinas/Watsonville areas and hereby submit the following comments to the Central Coast Regional Board concerning draft amendments to the agricultural waiver ("ag waiver") proposed by Central Coast Regional Board ("Regional Board") staff. The farming operations identified above have actively participated in efforts to improve water quality in the region during the course of the existing ag waiver. They have participated in regional monitoring programs as well as on-the-farm management practices to improve water quality and, more recently, in the collaborative effort to develop a reasonable and practical amendment to the ag waiver. These efforts have led to the development of reasonable and practical general amendments to the ag waiver known as the "ag alternative" which has been submitted to the Regional Board staff, and is believed to be a superior alternative.

The Central Coast staff draft waiver is a very lengthy document. It contains a notice and a staff report of 43 pages, the proposed waiver and findings of 87 pages (Appendix A), Monitoring Requirements (Appendix B), Milestone Time Schedule (Appendix C), Options (Appendix D), Response to Comments (Appendix E), Economic Analysis (Appendix F), Water Quality Conditions (Appendix G), CEQA Analysis (Appendix H), Background (Appendix I), and References (Appendix J), for a total of 490 pages, or two reams of paper.

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The Order, Findings and MRP alone exceed 110 pages, containing 173 findings, 9 pages of Water Quality Standards, 147 terms and conditions along with 67 definitions. The documents also include 10 tables, including a list of Impaired Water Bodies, the newly advanced Nitrate Hazard Index Rating; Ground Water and Surface Water Monitoring Parameters and an incredibly aggressive Time Schedule of Milestone Compliance Dates.

These extensive materials contain totally new regulatory concepts which make complete understanding difficult and the ability to focus comments nearly impossible. At this point, Ocean Mist Farms and RC Farms respond principally to the staff draft waiver itself (Section I) and the monitoring and reporting portions of the proposed regulatory package. Section II raises legal problems associated with the staff proposal and Section III briefly comments on the unquestionably superior alternative recently advanced by the agricultural community.

### **I. Response to Staff Draft**

1. The proposed waiver covers all irrigated lands growing commercial crops and expressly addresses all tail water discharges to surface waters or to groundwater, including tile drains and storm water. The expansion of this waiver to commence the regulation of tile drains is very problematic to our operations.

Tile drains are widely used to remove excessive and problem water from the crop root zone. The drains have been relied on by California agriculture for decades and have been responsible to make otherwise unproductive areas productive. Restricting the use of the tile drains would limit the productivity of land where they are used and likely require significant land to be taken out of production altogether. The Regional Board's authority covers the issue of water quality not the control of irrigation infrastructure improvements.

Tile drains are absolutely required for much of California agriculture. To restrict tile drains would not just eliminate agricultural productivity on an immediate basis, but could also render the farm land virtually unproductive and worthless forever. Instead of trying to regulate tile drains and thereby taking this land out of production, the Regional Boards, universities and agriculture should collectively focus research on how to effectively reclaim tile drainage for particular uses.

2. The staff draft inadequately recognizes the importance of the region's agriculture and the limits on what individual farmers can actually control.

The Regional Board's waiver should expressly recognize the importance of agriculture as the dominant and most important economic engine in the region and that these extensive regulatory efforts to control irrigation and drain water constitutes a major undertaking. The Board should further recognize that reasonable phase-in periods and a high level of coordination and cooperation between the agriculture community and the Regional Board is necessary to facilitate effective waiver implementation.

The Regional Board must recognize that farm operators only have the capacity to deal with their own operational inputs or influences on water. Agriculture receives its irrigation water from different

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sources, some of which enter farm properties with impairments. The Regional Board must further recognize the importance of tile drainage, particularly in certain areas of this region with historically high water tables, salt build-up, or salt water intrusion and the landmark efforts which have been employed around the mouth of the Salinas River where agriculture has effectively taken urban reclaimed water and, through irrigation, improves that water quality from the point at which it is received to the point that it is discharged.

3. All commercial farm operations will have to file a new NOI (Notice of Intent) to operate consistent with the waiver requirements within 30 days of adoption. These extensive NOIs will, among other purposes, attempt to characterize our farm operations and thereby place our total farm lands into one of three "Tiers" based on four factors which are alleged to determine water quality risk. This new regulatory system and these four factors are of particular concern as these criteria involve 1) size of operation (i.e., 1000 acres), 2) crop types, 3) proximity to 303d listed water courses ( i.e., 1000 feet), and 4) whether we use chlorpyrifos or diazinon. (§§ 9-16)

A. Even though the waiver advances the notion that "good farmers" could qualify for Tier 1 (§ 10) and therefore have only moderate regulatory interference to their operations, the criteria are actually set up to make this a false premise as all farms which are over 1,000 acres or if they need to use the important organophosphate pesticides (i.e., chlorpyrifos or diazinon), or if they are within 1000 feet of a 303d listed watercourse, they are thrust into Tier 3. The tiering structure is therefore arbitrary, and results in the region's most significant farm operations having to determine if they can possibly comply with these regulatory restrictions or if they must bifurcate their operations and accept the risk of unabated pestilence. (§§ 9-16)

B. We submit that merely the size of the farm operation and the use of certain individual pest control agents should not automatically subject the farm to the unprecedentedly strict Tier 3 regulatory regime. Mere acres or use of a particular agricultural management product does not necessarily equate to a discharge problem. The regulatory criteria should instead focus on identified discharge problems. The larger sized operations may actually increase a farm operation's ability to implement management strategies to eliminate or control discharge. Similarly, good farm practices coupled with irrigation controls can avoid problems even if a large farm responsibly relies on chlorpyrifos, diazinon or any other crop protection pesticide.

C. The regulatory impact of these regulations should therefore focus on properties offering drainage problems – not on all operations merely selected by size or the use of certain management tools, which farms may actually not be responsible for problems. Similarly, the waiver imposes its impacting regulatory burdens on entire categories of crops, several of which we produce (i.e., cole crops, lettuce) without any specific information linking our particular crops to creating water quality problems.

D. One of the major factors which the Regional Board seeks in the NOI is to determine which tier of regulation would be advanced on that property is whether the property controls pests by use of chlorpyrifos or diazinon. Most of the staff alternative in dealing with pesticides focuses exclusively on organophosphate pesticides, chlorpyrifos and diazinon. The draft waiver seems to totally

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lose sight of the fact that if pests cannot be controlled by one of these organophosphate pesticides, alternative pesticides will have to be used. Many alternatives are themselves toxic at low dosage and may also result in sediment toxicity, which has been particularly problematic to some sensitive aquatic species. The Regional Board has not yet recognized what the Department of Pesticide Regulation fully understands. When you target regulations on a particular pesticide, it will shift utilization to other products which may have equal or different toxic results. Consequently, this waiver is over-simplified and does not come to grips with the reality of pesticide shifting.

E. This arbitrary tier system as advanced does not allow a farmer to identify those portions of his operations that a) do not discharge at all, b) may discharge, but does not contribute to exceedance issues, and c) may have the potential of contributing to water quality issues. (¶ 8) This is a major shortcoming of this staff draft, and needs to be modified. A farm operation should be able to respond in the NOI such as to identify specific farms or portions of such farms which (1) do not have a potential to drain to waters of the state, (2) are not within 1000 feet (if maintained as a program standard) of an impaired watercourse, or (3) do not use specified chemicals (if this remains a program element).

F. Paragraphs 50c and 53 allow farmers to identify their specific tiers, but, as pointed out above, this appears to be a single tier for all one's lands; however, ¶ 81 allows farmers to "split" their lands for the specific purpose of nitrate risk. This same opportunity should also be available for tier (i.e., risk) classification.

G. The severe Tier 3 factors (i.e., 1000 feet to impaired waters and 1000 acres) are not only arbitrary they have no direct bearing on water quality and, moreover, they are factors over which a farmer cannot control or change so as to either improve water quality or to attain regulatory relief. The general reference to the 1000 feet from a 303d listing is too broad. It should be narrowed to only those water bodies listed for pesticides or nitrates.

H. These extensive regulatory impairments are so impacting to Tier 3 lands that those farmers will seriously consider applying for an individual WDR rather than be subject to this extreme regulatory program. The Regional Board cannot administer these programs with all farmers individually dealing with the Board, therefore the waiver program must be reasonable.

4. The staff waiver directs this regulatory program to apply both the landowner and the annual lessee (described as the operator). (¶ 52) The ultimate legal responsibility lies with the landowner, and the Regional Board's enforcement capacity is limited to the discharging landowner. Therefore, landowners should be the target of the waiver. It offers no problem to clarify that the target is the landowner as the landowner is expressly responsible to have his lessee compliant with the waiver requirements. (¶¶ 8 and 15) It is also the landowner that can make the major improvement, such as the construction of retention / recirculation systems, cap abandoned wells, etc. Splitting this responsibility raises confusion and creates an opportunity for people to point to the other as the real responsible party.

5. The proposed staff waiver requires farmers to have 15 hours of water quality education within the first 18 months. (¶¶ 75-77) We have no objection to this requirement.

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6. The proposed waiver also requires each farm to have an individual farm water management plan identifying the implementation of management practices in five areas: 1) irrigation management, 2) pesticide management, 3) nutrient management, 4) sediment control, and 6) aquatic habitat protection. (¶¶ 73-74) These are the correct areas of focus.

A. The pesticide management component of these proposed farm plans will be greatly enhanced as soon as the California Department of Pesticide Regulation (DPR) (having exclusive jurisdiction over pesticides as set forth below) completes both 1) the chlorpyrifos risk assessment which will soon be finalized and 2) when they conclude the promulgation of their new regulations designed to protect the state's water from pesticide use and discharge problems. (These important DPR actions are referenced in ¶ 62.) Until these major regulatory features are soon completed, these pesticide plans should focus on proper and limited use in accordance with Integrated Pest Management (IPM) principles.

1. Pesticides are regulated by DPR. (Food & Agr. Code, § 11454.) Among DPR's purposes are (1) protecting public health and safety; (2) protecting the environment; (3) assuring that pesticides are properly labeled; and (4) encouraging the implementation of biological and cultural pest control techniques when appropriate. (Food & Agr. Code, § 1502.) The California Legislature has expressly declared that, "matters relating to (pesticides) are of a statewide interest and concern and are to be administered on a statewide basis by the state unless specific exceptions are made in state legislation for local administration." (Stats. 1984, ch. 1386.)

The Central Coast Water Board is not vested with the authority to regulate or restrict pesticide use. As the Food and Agriculture Code indicates, the DPR is vested with the authority to regulate and restrict the use of pesticides in California. The Central Coast Water Board's authority is limited to matters that pertain to water quality. (Wat. Code, § 13225.) It does not include the authority to direct growers with regard to pesticide applications.

B. The irrigation management component of the farm plans is an important feature as in other regions it has been demonstrated that controlling the discharge is perhaps the most effective means to control harmful discharges – more than regulating farm inputs.

C. Sediment control is also of importance mostly to address pesticide residue discharges (particularly pyrethroids), however, this draft waiver is overly focused on the O-P pesticides, chlorpyrifos and diazinon. The staff draft waiver's efforts to discourage the use of these two O-P pesticides will automatically shift usage to other chemistries which may likely direct water quality toxicity impacts in sediments. These simplified regulatory approaches often have these types of unintended consequences.

D. We point out that there is not a lot of detail in the draft waiver as to the actual content of these components of the farm plans, and the Regional staff should work with the ag community and university in developing these components of the farm plans. (¶ 73)

7. Growers are compelled to select either individual farm monitoring or participate in a regional cooperative monitoring program. (¶ 45) Our past experience with this Region's and other water

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monitoring efforts throughout the state compels our support of an organized region-wide monitoring program. Only thereby do we get the benefit of a region-wide data set which allows the assessment of the actual watercourses as well as allowing the tracking back to identify the source of any problems. A scatter data set taken and input by individual farmers in accordance with inconsistent monitoring protocols will not assess the watercourse, will not be part of a disciplined monitoring database, and will not be scientifically useful. This concern also relates to the unreasonable requirement that all Tier 3 farms would be required to do on-farm monitoring.

8. As to the groundwater protection components of the proposed waiver, we understand the provisions concerning well casings, back flow prevention, and abandoned wells. These provisions, however, must only attach to the landowner. Therefore, this entire waiver should be limited to directly regulating the landowner. (¶ 64)

9. The proposed nitrogen application limits per crop type raise significant legal issues. The Regional Board's authority commences at the discharge point, and the Regional Board getting "into the field" to dictate specific elements of the farm's management practices raises both jurisdictional authority, and legal issues. The Regional Boards cannot tell PGE how to run a utility or Chevron how to operate a refinery – only what and how much they can discharge. The same is true and of even greater importance relative to the region's agriculture. The extensive provisions as to nitrate controls (¶¶ 79-91) are extreme and will significantly impede farmers management and crop performance.

A. In that the Regional Board's jurisdiction commences only when there has been a discharge to waters of the state (a more difficult premise as to groundwater than it is as to surface water), the Regional Board must offer some supportable authority on where that discharge point occurs for purposes of this regulation. Clearly, the position advanced in ¶ 31 that the quality of water is measured at where irrigation water enters the ground is legally and factually incorrect. This issue is important, generally, but also has direct bearing on the proposed requirement that irrigation containment structures must take steps to avoid percolation to groundwater. The Board has been focused on growers controlling field discharge and to specifically protect surface water. Therefore, these types of management practices (containment, ponds, berms, etc.) are encouraged, and should not now be discouraged by this waiver provision. The waiver should not be inconsistent within itself. Therefore, clarity must be provided to growers on this jurisdictional issue, and this particular feature should be eliminated. (¶ 34)

B. In dealing with groundwater, ¶40, indicates that Tier 3 farms would be required to sample their domestic and agricultural wells. This, as discussed further below, is significant enough, however, there is another provision suggesting that dischargers may be compelled to supply alternative drinking water to those relying on groundwater with high nitrates. This is wholly beyond the appropriate scope of the waiver. Such a remedy would only be appropriate by an enforcement action.

C. This provision which threatens growers by stating that the Central Coast Water Board may require growers to provide alternative water supplies pursuant to Water Code section 13304. Regulatory authority for such action is, however, lacking. How would the Central Coast Water Board require growers to provide alternative water supplies? Water Code section 13304 is an enforcement mechanism which allows regional boards to issue Cleanup and Abatement Orders. Only by use of a

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Cleanup and Abatement Order, may a regional board require replacement water to be provided. To issue a Cleanup and Abatement Order, however, the Central Coast Water Board will need to provide substantial evidence that the grower in question was directly causing the condition of pollution or nuisance. It is not an authority that the Central Coast Water Board may use without appropriate due process, and is not to be a part of a regulatory notice. It is an exclusively enforcement action.

It could also be ordered per a court order, but only after full factual evidence hearing showing that there is a water quality exceedance, proving a direct relationship by the particular discharger's actions, and a direct connection to the specific aquifer utilized by the domestic user.

10. The staff draft is confusing and inconsistent as in some places increased regulation is imposed, where a farm is within "1000 feet of a listed waterway" and at other points does so when it is "adjacent to" an impaired waterway. ¶¶ 92, 93)

11. Paragraph 44 requires all three tiers to monitor both their domestic and ag wells and to target those with the greatest risk and highest nitrate loads. Domestic wells are within the authority of local communities and public health authorities. This is an agricultural order and should focus on ag wells.

12. Paragraphs 48 and 96 require Tier 3 farms to engage individual discharge monitoring. This is not only a severe and impacting requirement – without prior precedence, it is intentionally slipped in this paragraph at the end of Part D, which predominantly deals with groundwater. The cooperative monitoring program will be more than sufficient to identify where problems exist and inform as to the source of problems. Therefore, it is unnecessary to selectively impose this extreme and burdensome obligation on the region's most significant farms.

A. In regards to monitoring, and as stated above, we embrace Regional monitoring, but have concerns as to requiring Tier 3 farmers to monitor at least 80% of their farm discharges twice during the irrigation season and once during the storm water season is required by the MRP. Also, tail water ponds would have to be monitored four times per year, which is excessive. (MRP, P II A 6) The reference to 80% of discharge makes no sense. It should be changed to require only “monitor a representative sample of drainage.”

B. There are several concerns as to the monitoring requirements of the MRP, and we fully support and reference hereby the testimony submittal of Preservation, Inc. submitted to Chairman Young on August 27, 2010 which remain relevant as to this staff draft.

13. We also note the importance of tile drains and tail water ponds to much of the region's agriculture, and suggest that such importance be acknowledged in the waiver. Moreover, the waiver needs to not only recognize, but be sure not to impact the region's important water reclamation projects involving the use and cleansing of recycled urban water. The use of recycled water has reached widespread acclaim from municipal users, regulators, environmentalists, and those interested in water conservation and reuse. For purposes of this discussion, agriculture in Monterey County has taken low quality municipal discharges that would otherwise have gone directly into the ocean and have used them

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for irrigation and improved the quality of the water as it returns to the environment. Consequently, not only are we 1) conserving water, 2) reusing water, and 3) taking problem discharges from municipalities, but we are discharging far cleaner water than what would have been discharged by the municipalities. It is for those reasons that these programs have reached widespread acclaim.

The Regional staff proposal must take care not to impact these programs. California Water Code section 13241(F) expressly encourages the use of recycled water. This staff proposal could put this highly acclaimed water re-use program in jeopardy.

14. Paragraph 58 requires monitoring data to be submitted by a state registered engineer or similar licensee. This is improper and needless as there are many qualified water managers and others who, in accordance with specified protocols, can reliably monitor, report and analyze data.

15. As to the monitoring and reporting provisions, we have reservations as to requiring Tier 3 (most all of the Region's significant operations) farms to also impose individual monitoring of nutrients and to impose a nitrate standard of 1 mg/l which is tenfold less than the national drinking water standard. Likewise, the four-year time line to achieve such new standard is unreasonable.

16. Table 2 advances a completely new nitrate loading risk factor criteria based on specific crops, specific irrigation systems and irrigation water nitrate concentration ratings. The table references the UC Riverside Nitrate Hazard Index as the basis for the criteria.

First, the table has added a criterion that was not part of the original index, the irrigation water nitrate concentration rating. There is no reference or data justifying the addition of this criterion.

Second, the table has omitted a criterion that was part of the original index, a soil type rating. The omission of this factor is indicative of a lack of knowledge about the critical fact that soil texture and clay content play a very important role in affecting hydraulic conductivity and denitrification, factors that significantly affect nitrate movement and availability in the soil profile. There is no reference or data justifying the omission of this criterion.

Third, the hazard index is not based on a comprehensive data set. A single 3 year study in the Eastern San Joaquin Valley is the "supporting document" that the model is validated. This limited data set is not comparable to the variability of soils, topography, hydro geologic properties, cropping patterns, and climate of the Central Coast of California.

Fourth, other key factors affecting nitrate movement have been ignored in the development of this approach. The variable slope of the irrigated lands in some areas of the Central Coast which is a critical factor influencing water and sediment run-off is not mentioned. The total amount of irrigation water used during the entire growing season is another critical factor influencing nitrate movement that is omitted.

The proposed nitrate loading risk factor criteria are a poorly devised, over simplified, and non data validated model. It is based on an old model that was never validated and then has been modified without reference to supporting data.

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Further, this approach is not predicated on actual risk presented by a particular property (which may not actually be discharging), but is merely converting a new academic formula into a severe regulation. (See also Section 16, below)

17. The waiver has several provisions relative to aquatic habitat, riparian areas, and vegetative cover. We recognize that vegetative buffers have importance in controlling residue run off. We therefore have had concerns relative to the food-safety restrictions which have resulted in the mandated removal of vegetation from many of these buffer areas. We therefore do not challenge reasonable efforts to provide such effective buffers. We stress, however, that this Board does not have the authority to compel what a farmer plants in any particular area of his farm, therefore, this waiver must be amended to reward and encourage such buffer vegetation rather than trying to regulatorily compel it of farmers. (¶¶ 25, 66-68, 92-94) This Regional Board must understand the dominant influence produce wholesalers and retailers have over agricultural production.

The attempt to exercise land use authority and crop control authority by mandating what growers must grow in certain locations of their fields is illegal. The Regional Board has no authority to require certain vegetation to be planted in certain areas, or to compel the removal of certain vegetation.

A. There is no question that regulatory efforts can occasionally result in unintended consequences, and it sometimes takes a year or two for things to come into balance. Some buyers in the produce industry sought to control how produce growers grow their commodities, and, in reaction to the leafy green public health issue, required in some locations a "clean farm" order of management. This is not something that production agriculture has brought on itself. This situation now seems to be coming back into balance. There may, however, be some legitimate water quality issues resulting from this situation, but they appear temporary in nature. However, this does not give the Regional Board jurisdiction to become a land use agency. Other regulators such as Department of Fish and Game, Fish and Wildlife Service, County Planning Commissions, and Department of Food and Agriculture, all have some responsibilities in this area. These agencies would be attentive to water quality issues advanced by the Regional Board; however, nothing has changed the jurisdictional limitations of the Porter-Cologne statutes to make the Regional Board the agricultural or plant and wildlife agency, or to give them authority over production or land use.

B. The staff proposal attempts to turn this Board into the regional land use authority by requiring these 30 foot vegetative buffer zones not only raises legal liability issues, but would take tens of thousands of productive ground out of production. This would constitute a regulatory taking of private property and is well beyond the agency's authority. Merely one argument as to the inappropriateness of the 30 foot vegetative buffer is that there is no requirement or guarantee that any of the irrigation run off water would even transit the buffer area. This alone clarifies that the staff is more interested in land control than improving water quality.

C. Further, the buffer restrictions advanced violate Water Code section 13360. Section 13360 prohibits the Central Coast Water Board from dictating the manner of compliance. In this case, the waiver proposes to set forth specific prescriptions for which growers would need to engage. As

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such, these specific vegetative buffer requirements dictate the manner of compliance and are not, therefore, lawful.

18. Commencing in ¶ 80 there are more than six pages of complex and severely imposing sets of regulatory obligations dealing with nitrate restrictions. These regulations require calculation of nitrate risk by crop, by irrigation system and water nitrates based on a university paper. Among the duties imposed (¶ 88) are nitrate uptake, nitrate needs of the crop, nitrate in the water and nitrate in the soil – all to calculate a supposed nitrate risk. Paragraph 88h also requires the monitoring of nitrate in tile drains, and ¶ 90 goes completely off the chart by requiring that in three years, farmers would be restricted in fertilization of their crop by imposition of "nitrogen balance" limits, which in annual crops would be 100% of the calculated crop needs, and in perennial crops 120%. (See also, prior discussion as to tile drains.)

A. The Nitrate Hazard Index is referenced as being a UC Riverside document, however, we do not seem to find it as a product of UCR. Further, if it is a University document it would be rare that it would be designed for or intended to be used for a regulatory purpose as UC materials are more often guidance documents that are intended to be used in concert with other "field" information. In this case, that would likely be soil conditions, compaction, depth, slope, etc. Therefore, turning this paper to a prescriptive enforceable regulation seems improper. Moreover, the University paper relies on three factors: crop, irrigation and soil information. This draft totally eliminated any reference to soil types/structure and instead inserted groundwater nitrate as a factor. This insertion is totally a product of the Regional Board staff and not a product of the University paper. Both the omission and the addition totally depart from this University paper.

B. The attempt to rely on this recently embraced nitrogen risk university paper to control the amount of fertilizer use is completely beyond the Board's authority. The simple formula advanced is an attempt to limit a farmer's management of his crops' nutrition is completely void of any consideration of soil types, soil compaction, or amount of organic material. Also, there is no consideration of the crop nutritional needs, or the differences as a result of microclimate or demand difference due to the growing season (there are large differences in crop demands from summer to winter).

19. The milestones advanced in the waiver are completely unrealistic. Agriculture cannot meet all water quality standards (pesticides in two years, sediment in three years). We, however, believe it is possible to reduce toxicity exceedances by 50% within four years and sediment toxicity by 20% in five years. (¶¶ 98-101)

The draft waiver also requires that within four years, Tier 3 dischargers must demonstrate that they are not causing or contributing to exceedances of water quality standards for nutrients and salts in surface waters of the state or of the United States. This could be read as inconsistent with Table 5 (page 38) which in relevant part clarifies that the farmer must "demonstrate that discharge (not including subsurface drainage to tile drains) is not causing or contributing to exceedances of nutrient water quality standards in the waters of the state."

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20. The economic analysis is hopelessly inadequate to capture the dramatic impact this staff alternative will have on the region's farms and the ripple effect throughout the region's communities. This inadequate economic analysis is insufficient for compliance with either the California Water Code or CEQA.

Table 4 advances only a few "conservation practices" and demonstrates that many of these practices will cost over \$1,000 per acre. The table, however, attempts to mitigate the costs by asserting a grower would have a net return by planting grass strips, grass roads, row crops, and underground outlets, etc. These are completely untrue and the additional costs are prohibitive.

Table 5 lists many additional management practices which would be mandated by the staff draft and any number of them would also run thousands of dollars per acre. Table 7 projects that a farmer's year-one cost would be \$71,000 to implement the prescribed management practices.

In Tables 9 and 10, the staff tries to justify such massive costs by comparing these new costs to the total ag gross value of crops in each county. This is a false analysis as gross value has no bearing on each farm's disposable profit.

Table 12 asserts that there are only 2,373 acres of farm ground within 50 feet of a watercourse. That seems very unlikely unless this is to apply to only a few major watercourses. Twenty-four hundred acres of important farm land is significant enough impact, however, this does not seem to square with the total of all of the 303d listed waterways which are the basis throughout the regulation. Simple math would indicate that such a 50 foot band of land would idle around 10,000 productive acres.

Finally, the chart on monitoring costs also seems to seriously undervalue the monitoring costs for virtually all significant farms (Tier 3) individually engaging surface and groundwater monitoring. It is believed this \$5 million figure is understated by several fold.

On balance, the economic analysis is inadequate and the evaluation of the major economic impact on the farms and the regional community are understated and unjustified.

## **II. Legal Impairments Related to the Staff Draft**

1. California Environmental Quality Act (CEQA). Findings 29 through 31 of the staff draft regarding CEQA attempts to avoid any responsibility to do a complete environmental evaluation. This staff draft proposes to avoid a full CEQA and environmental analysis by utilizing the negative declaration process.

The staff draft alternative is by far the most rigorous and thereby regulatorily impacting program even advanced dealing with water quality. The Regional Board staff held a CEQA scoping hearing in San Luis Obispo where the public presented dozens of examples of how this alternative would have significant environmental impacts and economic impacts. There were only a few modest amendments made to that previous version to the staff draft, and in large part these changes increased the environmental impact rather than mitigated the environmental impact of this regulation.

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Clearly, therefore, the record does not support the position that the Regional Board can declare that this program would have a negative environmental impact. The Regional Board cannot casually take such a position merely because the far lesser regulation that was advanced some five years prior were subject only to the negative declaration (and those were never challenged) because this proposed waiver is of an entirely different level of environmental consequence.

Furthermore, when the existing waiver was originally promulgated and supported by a declaration of negative environmental impact other regional boards had used that same approach concerning their respective waivers. That is now no longer the case as the Central Valley Regional Board is engaging a full NEPA environmental review on amending its ag waiver even though all of the five alternatives being discussed do not even come close to the significant environmental impact advanced by this proposed Central Coast waiver.

Consequently, the Regional Board should pull back this proposed waiver and engage a proper environmental CEQA review with this alternative being one of the several considered alternatives.

2. The draft waiver includes discharge prohibitions that exceed relevant provisions in Porter-Cologne. Porter-Cologne provides that "[a] regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted." (Wat. Code, § 13243.) The Porter-Cologne waiver authority in Cal. Wat. Code § 13269 is, however, more narrow and does not authorize a regional board to do blanket prohibitions of discharges as part of a waiver.

The staff waiver draft also contains discharge prohibitions which are unlawful because they are outside the Central Coast Water Board's authority to regulate and protect water quality. Provisions such as those which would prohibit the use of fertilizers in excess of crop needs are without authority. The Water Board has no authority to dictate or control the amount of fertilizer used by any grower. The Central Coast Water Board also has no expertise to determine if fertilizer application is in fact in excess of crop needs, and no capability to administer such prohibition. The Central Coast Water Board is also attempting to control planting of vegetation which also exceeds the Central Coast Water Board's authority, and would constitute a regulatory taking.

3. The waiver proposes minimum riparian buffer widths of 30 feet and mandate that growers maintain vegetation in the buffer zones, and would prohibit the removal of vegetation undertaken to protect food safety. These aquatic habitat requirements are regulations that deprive agricultural landowners of the economic benefit of their private property. Deprivation in this manner constitutes a taking under the State and Federal Constitutions. (*See Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104 and its subsequent series of cases.) Pursuant to current regulatory takings cases, in making this determination courts examine the economic impact on the land in question, the investment-backed expectations of the landowner, and the character of the government action. This aquatic habitat provision would meet the legal test to constitute a compensable taking of private property.

4. The Central Coast Water Board proposes to dictate that vegetative buffers must be maintained, clearing of vegetation is prohibited, and creating bare dirt is prohibited. All of these

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requirements clearly dictate how to comply with the general requirement to protect aquatic habitat. These are unlawful restrictions because they describe how a grower must operate which is inconsistent with section 13360 of the Water Code.

5. The Central Coast Water Board has no authority to require the total elimination of tail water discharges. Further, discharge prohibitions must be adopted as part of a water quality control plan or waste discharge requirements, and are limited in scope and area. Many of the provisions of this waiver go beyond the Basin Plan and are therefore without authority.

6. The Central Coast Water Board is requiring various technical reports pursuant to Water Code section 13267. The Central Coast Water Board's legal ability to require reports pursuant to 13267 has considerable constraints. To issue a lawful section 13267 request, the Central Coast Water Board has the burden of explaining the need for the information and for identifying factual evidence that supports requiring the reports. Unsupported assertions that such a nexus exists are insufficient to support a section 13267 request. Most of the technical report requests fail in whole or part to meet the Central Coast Water Board's statutory authority.

### **III. Brief Comparison of the Ag Alternative to the Staff Draft Waiver**

The agricultural alternative waiver that was advanced to the Regional Board is not just an equivalent approach to water quality regulation, it (a) is responsive to the requested points indicated by the Regional Board staff, (b) avoids the several legal shortcomings of the staff draft, and (c) offers several features not included in the staff draft. Therefore, it offers the superior alternative.

The ag alternative waiver was the product of meetings with the Regional Board staff and significant amendments were made to accommodate points raised by the Regional Board staff. Therefore, the ag alternative is of a very similar structure to the staff draft with filing NOIs, monitoring/reporting of the region's waters, developing farm plans with the same components as the staff draft, and has additional important features such as completion of water quality surveys, verification monitoring and other provisions that assure even further protection of the region's waters.

The ag alternative proposal regulates discharges from irrigated agricultural lands as authorized by Water Code section 13269, which requires farm dischargers to:

1. Participate in a region-wide monitoring program that will conduct monitoring and report annually on monitoring results, including the identification of water quality benchmark exceedances;
2. Develop a proprietary farm water quality management plan (Farm Plan), which identifies management practices in a) irrigation, b) pesticides, c) nutrients, and d) sediment that will address water quality benchmark exceedances;
3. Complete a Farm Water Quality Survey and submit it to the Regional Board;
4. Implement the Farm Plan and management practices to improve water quality;

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5. Be subject to a verification review of a statistically significant sample of Farm Water Quality Surveys per year by a third-party entity or the Regional Board to confirm compliance and determine where educational and management practice implementation efforts should be focused;
6. Assess the effectiveness of implemented agricultural management practices in attaining water quality benchmarks and identify any necessary upgrades to management practices.
7. Either participate in the Ag Water Quality Coalition to review by audit if management practices are adequate or be required to conduct individual on-farm monitoring.

This ag alternative waiver proposal calls for individual farms to submit new notices of intent (NOIs) to participate in the agricultural waiver, and to identify which of their lands have the potential of irrigation run off to waters of the state. It advances a representative surface water monitoring program to further characterize the water quality in the region's principal water courses, and enable parties to evaluate improved water quality. The watershed monitoring plan would be conducted by a third party monitoring group in accordance with an agreed monitoring protocol. Over time, monitoring locations may need to be readjusted to respond to problems, identify sources, or to respond to data gaps. Monitoring will focus on water quality constituents that have shown to be most prevalent in the region with particular focus on organophosphate and pyrethroid pesticide classes, and nitrates.

The ag alternative waiver also calls for each farm to craft and maintain an individualized Farm Plan which would identify their farm lands' associated watercourses and outline relevant management practices to reduce irrigation return flows and the runoff of contaminants. It would also contain components on grower training/education. Farm Plans may be required to include as components: pesticide management practices and nutrient management practices, both of which would indicate management considerations to reduce discharges of problematic pesticides, and in addition to balancing the application of fertilizers to crop needs.

The groundwater provisions of the two proposals are similar in having well monitoring (one well per property in the ag proposal) measurement of nitrate in the soil and water and incorporating that information into management decisions on the amount of nitrate fertilizer to apply. (The ag proposal does this by encouraging proper management decisions, whereas the staff proposal tries to regulate it by prescription.)

The ag alternative would employ a multi-phase verification program whereby farm plans would be reviewed for completeness and adequacy. This would be enhanced by a 3-stage farm audit (pre-audit, preliminary audit, and second audit), whereby the Farm Plan would be reviewed in association with review of water quality data to determine adequacy. Internal farm monitoring, i.e., SMART Sampling may be required. SMART Sampling is a management practice that includes on-farm sampling of surface irrigation water that allows individual farmers to establish a baseline of farm practices to determine effectiveness of individual farm measures. SMART Sampling data is confidential to the grower.

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The required audit review of management practices would be conducted by an approved coalition and is unique to the ag alternative. If a grower would not participate in such coalition audit efforts, he would be required to engage in individual on-farm monitoring.

These important provisions of the ag alternative make it even more responsive to water quality than the staff alternative.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Thomas", with a long horizontal flourish extending to the right.

William J. Thomas  
for BEST BEST & KRIEGER LLP

WJT:lmg

Cc: Board Members  
Ocean Mist Farms  
RC Farms