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6 Ocean Mist Farms and RC Farms

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8
9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

10
11 OCEAN MIST FARMS AND RC FARMS

12 vs.

13 CALIFORNIA REGIONAL WATER
14 QUALITY CONTROL BOARD,
CENTRAL COAST REGION

SWRCB File No. _____

15 REQUEST FOR STAY AND PETITION FOR
16 REVIEW OF CALIFORNIA REGIONAL
17 WATER QUALITY CONTROL BOARD,
CENTRAL COAST REGION, ORDER NOS.
R3-2012-0011, R3-2012-0011-01, R3-2012-
0011-02, AND R3-2012-0011-03, AND
RESOLUTION NO. R3-2012-0012

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1 Pursuant to Water Code section 13320, the Petitioners hereby petition the State Board to
2 review the California Regional Water Quality Control Board, Central Coast Region’s (“Regional
3 Board’s”) actions and inactions related to: (1) its adoption of Order No. R3-2012-0011:
4 Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands
5 (“2012 Ag Waiver”); (2) its adoption of Monitoring and Reporting Program Order No. R3-2012-
6 0011-01: Tier 1 (“Tier 1 MRP Order”); (3) its adoption of Monitoring and Reporting Program
7 Order No. R3-2012-0011-02: Tier 2 (“Tier 2 MRP Order”); (4) its adoption of Monitoring and
8 Reporting Program Order No. R3-2012-0011-03: Tier 3 (“Tier 3 MRP Order”, and collectively
9 with Tier 1 MRP Order and Tier 2 MRP Order, the “Tier MRP Orders” or the “MRP”); (5) its
10 certification of a “Final Subsequent Environmental Impact Report” (“Final SEIR”) in its
11 Resolution No. R3-2012-0012, purporting to conduct analysis required by the California
12 Environmental Quality Act (“CEQA”) for regulating discharges from irrigated lands, for which a
13 Notice of Determination (“NOD”) was allegedly filed; and (6) its failure to properly conduct an
14 environmental impact analysis of the 2012 Ag Waiver as required by the CEQA.

15 In addition, pursuant to Water Code section 13321(a) and title 23, section 2053 of the
16 California Code of Regulations, the Petitioners hereby request the State Board to immediately
17 stay the 2012 Ag Waiver and Tier MRP Orders, or in the alternative, to schedule a hearing
18 regarding the Petitioners’ Request for Stay.

19 Attached as **Exhibit A** to this Petition is a copy of Order No. R3-2012-0011. Attached as
20 **Exhibit B** to this Petition is a copy of Order No. R3-2012-0011-01. Attached as **Exhibit C** to
21 this Petition is a copy of the Order No. R3-2012-0011-02. Attached as **Exhibit D** to this Petition
22 is a copy of Order No. R3-2012-0011-03. Attached as **Exhibit E** to this Petition is a copy of
23 Resolution No. R3-2012-0012. Attached as **Exhibit F** to this Petition is a copy of Notice of
24 Determination, dated April 3, 2012. Attached as **Exhibit G** to this Petition is the Declaration of
25 Dale Huss in support of the Petitioners’ Request for Stay and Petition (“Huss Decl.”). Attached
26 as **Exhibit H** to this Petition is the Declaration of Dennis Sites in support of the Petitioners’
27 Request for Stay and Petition (“Sites Decl.”). Attached as **Exhibit I** to this Petition is the
28 Declaration of William J. Thomas in support of the Petitioners’ Request for Stay and Petition

1 (“Thomas Decl.”). Attached as **Exhibit J** to this Petition is a copy of the transcript for the
2 Regional Board’s hearing held on March 14, 2012 (“Hearing Tr. (3/14/2012)”). Attached as
3 **Exhibit K** to this Petition is a copy of the transcript for the Regional Board’s hearing held on
4 March 15, 2012 (“Hearing Tr. (3/15/2012)”).

5 This Petition and Request for Stay satisfy the requirements of title 23, sections 2050 and
6 2053 of the California Code of Regulations. Petitioners request the opportunity to file
7 supplemental points and authorities in support of this Petition once the administrative record
8 becomes available. Petitioners also request the opportunity to amend its Request for Stay,
9 Petition and statement of points and authorities as the Petitioners have been delayed by the
10 Regional Board’s slow response time in providing the necessary documents to submit this
11 Petition and as the limitations period to object to Resolution No. R3-2012-0012 and the Notice of
12 Determination has not expired. Pursuant to title 23, section 2050.5(a) of the California Code of
13 Regulations, Petitioners also reserve the right to submit additional argument and evidence in reply
14 to the Regional Board’s or other interested parties’ responses to this Petition.

15 **I. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

16 Petitioners submit this Petition in compliance with Water Code sections 13320(a),
17 13321(a), and 13330(c). Section 13320(a) provides that an aggrieved person may petition the
18 State Board to review any action or inaction of a Regional Board under Water Code section
19 13260 *et seq.*, including actions or inactions relating to waiver of waste discharge requirements.
20 Section 13321(a) allows the State Board to stay a regional board’s decision and order and to hold
21 a hearing regarding the request for stay. Section 13330(c) states that “[t]he time for filing an
22 action or proceeding subject to Section 21167 of the Public Resources Code for a person who
23 seeks review of the regional board’s decision or order under Section 13320 . . . , shall commence
24 upon the state board’s completion of that review” Based on this provision of the Water
25 Code, Petitioners are required to submit a challenge to the Regional Board’s actions with respect
26 to CEQA to the State Board for review prior to filing a writ of mandate pursuant to Public
27 Resources Code section 21167. Throughout the 2012 Ag Waiver review process, which included
28 the CEQA review, Petitioners had protested the Regional Board’s improper reliance on its

1 negative declaration issued in 2004 (“2004 Negative Declaration”) in connection with its
2 adoption of the 2004 conditional waiver of waste discharge requirements for discharges from
3 irrigated lands (“2004 Ag Waiver”). The 2012 Ag Waiver contains new conditions and
4 regulations, and is significantly different in scope from the 2004 Ag Waiver. As such, the 2012
5 Ag Waiver qualifies as a new “project” for which a full CEQA review is required. However, the
6 Regional Board relied heavily on the 2004 Negative Declaration and issued a draft subsequent
7 EIR (“Draft SEIR”) on November 19, 2010, which purported to analyze the 2010 draft of the
8 proposed waiver, the Final SEIR on March 17, 2011, which purported to analyze the March 17,
9 2011 draft of the proposed waiver, and an addendum to the Final SEIR on August 10, 2011
10 (“Addendum”). As further discussed in the attached Statement of Points and Authorities, the
11 Final SEIR fails to satisfy CEQA requirements for many reasons and no environmental impact
12 analysis was ever prepared for the actual project that adopted on March 15, 2012.

13 **II. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF**
14 **PETITIONERS**

15 Ocean Mist Farms
16 Attention: Dale Huss
17 10855 Ocean Mist Parkway
18 Castroville, CA 95012
19 Phone: (831) 633-2144
20 Email: daleh@OceanMist.com

21 RC Farms
22 Attention: Dennis Sites
23 25350 Paseo del Chaparral
24 Salinas, CA 93908
25 Phone: (831) 595-3618
26 Email: dsitesagmt@aol.com

27 In addition, Petitioners request that all materials in connection with the Petition and
28 administrative record be provided to Petitioners’ counsel as identified on the caption page of this
Petition.

29 **III. THE PETITIONERS**

30 **A. Ocean Mist Farms**

31 Ocean Mist Farms is a major vegetable grower and packer based in Castroville and with
32 farms also in the Salinas Valley and Pajaro Valley areas of the Central Valley region. Ocean Mist
33

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1 Farms actively participates in the Presentation, Inc.’s monitoring program and has aggressively
2 engaged in water quality management on its farm properties. Ocean Mist Farms is enrolled in the
3 2004 Ag Waiver and its operations and management of its farms would be significantly impacted
4 by the 2012 Ag Waiver.

5 **B. RC Farms**

6 RC Farms is a major vegetable grower based in the Salinas Valley area of the Central
7 Valley region. RC Farms actively participates in the Presentation, Inc.’s monitoring program and
8 has aggressively engaged in water quality management on its farm properties. RC Farms is
9 enrolled in the 2004 Ag Waiver and its operations and management of its farms would be
10 significantly impacted by the 2012 Ag Waiver.

11 **IV. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH**
12 **PETITIONERS REQUEST THE STATE BOARD TO REVIEW**

13 Petitioners seek review of the Regional Board’s: (1) adoption of the 2012 Ag Waiver; (2)
14 adoption of the Tier 1 MRP Order; (3) adoption of the Tier 2 MRP Order; (4) adoption of Tier 3
15 MRP Order; (5) certification of the Final SEIR in its Resolution No. R3-2012-0012, purporting to
16 conduct analysis required by CEQA, for which a Notice of Determination was allegedly filed; and
17 (6) failure to properly conduct an environmental impact analysis of the 2012 Ag Waiver as
18 required by the CEQA.

19 More specifically, the Petitioners request the State Board review the Regional Board’s
20 adoption of a complex and confusing regulatory scheme that requires applicable dischargers to
21 comply with unreasonable and inappropriate conditions. In doing so, the Regional Board failed
22 to consider the reality facing the agricultural industry and imposed certain regulations that are
23 simply unfeasible and impossible to comply. Consequently, farmers in the Central Valley region
24 will be subject to enforcement actions for their inability to meet the Regional Board’s unrealistic
25 goals and milestones. Moreover, as discussed in further detail in the attached Statement of Point
26 and Authorities, the Regional Board exceeded its authority and violated applicable laws in
27 adopting these orders and resolution, which are substantively and procedurally defective. Many
28 of the conditions contained therein are not directly tied to the protection of the water quality;

1 rather, they target certain agricultural practices that are critical to the industry and seek to alter the
2 operations and managements of farmlands. Such provisions include unreasonable restrictions on
3 the use of nitrate, certain insecticides, tile drains, and retention ponds.

4 Further, the Petitioners request that the State Board review the Regional Board’s failure to
5 proceed in a manner required by law with respect to complying with the substantive and
6 procedural requirements under the CEQA. The 2012 Ag Waiver is substantively and
7 significantly different from the prior 2004 Ag Waiver. As such, for the purposes of CEQA, the
8 2012 Ag Waiver is a separate and distinctive project from the 2004 Ag Waiver. Consequently,
9 the Regional Board should have conducted a separate environmental impact analysis, instead of
10 relying on the 2004 Negative Declaration. Even assuming that the 2012 Ag Waiver does not
11 constitute a new project, the Regional Board failed, among other things, (1) to conduct an
12 environmental impact analysis on the actual project adopted, (2) to properly assess the
13 environmental impacts, their significance, project alternatives and mitigations, (3) to properly
14 make the required CEQA findings and overriding statement, and (4) to abide by required
15 procedures mandated by CEQA and chapter 13 of title 14 of the California Code of Regulations
16 (“CEQA Guidelines”).

17 **V. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO**
18 **ACT**

19 The Regional Board adopted the 2012 Ag Waiver, the Tier MRP Orders, and Resolution
20 No. R3-2012-0012 on March 15, 2012. Pursuant to CEQA guidelines, the Regional Board is
21 required to file the Notice of Determination by March 22, 2012 (five working days from the date
22 of project approval).¹ (See CEQA Guidelines, §15094(c).) The Petitioners have thirty days
23 from the date on which the Regional Board acted or refused to act to file this Petition. Since the
24 thirtieth day from March 15, 2012 falls on a weekend, the Petitioners may file their papers on the
25 following Monday. (Cal. Code Regs., tit. 23, §2050(b).) Accordingly, this Petition is timely
26 filed pursuant to Water Code section 13320 and title 23, California Code of Regulations, section

27 _____
28 ¹ To date, the Regional Board has not provided the Petitioners with a copy of the notice bearing the Office of
Planning and Research’s stamp, which indicates that the notice has been filed.

1 2050.

2 **VI. A STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT IS**
3 **INAPPROPRIATE OR IMPROPER**

4 As explained in more detail in the Statement of Points and Authorities herein, the
5 Regional Board's adoption of 2012 Ag Waiver, the Tier MRP Orders, and Resolution No. R3-
6 2012-0012 constitutes a prejudicial abuse of discretion because the Regional Board exceeded its
7 legal authority and failed to proceed in a manner required by law. These orders and resolutions
8 are substantively and procedurally defective.

9 The extreme new regulations contained in the 2012 Ag Waiver and the Tier MRP Orders
10 are unreasonable and inappropriate, are not tied to the improvement of water quality, are
11 impractical and unfeasible to implement, and will subject dischargers to unnecessary costs and
12 exposure to liabilities. Moreover, this regulatory scheme unreasonably targets certain essential
13 agricultural practices that are critical to the industry. In doing so, the Regional Board is
14 interfering with a farmer's operations and management of its farmland. Such unlawful intrusions
15 include the unreasonable restriction on the use of nitrate, certain insecticides, tile drains, and
16 retention ponds.

17 Furthermore, CEQA requires that an agency analyze the potential environmental impacts
18 of its proposed actions in an EIR (except in certain limited circumstances). (See, e.g., Pub.
19 Resources Code, § 21100.) CEQA is designed to inform decision makers and the public about
20 potential, significant environmental effects of a project. (CEQA Guidelines, § 15002(a)(1).) "Its
21 purpose is to inform the public and its responsible officials of the environmental consequences of
22 their decisions before they are made. Thus, the EIR 'protects not only the environment, but also
23 informed self-government.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.
24 3d 553, 564.) Here, the Regional Board failed to comply with substantive and procedural
25 requirements of CEQA in that it, among other things, did not conduct an environmental impact
26 analysis on the actual project adopted, failed to properly assess the environmental impacts, their
27 significance, project alternatives and mitigations, failed to properly make the required CEQA
28 findings and overriding statement, and did not abide by required procedures mandated by CEQA.

1 Because the Regional Board failed to properly comply with CEQA, the Regional Board's
2 certification of the Final SEIR, approval of the 2012 Ag Waiver and the MRP, and execution of a
3 Notice of Determination constitute a prejudicial abuse of discretion.

4 **VII. THE MANNER IN WHICH PETITIONERS ARE AGGRIEVED**

5 Petitioners are participants under the 2004 Ag Waiver and are subject to regulation under
6 the 2012 Ag Waiver and Tier MRP Orders. Because the Petitioners own farms exceeding certain
7 acreage, may have used certain chemicals, and have farmland near certain impaired waterbodies,
8 they are automatically subject to the most stringent requirements under the 2012 Ag Waiver and
9 Tier MRP Orders. These requirements would significantly impact the Petitioners' management
10 and operations of their farm.

11 Further, Petitioners are aggrieved by the Regional Board's failure to comply substantively
12 and procedurally with CEQA and other applicable laws.

13 **VIII. THE SPECIFIC ACTION REQUESTED BY PETITIONERS**

14 Based on the foregoing, and as supported by the Statement of Points and Authorities and
15 the attached declarations, Petitioners request the State Board: (1) to immediately stay the 2012 Ag
16 Waiver and the Tier MRP Orders, or in the alternative, to schedule a hearing regarding the
17 Petitioners' request for stay; (2) to order the Regional Board to vacate the 2012 Ag Waiver, the
18 Tier MRP Orders, and Resolution No. R3-2012-0012; (3) to order the Regional Board to
19 withdraw its Notice of Determination; (4) to cure the flaws indentified herein in the existing 2012
20 Ag Waiver and the Tier MRP Orders by modifying the 2012 Ag Waiver and the Tier MRP
21 Orders; and (5) to prepare and circulate an EIR pursuant to CEQA requirements for the State
22 Board's conditional waiver of waste discharge requirements for discharges from irrigated lands.

23 A stay of the 2012 Ag Waiver and the Tier MRP Orders is appropriate to prevent
24 substantial harm to the Petitioners and other similarly situated farm owners or operators. As
25 explained in more detail in the Statement of Points and Authorities herein, the 2012 Ag Waiver
26 requires applicable dischargers to take certain actions either immediately or by October 1, 2012,
27 which is less than six months or 168 days from April 16, 2012. To comply with the 2012 Ag
28 Waiver, the Petitioners would have to take immediate actions at substantial costs during the time

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1 that this Petition is subject to the State Board's review. Accordingly, the State Board should
2 immediately stay the 2012 Ag Waiver and the Tier MRP Orders pursuant to Water Code section
3 13321(a) and title 23, section 2053 of the California Code of Regulations because supporting
4 declarations attached hereto as **Exhibits G, H, and I** clearly demonstrate:

- 5 (1) substantial harm to the Petitioners or to the public interest if a stay is not granted;
- 6 (2) a lack of substantial harm to other interested persons and to the public interest if a stay
7 is granted; and
- 8 (3) substantial questions of fact or law regarding the disputed action.

9 **IX. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
10 **ISSUES RAISED IN THIS PETITION**

11 As required by title 23, section 2050(a)(7) of the California Code of Regulations,
12 Petitioners have included a Statement of Points and Authorities in support of this Petition
13 beginning on page 10.

14 **X. A STATEMENT THAT THIS PETITION WAS SENT TO THE REGIONAL**
15 **WATER BOARD**

16 In accordance with title 23, section 2050(a)(8) of the California Code of Regulations,
17 Petitioners caused a true and correct copy of this Petition and accompanying Exhibits and
18 Declarations to be delivered in person to the Regional Board on April 13, 2012. The address to
19 which Petitioners served the copy is:

20 Roger W. Briggs, Executive Officer
21 Central Coast Regional Water Quality Control Board
22 895 Aerovista Place, Suite 101
23 San Luis Obispo, CA 93401-7906

24 Petitioners are the very dischargers subject to the 2012 Ag Waiver and the Tier MRP
25 Orders. Therefore, Petitioners did not serve a separate copy of this Petition to the dischargers.

26 **XI. A STATEMENT AS TO WHETHER THE PETITIONERS RAISED THE**
27 **SUBSTANTIVE ISSUES OR OBJECTIONS IN THE PETITION TO THE**
28 **REGIONAL BOARD**

29 Petitioners raised the substantive issues and objections in this Petition before the Regional
30 Board in written comment letters submitted in December 2010, March 2001, July 2011, August

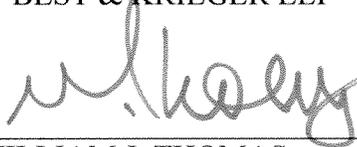
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2011, and January 2012, and in testimony provided to the Regional Board at the March 14 and
15, 2012 public hearings and during the Regional Board Workshop held in March and May of
2011. Petitioners also participated in another Regional Board workshop and in meetings with the
Executive Officer and staff.

Dated: April 16, 2012

BEST BEST & KRIEGER LLP

By: 
WILLIAM J. THOMAS
WENDY Y. WANG
Attorneys for Ocean Mist Farms and RC
Farms

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STATEMENT OF POINTS AND AUTHORITIES

On March 15, 2012, the Regional Board adopted the 2012 Ag Waiver, the MRP and Resolution No. R3-2012-0012, which certified the Final SEIR. However, the orders and resolution are substantively and procedurally flawed. The 2012 Ag Waiver and the MRP contain unreasonable and inappropriate provisions, and the Regional Board failed to comply with CEQA requirements in approving the 2012 Ag Waiver and the MRP. As such, the Regional Board's certification of the Final SEIR constitutes a prejudicial abuse of discretion under Public Resources Code section 21168.5.

I. INTRODUCTION

Petitioners Ocean Mist Farms and RC Farms and their related operations are major farm operations based in the Salinas and Pajaro Valley areas of the Region. They grow various vegetable crops in the lower half of the Salinas Valley, Castroville, and the Pajaro Valley. Petitioners have been aggressively engaged in water quality management on their farm properties and have been fully involved in the Central Coast waiver implementation and in all the deliberations over amendments to this new waiver. Petitioners are currently enrolled in the 2004 Ag Waiver and have been actively involved in the Preservation, Inc.'s monitoring program and in proposing and expanding the agricultural alternative to the 2012 Ag Waiver. Petitioners have testified at each of the March and May 2011 workshops, have met with the Regional Board's staff, and have fully participated in the two days of hearings recently conducted in San Luis Obispo on the conditional waiver.

During the nearly year long period where the Regional Board could take no formal action for lack of quorum, the Petitioners had encouraged all parties, including the agriculture community and the Regional Board's staff, to make use of this valuable time to find and promote moderated and responsible positions somewhere between the very responsible agriculture alternative² (which incorporates many protective provisions well beyond the 2012 Ag Waiver)

² Although the Petitioners believe that the agricultural alternative is a superior means to address the region's water quality issues, this Petition focuses on the unreasonable and inappropriate provisions of the waiver as adopted by the Regional Board.

1 and the extreme alternative proposed by the Regional Board’s staff (which incorporated
2 unreasonable and unworkable provisions, as discussed below). Petitioners have been frustrated
3 with the Regional Board’s rejection of all efforts to resolve substantive problems with the
4 proposed waiver and with the Regional Board’s adoption of an extreme regulatory waiver, which
5 contains inappropriate, unreasonable and impractical conditions. As discussed below, many of
6 the drastic regulations are not tied to water quality risks, but are driven by a desire to regulate
7 certain agricultural practices. In short, the Regional Board has refused to address the short-
8 comings of the 2012 Ag Waiver and the Tier MRP Orders and has merely kicked this matter up to
9 the State Board to resolve these issues.

10 Throughout the 2012 Ag Waiver review process, which included the CEQA review,
11 Petitioners had protested the Regional Board’s improper reliance on the 2004 Negative
12 Declaration adopted in connection with the 2004 Ag Waiver. The 2012 Ag Waiver contains new
13 conditions and regulations, and is significantly different in scope from the 2004 Ag Waiver. As
14 such, the 2012 Ag Waiver qualifies as a new “project” for which a full CEQA review is required.
15 However, the Regional Board relied heavily on the 2004 Negative Declaration and issued the
16 Draft SEIR on November 19, 2010, which purported to analyze the 2010 draft of the proposed
17 waiver, the Final SEIR on March 17, 2011, which purported to analyze the March 17, 2011 draft
18 of the proposed waiver, and the Addendum on August 10, 2011. As discussed in further detail
19 below, no environmental impact analysis was ever prepared for the 2012 Ag Waiver and the
20 Regional Board failed to satisfy many of CEQA’s substantive and procedural requirements.

21 Accordingly, Petitioners respectfully request the State Board (1) to immediately stay the
22 2012 Ag Waiver and the MRP, or in the alternative, to schedule a hearing regarding the
23 Petitioners’ request for stay; (2) to order the Regional Board to vacate the 2012 Ag Waiver, the
24 Tier MRP Orders, and Resolution No. R3-2012-0012; (3) to order the Regional Board to
25 withdraw its Notice of Determination; (4) to cure the flaws indentified herein in the existing 2012
26 Ag Waiver and the Tier MRP Orders by modifying the 2012 Ag Waiver and the Tier MRP
27 Orders; and (5) to prepare and circulate an EIR pursuant to CEQA requirements for the State
28 Board’s conditional waiver of waste discharge requirements for discharges from irrigated lands.

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II. ARGUMENT

A. An Immediate Stay of the 2012 Ag Waiver and the Tier MRP Orders Are Required to Prevent the Petitioners From Suffering Irreparable and Substantial Harm

A stay of the 2012 Ag Waiver and the Tier MRP Orders is appropriate to prevent substantial harm to the Petitioners and other similarly situated farm owners or operators. (See Cal. Code Regs., tit. 23, §2053(a); Dale Decl. at ¶4; Sites Decl. at ¶4.) The 2012 Ag Waiver requires applicable dischargers to take certain actions either immediately or by October 1, 2012, which is less than six months or 168 days from April 16, 2012. Since the State Board has at least 270 days to render a decision on the Petition, the 2012 Ag Waiver requires applicable dischargers to take immediate actions during the period the Petition is subject to review. (See Cal. Code Regs., tit. 23, § 2050.5(b).)

Specifically, the 2012 Ag Waiver requires that all dischargers immediately comply with applicable Total Maximum Daily Loads, prevent its existing containment structures (such as retention ponds or reservoirs) from percolating any waste to groundwater, and maintain riparian vegetative covers and riparian areas for aquatic and wildlife support. (See 2012 Ag Waiver, p. 24, ¶24, & p. 20, ¶33 & 39.) To satisfy the new regulations that are currently subject to review by the State Board, the Petitioners need to hire experts and consultants to development a program to comply with the Total Maximum Daily Loads, design and construct new containment structures to replace their existing retention ponds, and hire and/or train their employees to maintain riparian vegetative covers and riparian areas. (Huss Decl. at ¶5; Sites Decl. at ¶5.)

Moreover, by October 1, 2012, dischargers must install backflow prevention devices at its wells and pumps and develop a farm water quality management plan. (See 2012 Ag Waiver, p. 19, ¶31, & p. 21, ¶44.) Tier 2 and Tier 3 dischargers must also submit an Annual Compliance Form, calculate its nitrate loading risk, and conduct photo monitoring of impaired waterbodies by October 1, 2012 – less than six months from now. (See 2012 Ag Waiver, pp. 27-28, ¶¶67, 68 & 69.)

As growers of high nitrate load risk crops (vegetables), Petitioners are required to determine the nitrate uptake for each crop type. The new regulations would require the

1 Petitioners to calculate nitrate chemical uptake for each of their many crops, each different soil
2 type, each different soil pH, and considerable other variables within a short amount of time.
3 These studies and calculations take many experts, and considerable time to evaluate. Petitioners
4 could not possibly comply within the October 1, 2012 regulatory deadline. (Huss Decl. at ¶7;
5 Sites Decl. at ¶7.)

6 Because the Petitioners own farms exceeding certain acreage, have used certain pesticides
7 as agronomic need arises, plant certain crops, and have farmland near certain impaired
8 waterbodies, they are automatically subject to the most stringent requirements under the 2012 Ag
9 Waiver and must comply with these new conditions. (Huss Decl. at ¶2; Sites Decl. at ¶2.) Given
10 the size of the Petitioners' operations, six months will not even be enough time to implement the
11 required actions. To ensure compliance, the Petitioners must take action now to (a) retain experts
12 and consultants to develop management plan and calculate nitrate loading risks, (b) purchase,
13 install, and maintain the backflow prevention devices for its wells and pumps, and (c) train and/or
14 hire additional employees to perform the required work. (Huss Decl. at ¶9; Sites Decl. at ¶9.)

15 If a stay is not granted immediately, the Petitioners will suffer irreparable and substantial
16 harm as they implement measures to comply with the 2012 Ag Wavier. (Huss Decl. at ¶¶5-10;
17 Sites Decl. at ¶¶5-10.) As the State Board may not render its decision on the Petition until after
18 October 1, 2012, each Petitioner will have to take the above-described actions and will incur costs
19 estimated to be several hundreds of thousands of dollars during the time that the Petition is
20 subject to review. (*Id.*)

21 The Petition raises substantial questions of facts and law, including (a) whether the
22 Regional Board exceed its authorities and violated applicable laws in enacting the 2012 Ag
23 Waiver and the Tier MRP Orders; (b) whether the Regional Board complied with CEQA
24 requirements; and (c) whether the Regional Board's staff failed to properly examine the impact of
25 the 2012 Ag Waiver pursuant to CEQA. Staying the 2012 Ag Waiver and the Tier MRP Orders
26 will allow the State Board to resolve these substantial questions of facts and laws prior to
27 implantation of the new regulations. (Thomas Decl. at ¶4.)

28 Such stay will not cause substantial harm to other interested persons or to the public

1 interest in that dischargers will still be obligated to abide by the water quality control and
2 regulations of the 2014 Ag Waiver, whose effective period was extended till September 30,
3 2012.³ (2012 Ag Waiver, p. 2, ¶4.)

4 **B. Petitioners' Effective Time for Appeal Has Been Prejudicially Delayed By the**
5 **Regional Board**

6 The Petitioners' ability to prepare the Request for Stay and the Petition has been
7 prejudicially impeded by the Regional Board's slow response time in providing the necessary
8 documents. Section 13320 of the Water Code affords Petitioners 30 days to appeal the Regional
9 Board's action or failure to act. (Water Code § 13320(a).) However, the Regional Board has
10 hampered the Petitioners' ability to prepare this Petition and Request for Stay by withholding key
11 documents and, in effect, has shortened the Petitioners' statutorily permitted time to appeal.

12 Although the Regional Board adopted the 2012 Ag Waiver, the MRP, and Resolution No.
13 R3-2012-0012 on March 15, 2012, mandating the Petition to be filed by April 16, 2012, the
14 Regional Board did not make available the 2012 Ag Waiver and the MRP until March 26, 2012,
15 and did not provide the Petitioners with Resolution No. R3-2012-0012 until April 10, 2012.
16 (Thomas Decl. at ¶6.) To prepare this Petition, Petitioners require the executed copies of these
17 orders and resolution, because the Regional Board verbally amended several provisions of the
18 proposed waiver during its March 14 and 15, 2012 hearings. Without the executed copies, the
19 Petitioners would have no method of verifying what was actually incorporated into the 2012 Ag
20 Waiver, the MRP, and Resolution No. R3-2012-0012.

21 Moreover, despite repeated requests for expedited transcripts for the Regional Board's
22 hearing conducted on March 14 and 15, 2012, the Regional Board did not provide the draft March
23 14, 2012 hearing transcript until April 11, 2012 and the final transcript until April 13, 2012.
24 (Thomas Decl. at ¶6.) The Petitioners only received the March 15, 2012 hearing transcript on
25 April 3, 2012. (*Id.*) Without final hearing transcripts or executed orders and resolutions, the
26 Petitioners could not effectively draft this Petition.

27 _____
28 ³ Petitioners are not aware of any interested persons or public interest that will be substantially harmed if a stay is
granted. (Huss Decl. at ¶11; Sites Decl. at ¶11; Thomas Decl. at ¶5)

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1 Furthermore, to date, the Regional Board has not produced a NOD that bears the stamp of
2 the Office of Planning and Research, indicating that the NOD has been filed. (Thomas Decl. at
3 ¶6.) The filing of the NOD starts the 30-day statute of limitation on challenges to project approval
4 under CEQA. (CEQA Guidelines, §15094(g); Public Resource Code §21167.) Without
5 confirmation that the NOD was filed, the Petitioners are ignorant as to the filing deadline for
6 challenges to project approval under CEQA. Consequently, the 30 day statutory period for
7 Petitioners to exercise their due process appeal rights has effectively been cut to only a few days.

8 Accordingly, Petitioners request the opportunity to amend its Request for Stay, Petition
9 and statement of points and authorities as the Petitioners have been prejudicially delayed by the
10 Regional Board’s slow response time in providing the necessary documents to submit this
11 Petition and as the limitations period to object to Resolution No. R3-2012-0012 and the Notice of
12 Determination has not expired.

13 **C. THE 2012 AG WAIVER AND THE MRP CONTAIN EXTREME,
14 UNREASONABLE AND INAPPROPRIATE PROVISIONS AND THE REGIONAL
15 BOARD EXCEEDS ITS AUTHORITY IN ADOPTING THIS EXTREME AND
UNPRECEDENTED REGULATORY SCHEME**

16 **1. The 2012 Ag Waiver Advances Extreme And Unreasonable Requirements
17 For Nitrate Nutrient Management and the Regional Board Exceeds Its
18 Authority in Proposing to Control a Farmer’s Use Of Fertilizer**

19 **(a) Nitrate Load Risk Calculations**

20 The 2012 Ag Waiver demands that by October 1, 2012 – less than six months from now –
21 a farmer must “determine nitrate loading risk factors” and report the amount calculated for each
22 farm or unit. (2012 Ag Waiver, p. 28, ¶ 68.) As the Petitioners will need to retain experts and
23 consultants to make such determinations, the October 2012 deadline for compliance is clearly
24 unreasonable.

25 The Regional Board’s staff has indicated that vegetable farms will be deemed to have a
26 high nitrate load risk. Under the 2012 Ag Waiver and the MRP, such farmer must determine the
27 nitrate uptake for each crop type. Paragraph 74 of the 2012 Ag Waiver requires that by October
28 1, 2013, a Tier 3 discharger must determine “typical crop nitrogen” uptake for each crop. Plant
physiology studies for every crop, soil type, moisture, soil nutrient, soil pH, and climactic

1 conditions on a farm will take several years to complete and hundreds of thousands of dollars,
2 since this information is not presently available in any documents or any scientific resource. To
3 comply with this new condition, Petitioners will have to retain experts for several years to
4 calculate the nitrate used by each of their many crops in each of the different soil conditions on
5 which each crop is grown and under various moisture and climate conditions. The uptake
6 calculation will also have to take into consideration numerous other important variables,
7 including the pH level of the soil. These studies and calculations take many experts, and
8 considerable time to evaluate. The provisions requiring nitrate uptake calculation are, therefore,
9 not just unreasonable, but are designed by the Regional Board’s staff to be impossible to be
10 achieved by the farmers.

11 Tier 2 MRP Order and Tier 3 MRP Order contain pages of complex and severe regulatory
12 obligations and restrictions dealing with nitrate. These regulations require the calculation of
13 nitrate risk by crop and by irrigation system. (Tier 2 MRP Order, pp. 11-12; Tier 3 MRP Order,
14 pp. 10-12.) Among the duties imposed is the reporting all nitrogen usage to calculate the
15 supposed nitrate risk. Tier 3 dischargers are further required to consider nitrate uptake of each
16 crop in their INMP. (2012 Ag Waiver, p. 29, ¶74.) If a Tier 2 or Tier 3 discharger divides his
17 farm/ranch to units of different risk, independent records must be maintained for each unit. (Tier
18 2 MRP Order, p. 11, ¶2; Tier 3 MRP Order, p. 11, ¶ 2.) All of these unreasonable requirements
19 are demanded in accordance with specified timelines and any slippage is an enforceable violation.

20 The Tier 2 and Tier 3 MRP Orders allow a discharger to calculate the nitrate loading risk
21 by employing one of two methods: (1) criteria and methodology set forth in Table 4, which
22 arbitrarily calculates nitrate loading risk based on the types of crops, irrigation system, and nitrate
23 concentration in the irrigation water (“Table 4 Methodology”); or (2) the controversial Nitrate
24 Groundwater Pollution Hazard Index developed by the University of California (“UC
25 Methodology”). (Tier 2 MRP Order, p. 11; Tier 3 MRP Order, p. 11.) Neither of these
26 methodologies is appropriate. As cautioned by the University of California, the controversial UC
27 Method was never designed to be used as a regulatory provision. Further, the Table 4
28 Methodology is new, untested, and perhaps even less reliable for calculating nitrate loading risk

1 than the UC Methodology. The Table 4 Methodology is also entirely unmanageable as it
2 mandates separate calculations for individual farms, including “any variability in soil types,” crop
3 type, irrigation types, and deep rip practices, and various other components which may only be
4 found by a grower “utilizing the index tool at [an] internet link” maintained by the University of
5 California. (Tier 2 MRP Order, p. 11, ¶4; Tier 3 MRP Order, p. 11, ¶4.) This reference to an
6 internet link website is an improper method to regulate the targeted growers as access to the
7 website may be unavailable to many farmers. Moreover, the reliance on a third-party website,
8 which may be altered at any time by the University of California, would in fact allow the
9 Regional Board to alter conditions under the 2012 Ag Waiver without revising the actual waiver.

10 (b) Nitrate Calculations Regarding Groundwater

11 The 2012 Ag Waiver also requires that Tier 3 farmers initiate an Irrigation and Nutrient
12 Management Plan (“INMP”) which is to be certified by an experienced Certified Crop Advisor
13 (“CCA”) or propose a Groundwater Monitoring and Reporting Plan (“GMRP”) for each ranch
14 unit and assess if waste will cause exceedances of nitrate in groundwater. (2012 Ag Waiver, pp.
15 29-30, ¶¶ 74-79.) It is totally an unreasonable requirement for a farmer to calculate the nitrogen
16 uptake for each crop at each locations, much less calculate how much of a particular nutrient
17 would not be taken up by plants, and would be tied to soil particles or would otherwise be
18 attenuated by the soil and its organic components and therefore may actually percolate to
19 groundwater.

20 (c) Nitrogen Limitations

21 The attempt to control a farmer’s on-farm crop nutrient management is beyond the
22 Regional Board’s authority. The simple formula restrictions (1:1 and 1:2 ratios) advanced by
23 the 2012 Ag Waiver and the MRP are regulatory attempts to limit a farmer’s management of
24 his crops’ nutritional needs and is completely void of any consideration of soil types, soil
25 compaction, or amount of organic material in the soil. Also, there is no consideration of the
26 crop’s actual nutritional needs, or the differences in need as a result of microclimate, or the
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1 demand differences due to the growing season⁴. The soil’s assimilative capacity and soil
2 organic matter are totally disregarded by the 2012 Ag Waiver. The overarching issue,
3 however, is that the Regional Board cannot legally dictate specific management practices on
4 the farm.

5 By October 1, 2015, a Tier 3 farmer must report his progress toward a Nitrogen Balance
6 ratio, or implement an alternative to demonstrate nitrate load reduction. (2012 Ag Waiver, pp.
7 29-30, ¶78.) This “Nitrogen Balance ratio” refers to the total number of nitrogen units applied to
8 the crop (considering all sources of nitrogen) relative to the typical nitrogen uptake value of the
9 crop. Thus, within three years, farmers would be further restricted in their fertilization of their
10 crop by imposition of “nitrogen balance” limits, which in annual crops would be limited to
11 only the “calculated” crop needs (100%), and in perennial crops 120% of the average crop needs.
12 (2012 Ag Waiver, pp. 29-30, ¶¶78-79.) This regulatory provision expresses that the target will
13 be a ratio of 1:1 where a farmer would only be allowed to apply the amount of nitrogen that the
14 Regional Board’s staff believes is needed by that particular vegetable crop. A year-long crop,
15 such as strawberries or perennial artichokes, can use only a ratio of 1:2.

16 After three years, these ratios must be “improved” and the Nitrogen Balance ratio should
17 compare the amount of nitrogen applied to the crop against nitrogen removed at harvest, rather
18 than the typical nitrogen crop uptake. (2012 Ag Waiver, p. 30, ¶78(c).) This requirement totally
19 ignores realities of agriculture. The nitrogen levels in the harvested and removed portions of
20 plants are not presently available for most crops. As an example, in a field corn situation, perhaps
21 150 pounds of nitrate may be required to produce the stalks and head out the corn. At harvest,
22 less than 1 pounds of nitrate (approximately 4 oz.) would actually be in the harvested kernels
23 removed from the field. Certainly, that 1 pound of nitrate will not commence to grow a corn crop.
24 All crops vary widely in this “required” versus “harvested” comparison, but this example merely
25 points out the absurdity of having the Regional Board’s staff, who have limited knowledge of
26 agriculture, try to dictate critical farm management practices. This is why the legislature has

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28 ⁴ There are large differences in nitrogen demands for each crop between seasons.

1 made clear that while the Regional Board’s legal authority commences at the point of discharge,
2 the Regional Board cannot to dictate management practices in the factory, in the plant or on the
3 farm.

4 (d) Groundwater Nitrate

5 After three years, a Tier 3 farmer must also demonstrate that he has reduced nitrate
6 loading to groundwater. (2012 Ag Waiver, p. 30, ¶78(c).) The Regional Board’s attempt to
7 control agriculture’s necessary use of nitrogen/nitrate is oppressively regulatory and simplistic
8 and does not reflect an understanding of either agricultural production or soil chemistry
9 dynamics. The 2012 Ag Waiver entirely ignores the major relevant components of the
10 assimilative capacity of the soil column, temperature (season), and depth of aquifers. The
11 Regional Board assumes that total nitrogen applied and the total nitrate uptake by the crop should
12 be equal. It does not even consider volatilization or absorption by organic matter, or nitrates tied
13 to soil particles. The approach adopted in the 2012 Ag Waiver is to concoct a regulatory
14 limitation on a farm’s ability to provide nutrients essential for plant function. The nitrate loading
15 calculation of how much nitrogen can get to groundwater is nothing short of bizarre. A grower
16 is in no position to determine how much nitrate, originally sourced from his fertilization, might
17 migrate to an underlying aquifer, perhaps 200-400 feet deep, some 2 to 8 years into the future.

18 (e) The Irrigation and Nutrient Management Plan

19 Tier 3 MRP Order describes the purpose of the INMP as “to budget and manage the
20 nutrients applied to each farm/ranch or nitrate loading risk unit considering all sources of
21 nutrients, crop requirements, soil types, climate, and local conditions in order to minimize nitrate
22 loading to surface water and groundwater in compliance with this Order.” (Tier 3 MRP Order, p.
23 17, ¶A2.) Petitioners do not take issue with the requirement of an INMP or the purposes
24 expressed for the INMP. However, some elements of the INMP are unreasonable. Specifically,
25 the INMP of a Tier 3 discharger with high nitrate loading risks must contain:

- 26 c. Identification of nitrate loading risk factors or input to the
27 Groundwater Pollution Nitrate Hazard Index and overall Nitrate
28 Loading Risk level calculation for each ranch/farm or nitrate
loading risk unit;

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- d. Identification of crop nitrogen uptake values for use in nutrient balance calculations; . . .
- g. Annual balance of nitrogen applied compared to typical crop nitrogen uptake for each ranch/farm or nitrate loading risk unit (Nitrogen Balance ratio);
- h. Annual estimation of nitrogen loading to groundwater and surface water, including subsurface drainage (e.g., tile drains), from each ranch/farm or nitrate loading risk unit

(Tier 3 MRP Order, p. 18, ¶A4.) As discussed herein, the restriction on the use and calculations of the nitrogen and the use of tile drains in the 2012 Ag Waiver and the MRP Orders is unreasonable. These provisions, as well as requirements to include information regarding nitrogen balance ratio, nitrogen uptake value, nitrate loading in the Annual Compliance Form, should be stricken. (See Tier 3 MRP Order, pp. 19-20.)

While it is reasonable in the INMP to require that farmers identify available nitrogen in their soil and their irrigation water and to take those contributions into consideration in making their management plans on fertilization, it is irresponsible, and also beyond the Regional Board's authority to impose on-farm management plans or restrictions. The former assures informed and responsible farm management, but the latter is a prejudicial abuse of power that seeks to regulate the operations and managements of their farms. Consequently, the fertilizer limits must be eliminated from the waiver. As counsel for the Petitioners testified at the Regional Board's hearing on March 14, 2012:

The nutrient limit, the encircled nutrient management plans are appropriate. You should know the amount of nitrate in the water, in the soil and make the determination of your need. That's appropriate. That's asking for proper management, but this goes beyond that and puts a limit on the amount of nitrogen you could use. That's making a management decision."

(Hearing Tr. (3/14/2012) at 312:17-24.)

Moreover, the requirement of the use of a scientist, agronomist, or CCA to certify the INMP would result in unnecessary hardship of the Tier 3 dischargers. (Tier 3 MRP Order, p. 17, ¶¶A1, A4.) This is an unnecessary cost and a harsh condition to implement as there are very few qualified professionals in the Central Coast region. For example, Joel Wiley, a 33-year licensed CCA, practicing crop nutrition in the region and speaking to the requirement of needing CCA's

1 experienced in hydrology, testified at the Regional Board’s hearing held on March 14, 2012: “The
2 hydrologist – the hydrology requirement as CCA having that certification, I don’t know if there is
3 very many of those available in the State of California that have that certification.” (Hearing Tr.
4 (3/14/2012) at 334:5-9.)

5 Further, by October 1, 2016, a Tier 3 farmer must file an INMP Effectiveness Report,
6 prepared by a registered professional engineer, geologist or CCA to “evaluate the effectiveness”
7 of the INMP. (Tier 3 MRP Order, p. 18, ¶A5.) As discussed above, the shortage in qualified
8 professionals to perform work will make this unreasonable and unnecessary condition difficult to
9 implement. Moreover, most Salinas Valley operations are fully capable of putting together
10 effective INMPs. Therefore, the requirements for the INMP to be certified and evaluated by a
11 qualified professional should be stricken.

12 In addition, the requirement for the “Effectiveness Report” to document “measured
13 progress towards protecting groundwater quality” must be stricken. (Tier 3 MRP Order, p. 19, ¶
14 B2.) The Regional Board attempts to use the INMP requirements to clean-up or “restore”
15 groundwater quality. (*Id.*) However, groundwater restoration and cleanup are well beyond the
16 authority granted to the Regional Board pursuant to section 13269 of the Water Code, which
17 governs waivers.

18 (f) Certain Provisions of the Farm Plan Are Unreasonable and Inappropriate

19 Petitioners generally do not object to or challenge the requirement that farmers develop
20 and maintain an individual farm plan to govern farm management designed to protect water
21 quality, including individual irrigation, pesticide, nutrient, salinity and sediment management
22 plans. However, subparagraphs (c), (d), and (f) of Paragraph 44 of the 2012 Ag Waiver MRP
23 Order should be stricken. (2012 Ag Waiver, pp. 21-22.). Subparagraph (c) requires maps
24 “identifying . . . stormwater runoff discharge locations where . . . they may leave the farm.”
25 (2012 Ag Waiver, p. 21.) This provision is impossible to implement as such discharge points
26 may be undefined for stormwater drainage in non-point source situations. Subparagraph (d)
27 requires the Farm Plan to include “[d]escription of typical volume of discharges.” This is
28 similarly impossible to implement and unreasonable for many agricultural non-point discharges.

1 Subparagraph (f) requires the Petitioners to describe and manage tile drain discharges. As
2 described below, it is unreasonable to commence regulating tile drains that are critically
3 important to agriculture and, in many applications, are important to regional/municipal
4 reclamation water programs. Accordingly, these subparagraphs should be stricken.

5 **2. Tile Drains Are Inappropriately Targeted by the 2012 Ag Waiver**

6 The original draft of the proposed waiver had targeted tile drains, but after that
7 proposal was first circulated, the proposed restriction on tile drains fostered considerable
8 focused reaction. Consequently, the Regional Board’s staff indicated that it would back
9 away from that misstep and would remove, from the waiver, provisions regarding tile drain
10 irrigation facilities. However, the 2012 Ag Waiver and the MRP once again targeted the tile
11 drains, which are crucial to agricultural production. Specifically, the 2012 Ag Waiver allows
12 the Executive Officer to require “additional monitoring and reporting for discharges to tile
13 drains,” and the Tier 3 MRP Order requires the Sampling and Analysis Plan to include sites to
14 evaluate water quality impacts resulting from areas receiving tile drain discharges. (2012 Ag
15 Waiver, p. 5, ¶12; Tier 3 MRP Order, p. 5, ¶9.)

16 Tile drains are widely used to remove the problem of excessive water from the crop’s
17 root zone. The drains have been used by California agriculture industry for decades and have
18 made otherwise unproductive areas productive. Any restriction on the use of the tile drains
19 would limit the productivity of the land where they are used and would likely result in significant
20 amount of land taken out of agricultural production altogether. Restricting tile drains would not
21 just eliminate agricultural productivity on an immediate basis, but would also render the
22 farmland virtually unproductive and worthless forever.

23 Moreover, the Regional Board’s authority covers the issue of water quality – not
24 irrigation infrastructures. Field water collected in tile drains is still field water, even through
25 some of it may be collected below the root zone (which in vegetables and strawberries may only
26 be a matter of inches), and in some areas is incorporated into a farm’s irrigation re-circulating
27 systems. The Regional Board should not be regulating or monitoring tile drain water. It is still
28 field water and not yet waters of the state. Because of that, water quality objectives are not

1 applicable to such water, so monitoring this field water is meaningless and thus inappropriate.
2 The use of recycled water has reached widespread acclaim from all sectors, including
3 municipal users, regulators, environmentalists, and those interested in water conservation and
4 water reuse. Agriculture communities in Monterey County and in the Pajaro Valley have taken
5 low quality, but treated, municipal discharges that would otherwise have gone directly into the
6 ocean and have used them for irrigation. The irrigation process dramatically improves the quality
7 of the municipal discharges by cleaning such water before it returns to the environment.
8 Consequently, not only are the Petitioners' operations (1) conserving water, (2) reusing water,
9 and (3) taking problem discharges from municipalities, but are discharging far cleaner water than
10 what would have been discharged by the municipalities. For these reasons, these water
11 recycling programs have reached widespread acclaim.

12 The recycling of municipal discharges in order to clean them up through field irrigation
13 relies heavily on the tile drains to protect these crops. If the farmers are prohibited from using
14 tile drains, their land would be unproductive, consequently there would be no use of the low
15 quality municipal discharges. This land would go out of production and the discharges would go
16 to the ocean uncleaned. The 2012 Ag Waiver now commences to regulate these important
17 facilities by requiring the monitoring and reporting of the water in the drains. The Regional
18 Board should, however, avoid impacting these important recycling programs. California Water
19 Code section 13241(f) expressly encourages the use of recycled water. The 2012 Ag Waiver will
20 put these highly acclaimed water re-use programs in jeopardy.

21 Instead of trying to regulate tile drains and thereby taking land out of production, the
22 Regional Boards, universities and the agriculture industry should collectively focus research on
23 how to effectively reclaim tile drainage for particular uses. The ultimate answer to the tile drain
24 issue requires long-term scientific analysis and development of treatment alternatives which will,
25 in addition, to cleaning the tile drain discharge, will make it fit for reuse. The goal of developing
26 treatment strategies is for the drain discharge to be captured, treated, and recycled for farm use.
27 To be effective, this effort needs to be a multifaceted cooperative effort. The approach set forth
28 in the 2012 Ag Waiver to simply disallow impoundments and to commence regulation on tile

1 drains is going in the wrong direction. (See Hearing Tr. (3/14/2012) at 312:15-17.)

2 **3. The Three Tier Regulatory System Is Complex and Difficult to Administer**
3 **and not Linked to Actual Water Quality Risk**

4 Provisions concerning the complex and confusing multi-tier system are set forth in some
5 16 pages of the 2012 Ag Waiver and some 70 pages of the Tier MRP Orders. The tier system
6 arbitrarily separates dischargers into three separate tiers, based on the size and location of the
7 farmland and the dischargers' use of certain chemical. Tier 1 dischargers are subject to the
8 least amount of regulations, with which they must comply. Tier 2 and Tier 3 dischargers are
9 subject to progressively more stringent level of regulations.

10 The tier system constitutes an inappropriate attempt to lump virtually all agricultural
11 operations into the most severely regulated tiers merely based on the size, crop, proximity to
12 impaired waterbodies and the use of two particular agricultural chemicals. For example, Tier
13 1 dischargers must have farmlands that are less than 50 acres. (2012 Ag Waiver, p. 16, ¶15.)
14 As a result, virtually no commercial operations can qualify. Moreover, if a farmer uses either
15 of the targeted two organophosphate insecticides (chlorpyrifos or diazinon), it cannot qualify
16 for Tier 1 regardless of whether their land drains water to the state.⁵ (*Id.*) Further, the 2012
17 Ag Waiver subjects a farmer to the strict requirements of Tier 3, if the farmer farms vegetables
18 (which require more nitrate), farms more than 500 acres, uses chlorpyrifos or diazinon, or farms
19 next to a listed impaired waterbody. (2012 Ag Waiver, p. 17, ¶17.)

20 The size of the farm operation or the use of certain individual pest control agents
21 should not automatically subject the farm to the unprecedentedly strict regulatory regimes.
22 Mere size of the operations or the use of a particular agricultural management product does
23 not necessarily equate to a discharge problem. For example, Mr. Wiley, a licensed CCA with
24 experience in crop nutrition in the Region, testified as to the absurdity of using acreage of
25 operations to categorize various dischargers in the tier structure and offered: "I am trying to figure

26 ⁵ To be Tier 1 discharger, a farmer: (a) cannot use chlorpyrifos or diazinon, (b) cannot have farmlands within 1000
27 feet of an impaired water body, and (c) must not (1) farm high risk nitrate crops (vegetables and artichokes), (2) farm
28 more than 50 acres or (3) farm closer than 1000 feet of a well that exceeds nitrate standards. (2012 Ag Waiver, p.
16, ¶15.) Under this criteria, virtually no agricultural operation in the Central Coast region will qualify as a Tier 1
discharger.

1 out the Tier process, because I can identify [an] one acre parcel that has as much influence on
2 groundwater than a 500-acre parcel would have” (Hearing Tr. (3/14/2012) at 334:13-16.)
3 Further, the larger sized operations may actually increase that farmer’s ability to implement
4 management strategies to eliminate or control discharge. Similarly, good farm practices
5 coupled with irrigation controls can avoid problems even if a large farm responsibly relies on
6 any particular crop protection pesticide. Rather than imposing bureaucratic attitudes against
7 large vegetable operations or use of important agricultural chemicals, the severe regulatory
8 proscriptions advanced by the increased Tiers should be governed by increased water quality
9 risk.

10 Furthermore, while the provisions in the 2012 Ag Waiver Order (page 13, paragraph 6,
11 and page 15, paragraph 13) allows a farm operator to separately identify parcels of its
12 farmlands as to group each of those parcels within the same tiers; however, paragraphs 19 and
13 20 of page 18 of the 2012 Ag Waiver permits the Executive Officer to elevate lands to a higher
14 tier and to require a landowner or farm operator to group what the Executive Officer feels is
15 “similar lands” as a single farm. These latter provisions, in essence, take away what was
16 supposed to be a positive provision to allow farmers this flexibility which was added to
17 alleviate concerns of the agriculture community.

18 **4. Unreasonable Restriction on Retention Ponds**

19 The agriculture industry has found that in the Central Cost region as well as other regions,
20 the most direct way to control the discharge of agricultural crop control materials to waters of the
21 state is to control, capture, retain, and reuse irrigation water. Such procedure is widely used as an
22 important mitigation practice in the Central Valley. The Regional Board, as part of its effort to
23 target on-farm production and management decisions, strives to prevent farmers from using these
24 mitigation efforts. Specifically, the Regional Board oversteps its authority by prohibiting
25 percolation of waste to groundwater through retention ponds and by compelling the Tier 3
26 farmers to monitor their on-farm re-circulating and tailwater ponds. (2012 Ag Waiver, p. 20, ¶33;
27 Tier 3 MRP Order, p. 16, ¶¶7 & 8.)
28

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1 **5. The 2012 Ag Waiver Inappropriately Targets Chlorpyrifos and Diazinon**

2 The Regional Board’s targeting of specific agricultural chemicals is unreasonable. The
3 2012 Ag Waiver improperly targets particular pesticides (chlorpyrifos and diazinons), which are
4 important tools that farmers use to manage their operations. For example, Tier 3 dischargers are
5 required to monitor runoff or tailwater within one week of applying chlorpyrifos or diazinons.
6 (Tier 3 MRP Order, p. 16, ¶¶7 & 8.) The focus on only two of organophosphate pesticides is
7 meritless. Rather than identifying problematic uses of these pesticides that directly impact
8 water quality, the Regional Board is attempting to eliminate the use of two of the most important
9 insecticide tools on which farmers rely. By subjecting users of these pesticides to stringent
10 regulatory requirements, the Regional Board has designed a monitoring regime to maximize the
11 chance of incriminating farmers and to thereby change farm management operations “on-the
12 farm.” These provisions are beyond the Regional Board’s authority and constitute an improper
13 and unwarranted attack on coastal agriculture.

14 Moreover, chlorpyrifos and diazinons are heavily regulated by California Department of
15 Pesticide Regulation (“CDPR”) and local agricultural commissioners. Applicators of such
16 chemicals are required to employ the most focused management practices, all designed around
17 water quality. Further, the 2012 Ag Waiver loses sight of the fact that if pests cannot be
18 controlled by one of these organophosphate pesticides, alternative pesticides not subject to
19 local agricultural and CDPR regulatory protections will have to be used. Many of the
20 alternate chemicals are themselves toxic at low dosage and may also result in sediment
21 toxicity, which has been particularly problematic to some sensitive aquatic species.

22 When the Regional Board targets a particular pesticide, the regulation will merely
23 shift utilization to other products, which may have equal or different toxic results. This
24 approach also fails to take into account that the implementation of certain best management
25 practices may be more effective in protecting water quality than merely shifting pesticide
26 use. Targeting of these two insecticides is merely a way for the Regional Board to
27 improperly control on-farm management of practices and will only shift product use resulting
28 in unknown net affect on water quality risk.

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6. Regional Board Overreached By Imposing Regulations Based on Proximity to Impaired Waterbody

The 2012 Ag Waiver contains several regulations purporting to protect waterbodies that are listed as impaired in Table 1 (2010 Clean Water Action Section 303(d) List of Impaired Waterbodies). Table 1 lists waterbodies that are impaired for toxicity, pesticides, nutrients, temperature, turbidity, or sediment. Pursuant to the 2012 Ag Waiver, if a Tier 3 farm is adjacent to a Table 1 waterbody that is impaired for temperature, turbidity, or sediment, the farmer must develop a water quality buffer plan that includes a 30 foot buffer. (2012 Ag Waiver, pp. 30-31, ¶¶80 & 81; Tier 3 MRP Order, p. 21, ¶2.) In addition, Tier 2 and Tier 3 farms that border such a waterbody must conduct photo monitoring to document riparian areas to demonstrate compliance with sediment controls. (2012 Ag Waiver, p. 28, ¶69.)

These provisions are overbroad as such regulations should be restricted to lands adjacent to and capable of draining to the Table 1 impaired waterbodies. If there is no nexus on the farm to the impaired waterbody, there is no reason to impose these 30 feet “no farm” restrictions, which constitutes uncompensated regulatory taking.

7. Milestones for Toxic and Nutrient Controls Are Unreasonable

The milestones advanced by the 2012 Ag Waiver are totally unreasonable. The waiver seeks to: (1) control all toxics by 2014, (2) control sediment by 2015, (3) control nutrients to surface water by 2016, and (4) control nutrients to groundwater by 2016. (2012 Ag Waiver, p. 32, ¶¶ 84-87) Controlling all toxics in a year and a half is laughable, and controlling nitrates in groundwater aquifers in five years is likewise unreasonable and counters the assessment of all experts in this area as well as the recent University of California, Davis Nitrate Report presently under review by the State Board. Moreover, these “milestones” do not protect farmers from over aggressive enforcement actions, which may be taken even prior to these aggressive milestone dates.

Additionally, many of the deadlines and milestones in the waiver are not only rigid, but do not take into account that many of the larger and most responsible farm operations have invested hundreds of thousands of dollars, management efforts and operational amendments to improve

1 water quality. The regulations, however, offer no recognition of such efforts and demand further
2 improvements which will be difficult for those operations to demonstrate because those
3 reductions have already been effectuated.

4 **8. The Regional Board Should Adopt a Holistic Approach to Regulating**
5 **Groundwater**

6 The 2012 Ag Waiver provides that “the Executive Officer may require Dischargers to
7 locate (inventory) and conduct monitoring of private domestic wells in or near agricultural areas
8 with high nitrate in groundwater and submit technical reports evaluating the monitoring results.”
9 (2012 Ag Waiver, p. 7, ¶21.) However, the waiver contains few specifics as to the regulation of
10 groundwater. To properly address the situation of nitrate in the region’s groundwater, a far more
11 holistic and scientific approach should be undertaken. All existing groundwater data should be
12 assembled; all well inventory, well depth, draw depth and casing information should be mapped;
13 and, if necessary, additional monitoring wells should be added. Only when that information is
14 gathered, can the Regional Board properly assess the region’s aquifers and their condition. The
15 Regional Board can then identify problem source contributions and employ appropriate
16 mitigations.⁶ However, the 2012 Ag Waiver merely empowers the Executive Officer to conduct
17 spot well monitoring and submit reports. This reflects a completely naïve means to address
18 groundwater, as it wrongfully presumes that a groundwater problem is directly linked to the
19 overlying farm. This is not the case.

20 In addition, the 2012 Ag Waiver references that pursuant to Water Code section 13304,
21 “the Central Coast Water Board may require Dischargers to provide alternative water supplies or
22 replacement water service, including wellhead treatment, to affected public water suppliers or
23 private domestic well owners.” (2012 Ag Waiver, p. 7, ¶21.) This is a mischaracterization of
24 Section 13304, which does not allow the Regional Board to compel farmers to provide alternative
25 water to private well owners.

26 **9. The Regulations Under 2012 Ag Waiver Are Costly to Implement**

27 As discussed above, many of the new regulatory provisions require fundamental and

28 ⁶ Other regions are moving towards this holistic approach.

1 costly changes in farm operations and management. Such impacts include surface water
2 monitoring, groundwater monitoring, non-farmed buffer zones, changes in pesticide tools,
3 possible crop impacting reductions in fertilizer, hiring engineers and certified consultants, and
4 diversion of management efforts. Moreover, some of the regulations, such as the nitrate risk
5 assessment and nitrate groundwater percolation studies are presently impossible to implement and
6 will require substantial investment in new research. These are huge undertakings compelling
7 untold direct costs. Since many, if not most farmers, will not be able to meet the regulatory
8 deadlines, these farmers will also incur substantial legal costs to defend against enforcement
9 actions. The Regional Board has ignored these costs considerations that would potentially
10 jeopardize the region's agricultural industry.

11 At the outset of the waiver adoption hearing, Congressman Sam Farr pleaded, "agriculture
12 isn't trying to deny there's a problem. They're trying, you know, they're working with you to try
13 to figure out, how do we get a workable solution so we can both win." (Hearing Tr. (3/14/2012)
14 at 80:8-11.) Mr. Farr acknowledged that cooperation is far more effective than adversarial
15 regulation:

16 the only way it could be solved [the problem] is if the people . . .
17 who own the land where it's been contaminated for 100 years, how
18 do you get that cleaned up? You've got to have their cooperation, it
seems to me. Put out those objectives that you want to achieve and
get their suggestion on how to solve them

19 (*Id.* at 85:20-86:1.) In keeping with Congressman Farr's call for cooperative efforts, many
20 witnesses spoke about progress that has been achieved through industry and local efforts. One
21 such speaker was Sara Green-Lopez, who is the technical program manager for Preservation, Inc,
22 which manages the Cooperative Monitoring Program. Ms. Green-Lopez testified to the
23 cooperative efforts on Quail Creek, a previous troubled tributary to the Salinas River:

24 This monitoring site has shown significant reduction of nitrogen to
25 the Salinas River. By significant, I mean that, at the beginning of
26 the waiver period 2005, -06, and -07, the instantaneous nitrogen
27 loads at that monitoring site were 4.2, 12.8, and 5.5 pounds of
28 nitrogen per hour. In 2009, -10, and -11, the nitrogen levels were
0.00, 0.9, and 0.00 pounds of nitrogen per hour. The load
reductions are the direct result of actions taken by farmers on the
watershed for tail water run-off.

1 (Id. at 241:21-242:5)

2 Other local and state office holders are similarly frustrated by the extreme measures
3 proposed by the Regional Board staff. Mr. Bill Ritz, speaking for State Senator Cannella,
4 testified:

5 the cost of Tier 3 compliance at approximately \$600 per acre per
6 year making that land infeasible for farming based on row crops
7 economics. I think it is imperative that we reconcile the percentage
8 of our agricultural land that may be forced out of production under
9 the provisions of the Tier 3 regulatory requirements contained in
10 the Draft Order.

11 (Hearing Tr. (3/14/2012) at 111:8-16.) None of these testimonies or pleas registered with
12 the Regional Board or its staff. The Regional Board simply ignored them.

13 **D. REMEDY**

14 Pursuant to the State Board’s appellate authority regarding challenges to Regional Board’s
15 actions (California Water Code section 13320), “[t]he State Board is vested with all the powers of
16 the Regional Board.” (CWC 13320(c).) The State Board may therefore either a) uphold the
17 Regional Board as orders and resolutions, b) craft an amended waiver order (“take the appropriate
18 action itself”), or c) remand the deficient order back to the Board with remedial instructions.
19 (Cal. Water Code § 13320(c).)

20 In this particular instance, it is important for the State Board to “take the appropriate
21 action itself.” In so doing, the State Board should either draft an entirely new alternative waiver
22 or re-write the offending provisions of the order as passed. Such modification would be required
23 to address each the 2012 Ag Waiver and the Tier MRP orders so as to amend those provisions
24 which are inconsistent with the law, are impossible or unreasonable, are widely inconsistent with
25 similar programs in other regions and those provisions simply deemed to be inappropriate
26 overreaches.

27 Follows is a summary, but not exhaustive, list of such 17 provisions requiring redress.

	INAPPROPRIATE PROVISION	LOCATION
28 1.	Eliminate or revise requirement to calculate nitrate loading	2012 Ag Waiver, p. 28, ¶¶

1	risk, determine typical crop uptake	68 and 74
2	2. Eliminate for each ranch unit the requirement to assess if practices will cause exceedance of nitrate to groundwater	2012 Ag Waiver, p. 29 ¶¶ 74-79 Tier 1 MRP Order, pg. 27
3		
4	3. Eliminate the reference to Table 4, and the use of the UC Nitrate Hazard Index	Tier 1 MRP Order, pp. 27 and 11
5		
6	4. Remove the nitrate fertilizer limits (1:1 and 1:2) Eliminate the limit on the fertilizer use based on nutrients removed in the harvested crop	2012 Ag Waiver, pp., 29-30, ¶¶ 78, 79
7		
8	5. Remove the requirement to calculate the nitrate load going to groundwater	2012 Ag Waiver, p. 30, ¶ 78c
9		
10	6. Eliminate elements c, d, g, h from Tier 3 MRP regarding nitrogen loads and nitrates limits and rates	Tier 3 MRP Order, p. 18, ¶ 4
11	7. Remove or reduce the requirement that certified and licensed engineers and advisors must evaluate all INMP elements	Tier 3 MRP Order, p. 18, ¶ 5, and pp. 17-20 (Part 6)
12		
13	8. Eliminate the requirement that farmers must “restore”/clean up groundwater	Tier 3 MRP Order, p. 19, ¶ B2
14	9. Eliminate the sections which require monitoring a) field water, b) tile drains and c) field ponds	Tier 3 MRP Order, Part 5, Sect. 3, 7; Part B, ¶ 44
15		
16	10. Add a provision that to be subject to the buffer provisions the farm must be capable to drain to the waterbody	Tier 3 MRP Order, 2012 Ag Waiver, pp. 30-31, ¶ 80
17	11. Eliminate all references to tile drains	2012 Ag Waiver, p. 5, ¶¶ 12, ¶ 9
18		
19	12. Amend Tier 1 to allow farms over 50 acres and their choice chemical use so long as there is no risk	2012 Ag Waiver, p. 14, ¶ 14; p. 17, ¶ 17
20	13. Eliminate the E.O. authority to compel farmers to combine his farms for regulatory purposes	2012 Ag Waiver, pp. 18, 19, ¶¶ 19, 20
21	14. Eliminate retention pond monitoring	Tier 3 MRP Order, p. 16, ¶¶ 7, 8
22		
23	15. Eliminate the requirement to monitor field runoff within 2 weeks of Chlorpyrifos/Diazinon use	2012 Ag Waiver, p. 16, ¶¶ 7, 8
24	16. Modify the Milestones – lengthen the timelines	
25	17. Modify the groundwater section reference which overstates section 13304 authority	2012 Ag Waiver, p. 7, ¶ 21
26		
27		
28		

1 **E. THE 2012 AG WAIVER IS PROCEDURALLY DEFECTIVE IN THAT IT**
2 **CONTAINS POST RECORD AMENDMENTS FROM THE ENVIRONMENTAL**
3 **COMMUNITY**

4 Paragraph 11 of page 4 of the 2012 Ag Waiver is a new provision first raised and adopted
5 at the Regional Board hearing on March 15, 2012. Paragraph 11 provides:

6 Dischargers may form third party groups to develop and implement
7 alternative water quality management practices (i.e., group projects)
8 or cooperative monitoring and reporting programs to comply with
9 this order. At the discretion of the Executive Officer, Dischargers
10 that are a participant in a third party group that implements
11 Executive Officer-approved water quality improvement projects or
12 Executive Officer-approved alternative monitoring and reporting
13 programs may be moved to a lower Tier ... and/or provided
14 alternative project-specific timelines, and milestones.

15 (2012 Ag Waiver, p. 14, ¶ 11.) While Petitioners do not object to the substance of this new
16 language, which was crafted by the environmental community, its introduction at the March 2012
17 hearing renders the entire 2012 Ag Waiver procedurally defective for violation of the Brown Act.
18 This particular provision was circulated the week before the March 2012 hearing in Sacramento
19 to the California Environmental Protection Agency. The provision was also conveyed to
20 Regional Board member Michael Johnston, who introduced it, on the behalf of the environmental
21 community, at the very end of the hearing. The language itself was not introduced at the hearing
22 until all official hearing input had ended and public participation was closed. (Hearing Tr.
23 (3/15/2012) at 109:18-113:17.)

24 It is noteworthy that at the commencement of the March 14, 2012 hearing, Board
25 members Bruce Delgado and Russell Jeffries had made disclosures of all discussions they had
26 had relative to the proposed waiver prior to the hearing, and Board member Jean-Pierre Wolff
27 recused himself for conflicts. (Hearing Tr. (3/14/2012) at 11:1-13:22.) In response, Chairman
28 Jeffrey Young asked the remaining Board members if there are any other outside discussions by
asking, "Any one else have anything to add?" No other Board member responded. (*Id.* at 13:24-
25.) Mr. Johnston and the other Board members should have disclosed their discussion regarding
26 this new paragraph outside of the public hearing.

27 Although the Petitioners are not challenging the substance of the new paragraph 11, the
28 fact that there were improper undisclosed exchanges between Board members and that this

1 language was not timely submitted in the record is troubling and renders the Regional Board's
2 actions on March 15, 2012 procedurally defective.

3 **F. THE REGIONAL BOARD'S CERTIFICATION AND FILING OF A NOTICE OF**
4 **DETERMINATION FOR THE FINAL SEIR CONSTITUTES A PREJUDICIAL**
5 **ABUSE OF DISCRETION⁷**

6 In adopting the 2012 Ag Waiver, the MRP, and Resolution No. R3-2012-0012, the
7 Regional Board failed to comply with CEQA requirements. Instead of conducting a full CEQA
8 review of the 2012 Ag Waiver and the MRP, the Regional Board improperly relied on the
9 antiquated 2004 Negative Declaration, which was prepared for the 2004 Ag Waiver. Even
10 assuming that a full CEQA review is not required, the Final SEIR falls short of the thorough
11 analysis required by CEQA and contains conclusory statements not supported by substantial
12 evidence. Furthermore, after receiving public comments for the draft SEIR, the Regional Board
13 failed to re-circulate the revised SEIR for public comment and instead issued the Final SEIR on
14 March 17, 2011 – nearly a year before the proposed waiver was finalized. Moreover, the Final
15 SEIR does not take into consideration the subsequent amendments that changed the scope and
16 nature of the project. Hence, the analysis in the Final SEIR is inapplicable to the 2012 Ag Waiver
17 and the Regional Board never conducted the required environmental impact analysis on the
18 project that was actually adopted. As such, the Regional Board's certification of the Final SEIR
19 constitutes a prejudicial abuse of discretion under Public Resources Code section 21168.5.
20 Specific inadequacies with respect to CEQA are discussed further herein.

21 **1. The 2012 Ag Waiver Is a New Project With New Conditions and the Regional**
22 **Board Should Not Have Relied on the 2004 Negative Declaration for the 2004**
23 **Ag Waiver**

24 In an effort to avoid a full CEQA review and environmental analysis, the Regional Board
25 attempts to disguise the 2012 Ag Waiver as a mere renewal of the 2004 Ag Waiver with "some
26 new conditions" and relied on findings in the 2004 Negative Declaration to declare that the "new
27 conditions" would not have significant environmental impact. (Final SEIR at pp. 1 & 8.) For

28 ⁷ The Petitioners hereby incorporate by reference CEQA portion of California Farm Bureau Federation's ("CFBF's")
Petition filed on or about April 16, 2012, and the CEQA-related comments in CFBF's January 3, 2011 letter to the
Regional Board regarding the 2011 Draft Agricultural Order.

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1 example, in response to comments that the “new conditions” could change land use, alter aquatic
2 habitats, and result in negative economic impacts, the Final SEIR absurdly concludes that “[t]hese
3 environmental effects were previously evaluated in the Negative Declaration for the 2004
4 Agricultural Order and were found at that time not to be significant.” (*Id.* at p. 8.) This
5 conclusion defies logic for many reasons. First, several years have passed since the 2004
6 Negative Declaration was adopted. Since the completion of the 2004 Ag Waiver, significant new
7 information is available and the landscape, economy, and habitats of the region may have
8 changed. Even if the 2012 Ag Waiver is a mere renewal of the 2004 Ag Waiver, the Regional
9 Board should not be allowed to impute conclusions from an eight-year old analysis on the current
10 project.

11 Second, the 2012 Ag Waiver is a new project and is separate and distinct from the 2004
12 waiver. As such, a full CEQA review and environmental analysis is required. The so-called
13 “new conditions” are in actuality a whole new regulatory scheme that regulates dischargers’
14 management and operation of their farmland. As discussed herein, these new regulations include
15 a complex and arbitrary tiered MRP, an extreme and unreasonable nutrient management plan, the
16 creation of buffer zones, and restriction on use of tile drains, retention ponds, and certain
17 pesticides. This new regulatory scheme significantly alters the scope and nature of the waiver,
18 and was not considered in the 2004 Negative Declaration. Case law is clear that an agency
19 simply cannot rely on an earlier negative declaration, which did not examine the new proposals.
20 (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal. App. 3d 577, 594
21 [holding that an EIR was required for an airport runway extension because the earlier negative
22 declaration prepared for the airport project did not mention the runway extension].)

23 **2. The Final SEIR’s Description of Project Is Improper**

24 To further disguise the 2012 Ag Waiver as the same “project” as the 2004 Ag Waiver, the
25 Regional Board drastically altered the description of the project to create the impression that the
26 two waivers are essentially the same. The Draft SEIR lists, as examples, ten new conditions in
27 the 2011 draft waiver:
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- Implement pesticide management practices to reduce toxicity in discharges so receiving waterbodies meet water quality standards;
- Implement nutrient management practices to eliminate or minimize nutrient and salt in discharges to surface water so receiving waterbodies meet water quality standards;
- Implement nutrient management practices to minimize fertilizer and nitrate loading to groundwater to meet nitrate loading targets;
- Install and properly maintain back flow prevention devices for wells or pumps that apply fertilizers, pesticides, fumigants or other chemicals through an irrigation system;
- Implement erosion control and sediment management practices to reduce sediment in discharges so receiving water bodies meet water quality standards;
- Protect and manage existing aquatic habitat to prevent discharge of waste to waters of the State and protect the beneficial uses of these waters;
- Implement stormwater runoff and quality management practices.
- Develop, implement, and annually-update Farm Water Quality Management Plans.
- Submit an Annual Compliance Document (for higher threat dischargers) that includes individual discharge monitoring results, nitrate loading risk evaluation and, if nitrate loading risk is high, irrigation and nutrient management plan, verification of irrigation and nutrient management plan effectiveness.
- Submit a water quality buffer plan (for higher threat dischargers), if operations contain or are adjacent to a waterbody identified on the Clean Water Act Section 303(d) List of Impaired Waterbodies as impaired for temperature or turbidity.

(Draft SEIR at p. 4) After receiving numerous comments that the Regional Board should not rely on the 2004 Negative Declaration, the Regional Board deleted these bullet points from the project description of the Final SEIR. The revised project description emphasizes the similarities between the 2004 Ag Waiver and 2011 draft waiver. (Compare Draft SEIR at pp. 3-5 with Final SEIR at pp. 5-7.) Revising the project description to hide or de-emphasize the “new conditions” is improper, especially since such revision result in a less comprehensive description of the

1 project.

2 “An accurate, stable and finite project description is the *sine qua non* of an informative
3 and legally adequate EIR.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185,
4 192.) Without a well-defined project or program, the lead agency cannot properly conduct an
5 impact analysis or compare the project against alternatives. The specific differences between the
6 2004 and 2012 Ag Waivers are particularly important, since the Final SEIR relies heavily on the
7 analysis done for the 2004 Negative Declaration.

8 Further, the project description is defective on its face because it does not contain a
9 description of the project’s economic characteristics. (CEQA Guidelines, §15124(c) [“The
10 description of the project shall contain the following [:] . . . [a] general description of the project’s
11 technical, economic, and environmental characteristics”].)

12 **3. The Final SEIR’s Analysis of Impacts Is Improper**

13 The Final SEIR fails to properly analyze the potential impacts associated with the 2012
14 Ag Waiver. The Final SEIR is filled with cursory analysis, conclusory statements, and pure
15 speculations, and fails to take into consideration comments made regarding the inadequacies of
16 the Draft SEIR. For example, the Draft SEIR concludes that “the Water Board can only speculate
17 with respect to the extent there could be adverse environmental effects because it is not known
18 with specificity what actions dischargers may take to comply. There is not sufficient information
19 to determine the scope of any changes in environmental effects and any potential impacts are very
20 speculative.” (Draft SEIR at p. 8.) Rather than gathering new information, providing an in-depth
21 analysis of all potential impacts or revising its proposed waiver, the Regional Board simply
22 deleted the sentence that it “can only speculate with respect to the extent there could be adverse
23 environmental effects” from the Final SEIR. (Final SEIR at p. 11.) The mere deletion of that
24 sentence without further analysis does not cure the fundamental flaw that the Regional Board
25 made speculations and unjustified assumptions in reaching the Final SEIR’s conclusion that the
26 2012 Ag Waiver “may not result in significant adverse environmental effects.” (*Id.*) A “rigorous
27 analysis” is required to dispose of an impact as insignificant. (*Kings County Farm Bureau v. City
28 of Hanford*, 2221 Cal. App. 3d 692 (1990).)

1 One of the primary purposes of an EIR is to inform the public and decision makers of the
2 significant environmental effect of a project. (CEQA Guidelines, §§15002(a), & 15121(a).) Such
3 purpose is not achieved when the EIR does not provide a thorough analysis of all potential
4 impacts and simply provides conclusory statements.⁸ The EIR must also disclose all information
5 it relied upon and provide the “analytic route the . . . agency traveled from evidence to action.”
6 (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376,
7 404.) Failure to do so constitutes an abuse of discretion. While the courts review an EIR using
8 an “abuse of discretion” standard, . . . ‘clearly inadequate or unsupported study is entitled to no
9 judicial deference.’” (*Berkeley Keep Jets Over the Bay v. Board of Port Comm’rs* (2001) 91 Cal.
10 App. 4th 1344, 1355 (quoting *Laurel Heights Improvement Assn.*, *supra*, 47 Cal. 3d at p. 409, n.
11 12).) “A prejudicial abuse of discretion occurs ‘if the failure to include relevant information
12 precludes informed decision-making and informed public participating, thereby thwarting the
13 statutory goals of the EIR process.’” (*Id.* at 1355.)

14 Further, the Final SEIR is inadequate in that the Regional Board failed to properly analyze
15 the potential impact associated with the project. Specifically, the Final SEIR lacks proper review
16 of impacts such as the loss of agricultural lands taken out of production due to proposed
17 requirements and the cost of compliance, loss of agricultural lands, reduced productivity of
18 farmland resulting from restriction on use of tile drains, pesticide, and chemicals that may render
19 the farmland unproductive. The Final SEIR also fails to properly examine the impact of
20 sedimentation basins that the dischargers may employ to comply with the 2012 Ag Waiver. The
21 Final SEIR merely concluded that the 2012 Ag Waiver would not result in a “significant adverse
22 effect on the environment” solely on the basis that a large number of growers may not install
23 sedimentation basins. (Final SEIR at p. 16.) The Final SEIR offers no analysis of the impact, if
24 growers do install these basins as part of their compliance.

25 Moreover, the analysis of the buffer is inadequate in that the analysis only examines the
26 actual land used for the buffer, but not the impact that the buffer may have on surrounding

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28 ⁸ “Mere conclusions simply provide no vehicle for judicial view.” (*Citizens Association for Sensible Development of
Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.)

1 farmland and habitat. Such impact may constitute an indirect physical change that must be
2 evaluated. “In evaluating the significance of the environmental effect of a project, the lead
3 agency shall consider direct physical changes in the environment which may be caused by the
4 project and reasonably foreseeable indirect physical changes in the environment which may be
5 caused by the project.” (Cal. Code Regs., tit. 14, § 15064(d).) “An indirect physical change in
6 the environment is a physical change in the environment which is not immediately related to the
7 project, but which is caused indirectly by the project. If a direct physical change in the
8 environment in turn causes another change in the environment, then the other change is an
9 indirect physical change in the environment.” (*Id.* at § 15064(d)(2).) The buffer analysis is also
10 flawed in that the Final SEIR does not offer any facts or evidence to support its conclusion that
11 the use of riparian buffers “will result in beneficial, not adverse, impacts on the environment.”
12 (Final SEIR at p. 15.) Such unsupported conclusory and general statements are inappropriate.

13 **4. The Final SEIR’s Assessment of Significant Impacts and Effects on the**
14 **Environment is Inadequate**

15 The Final SEIR improperly concludes that “potential adverse environmental impacts to
16 agricultural resources are less than significant.” (Final SEIR at p. 11.) This conclusion is flawed.
17 CEQA Guidelines defines “significant effect” as “a substantial, or potentially substantial, adverse
18 change in any of the physical conditions within the area affected by the project.” (CEQA
19 Guidelines, §15382.) The lead agency should consider any “social or economic change related to
20 a physical change . . . in determining whether the physical change is significant.” (*Id.*) While the
21 Final SEIR acknowledges that the 2012 Ag Waiver “will result in increased costs of compliance”
22 and “agricultural land may be converted to buffers or sold for other uses,” the Final SEIR largely
23 ignores the possibility that social or economic change would result in physical change. (Final
24 SEIR at p. 17.) Common sense dictates that if cost of compliance exceeds potential profit from
25 agricultural use, the land will not be used for agricultural purposes. The Regional Board attempts
26 to shift the burden to the public to demonstrate that the economic impact would result in “a chain
27 of cause and effect to physical changes” and alleges that the public commenters have not
28 provided such proof. (*Id.*) This contradicts the Regional Board’s admission that cost will

1 increase for at least some dischargers and that some farmlands will no longer be used for
2 agricultural purposes. (Final SEIR at pp. 14 & 17.)

3 As discussed above, the 2012 Ag Waiver proposed a new regulatory scheme that will have
4 dramatic and sever impacts on the agricultural industry and significant effect on the economic and
5 social environment of the region. Such impacts include negative economic consequences, the
6 loss of productivity, the loss of food supply, the loss of prime agricultural crops, the loss of jobs,
7 the loss of groundwater recharge areas, and other social and economic impacts. All of these
8 changes will either directly or indirectly result in physical changes.

9 These physical changes in the environment must be evaluated based on factual evidence,
10 reasonable assumptions supported by facts, and expert opinion based on facts. (CEQA
11 Guidelines, §§15064(f) & 15384.) The Regional Board should not rely on an eight-year old
12 negative declaration in assessing whether the 2012 Ag Waiver, which contains new provisions
13 not in the 2004 Ag Waiver, poses significant impacts and effects on the environment. Rather, the
14 Regional Board must review all scientific data and facts, especially information collected since
15 the initiation of the 2004 Ag Waiver.

16 **5. The Final SEIR's Analysis of Project Alternatives is Cursory and Improper**

17 CEQA requires the Regional Board to rigorously examine all reasonable alternatives and
18 to include in the Final SEIR sufficient information "to allow meaningful evaluation, analysis, and
19 comparison." (CEQA Guidelines, §15126.6.) The Final SEIR's cursory treatment of the
20 alternatives is inadequate in that none of the project alternatives are fully analyzed and discussed
21 in detail to provide meaningful comments. For example, the Regional Board admitted that it did
22 not conduct an environmental analysis of the December 2010 and the January 2011 alternatives
23 submitted by agricultural groups ("Ag Alternative"). The Regional Board simply concluded that
24 the Ag Alternative is "similar" to the 2004 Ag Waiver and no further environmental analysis was
25 required "because it was included in the 2004 Negative Declaration." (Final SEIR at p. 30.) As
26 discussed above, reliance on the 2004 Negative Declaration is improper. At the very least, the
27 Final SEIR should have identified parts of the Ag Alternative that are different from the 2004 Ag
28 Waiver, and assess the potential environmental benefits and impacts of those new elements and

1 the feasibility and costs associated with the Ag Alternative.

2 **6. The Regional Board Failed to Assess Mitigation Options to Reduce**
3 **Significant Adverse Effect on Biological Resources**

4 The Regional Board concluded that the 2011 draft waiver “will have significant [adverse
5 environmental] effects” on biological resources, but does not assess potential mitigation
6 measures. (Final SEIR at p. 26.) CEQA Guidelines forbid the Regional Board from approving a
7 project if there are mitigating measures available that would lessen the significant effects. (Cal.
8 Code. Regs., tit. 14, §§15021(a)(2) & 15096(g).) To that end, the Regional Board must assess
9 the mitigating measure’s feasibility. (*Ibid.*) However, the Final SEIR offers only cursory
10 overview of mitigating measures with no discussion on their feasibility. (Final SEIR at p. 26.)

11 **7. The Required Findings and Overriding Statements Contained in Resolution**
12 **No. R3-2012-0012 Are Legally Flawed**

13 Since the Final SEIR “concludes that [the 2012 Ag Waiver will have] a significant effect”
14 on the region’s biological resources, the Regional Board must make findings that (1) changes
15 have been made in the project to lessen the environmental effect, (2) mitigating measures or
16 alternatives are within jurisdiction of another agency, or (3) mitigating measures or alternatives
17 are infeasible. (CEQA Guidelines, §15091.) The Regional Board must further make a statement
18 of overriding considerations that economic, legal, social, technological, or other benefits
19 outweigh the unavoidable adverse environmental effects. (CEQA Guidelines, §15093.) Such
20 findings and statements must be supported by substantial evidence in the record. (CEQA
21 Guidelines, §§15091(b) & 15093(b).) However, the records do not support the Regional
22 Board’s findings and statements. (See CEQA Guidelines, § 15064(f)(5) [“[a]rgument,
23 speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or
24 erroneous, or evidence that is not credible, shall not constitute substantial evidence.”]) The
25 Regional Board makes general and cursory remarks in the Final SEIR and Resolution No. R3-
26 2012-0012, but fails to specify that other agencies have *exclusive* jurisdiction over the mitigation
27 measures as required by CEQA Guidelines. (CEQA Guidelines, §15091(c).) In fact, the only
28 rationale proffered by the Regional Board for rejecting the mitigating measures as unfeasibility is
that the Regional Board cannot control the mitigation measures. (Resolution No. R3-2012-0012

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1 at ¶18.)

2 Further, CEQA requires the Regional Board to balance economic, legal, social,
3 technological, or other benefits with adverse environmental effects. The record does not provide
4 any evidence of the economic, legal, social, or technological benefit that outweigh the impact on
5 biological resources. The Final SEIR merely contains allegations that the “reduced flows could
6 be offset by increased recharge, higher quality of the discharges, and other beneficial impacts of
7 compliance.” Such general allegations fall short of the substantial evidence required by CEQA
8 Guidelines.

9 **8. The Regional Board Failed to Re-Circulate the SEIR as Required by CEQA**

10 A lead agency is required to re-circulate an EIR “when significant new information is
11 added to the EIR after public notice is given of the availability of the draft EIR for public review
12 under Section 15087 but before certification.” (CEQA Guidelines, §15088.5(a).) After receiving
13 public comments for the Draft SEIR, the Regional Board included significant new information in
14 the Final SEIR, such as a new description of the project, responses to comments, new analysis
15 and conclusion of impact. In fact, the Regional Board changed its assessment of the project’s
16 impact to agricultural resources from “less than significant with mitigation” to “less than
17 significant impact.” (Final SEIR at p. 9.) The public has a right to assess and comment on
18 whether the new conclusion drawn in the Final SEIR is supported by substantial evidence.
19 Moreover, the Region Board purported to have examined new “information provided at and
20 following the August 16, 2010 scoping meeting,” including new project alternatives that would
21 have reduced the adverse impact. (Final SEIR at pp. 2, 30-31.)

22 Further, the scope of the project was amended several times after the Region Board issued
23 the Final SEIR on March 17, 2011 – a year before the 2012 Ag Wavier was finalized. The
24 Addendum⁹ prepared for the September 1, 2011 draft waiver only addresses one of the many

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26 ⁹ The addendum of the Final SEIR (“Addendum”) should have been circulated as well. The Regional Board
27 introduced the Addendum via its Staff Report prepared for the September 1, 2011 hearing. The Addendum contains
28 conclusory statements regarding the September 1, 2011 revisions to the proposed project and claims that the revisions
to the tier structure would further reduce adverse environmental impact. (September 1, 2011 Staff Report, at p. 25-
26.) Failure to do so deprives the public its right to assess and comment on whether the substantial evidence supports
new conclusion drawn in the Addendum.

1 changes to the proposed waiver. The 2012 Ag Waiver is significantly different from the proposed
2 project considered by the Final SEIR. For example, the criteria for tier structure changed
3 dramatically. Under the proposed project considered by the Final SEIR, a discharger that is likely
4 to discharge nitrogen to groundwater would be classified as a Tier 3 discharger if its total
5 irrigated acreage is greater than or equal to 1000 acres. However, under the 2012 Ag Waiver,
6 such discharger would be categorized as a Tier 3 discharger if the total irrigated acreage for its
7 farm/ranch equals or exceeds 500 acres. Consequently, the Final SEIR, which was drafted nearly
8 a year before project approval, is inapplicable to the 2012 Ag Waiver in that it was prepared for
9 an earlier project that is substantively different from the actual project that was adopted.

10 **9. The Notice of Determination Was Not Timely Filed**

11 As another indicator of the Regional Board's disregard to CEQA Guidelines, the Regional
12 Board did not file the Notice of Determination in a timely manner. Pursuant to CEQA Guidelines
13 section 15094, the Regional Board is to file the NOD with the Office of Planning and Research
14 within five working days after approval of the project. Since the Regional Board approved the
15 2012 Ag Waiver on March 15, 2012, the deadline to file the NOD is March 22, 2012. However,
16 the Regional Board waited until April 3, 2012 – almost three weeks after project approval – to
17 execute the NOD. To date, the Petitioners have not received a stamped copy of the NOD and
18 have no knowledge whether the Regional Board actually filed the notice.

19 **III. CONCLUSION**

20 Based on this Petition and the evidence in the record, Petitioners respectfully request the
21 State Board (1) to immediately stay the 2012 Ag Waiver and the Tier MRP Orders, or in the
22 alternative, to schedule a hearing regarding the Petitioners' request for stay; (2) to order the
23 Regional Board to vacate the 2012 Ag Waiver, the Tier MRP Orders, and Resolution No. R3-
24 2012-0012; (3) to order the Regional Board to withdraw its Notice of Determination; (4) to cure
25 the flaws identified herein in the existing 2012 Ag Waiver and the Tier MRP Orders by
26 modifying the 2012 Ag Waiver and the Tier MRP Orders; and (5) to prepare and circulate an EIR
27 pursuant to CEQA requirements for the State Board's conditional waiver of waste discharge
28

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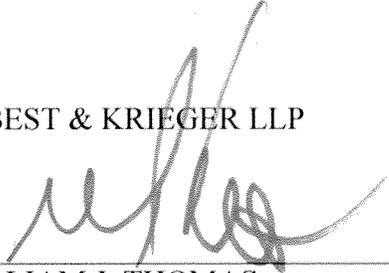
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requirements for discharges from irrigated lands.

Dated: April 16, 2012

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By:



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