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On behalf Of Petitioners, JENSEN FAMILY FARMS, INC., AND WILLIAM ELLIOTT

CALIFORNIA WATER RESOURCES CONTROL BOARD

In re: Matter of the Petitions of Ocean Mist Farms and RC Farms, Grower-Shipper Association of California, et al., Farm Bureau, et al.,	**SWRCB/OCC FILE A-2209 (a – e)** **RESPONSE OF PETITIONERS ROSS N. JENSEN AND WILLIAM ELLIOTT (SWRCB/OCC FILE 1-2209 (e) TO PETITIONS OF OCEAN MIST FARMS AND RC FARMS, GROWER-SHIPPER ASSOCIATION OF CALIFORNIA, ET AL., AND FARM BUREAU, ET AL.**

I. Introduction

Much ink has been spilled and many trees have been reduced to pulp and paper as the Petitioners and the Central Coast Regional Water Resources Control Board fight it out concerning the validity and legality of the Regional Board's 2012 Conditional Waiver and Order regarding agriculture's use and treatment of water. It is a three-sided battle. On the one side is the Regional Board which forwards that its Order (even with its draconian terms and deadlines) and nothing short of its Order's terms is required in order for it to meet the mandates of California's Porter-Cologne Water Quality Control Act, Cal.Water Code, div. 7, chap. 5.5, and that (regardless of whether it applied the same standards to its project as it applies to private projects) it properly determined that a negative declaration met the requirements of California's Environmental Quality Act ("CEQA"). On the second side are the professional "environmentalists" (including the Monterey Coastkeeper, Santa Barbara ChannelKeeper, and the San Luis Obispo CoastKeeper) which forward that the Order is essentially "OK" but that it does not go nearly far enough so as to fully comply with Porter-Cologne. On the third side are the agricultural/viticulture/nursery owners and operators who are the only parties subjected to and forced to comply with the terms of the Order regardless of cost and hardship to them who forward that the Order does not strike the correct balance between economic considerations and protection of the beneficial uses of water in the Central Coast Region required by Porter-Cologne since it is far too draconian, imposes duties and obligations on persons or businesses that do not pollute the waters, and violates various provisions of Porter-Cologne, CEQA, and other California statutes as well as their constitutionally protected rights to due process.

Our purpose here is not, at this time, to add too much new unnecessary fodder for the paper shredders. Rather, it is to assist the Board in coming to the correct conclusions concerning

the Petitions which we address. In this regard, we respond to certain arguments raised by three Petitioners: the entities referred to by the Board in its Stay Order WQ 2012-1102 as being, in the order presented, Ocean Mist, Grower-Shipper, and Farm Bureau. This response is not – except as embodied in one generalization -- however, critical of the arguments made by them. That generalization and weakness in the arguments they present is that they did not go far enough in establishing the illegality of the Regional Board's Order. Of course, this may be due in part to matters arising after the Petitions were filed including, but not limited to, this Board's finding in its Stay Order that certain of the Order's conditions exceeded the Regional Board's authority or were so vague that they could not be complied with (which, of course, is a violation of constitutional rights to due process and a matter not addressed thus far by this Board), and amendments to the Water Code concerning ex parte communications. This Response informs those matters.

We thus urge this Board to consider this Response and to use it as a basis for reversal of the Regional Board Orders.

II. Argument

1. Proscribed Ex Parte Communications By Members Of The Regional Board Occurred Which Require That The 2012 Conditional Waiver And Order Be "Reversed"

The Grower Shipper Petitioners (as well as other Petitioners) have set forth evidence and the law establishing the existence of proscribed ex parte communications by, among others, members of the Regional Board staff acting as "advocates" of the 2012 Conditional Waiver proposal (including Executive Officer Roger Briggs) and Regional Board member Johnston as well as Regional Board Member and Chairman Young. As presented by these Petitioners, the ex parte communications were initiated by Mr. Steve Shimek, who is, of course, an officer and

spokesman in this proceeding for the "Keeper" Petitioners, contacted (either directly or indirectly) the Regional Board Staff who, in turn, had proscribed communications with Mr. Johnston and (through Roger Briggs' provision of a copy of the proscribed communications to him) Chairman Young. While this fact, if true, is most definitely an aggravating factor relative to the poisonous spread of ex parte communications and their impact on the final decision of the Regional Board to approve the 2012 Conditional Order, whether the communications began with Mr. Shimek or with the Staff itself is of no moment in determining that they are proscribed, violate both the Water Code, the Government Code, this Board's Rules, legal precedent and, importantly, violate both the due process and liberty interests[1] of Petitioners and other similarly situated persons subject to the terms and conditions of the 2012 Conditional Waiver. The Grower Shipper's Petition (with accompanying Memorandum of Points and Authorities) ably sets forth these matters. However, they do not go far enough in their discussion and arguments, a shortcoming that is corrected below.

As set forth by the Grower Shippers, the "ex parte" communications involved here are:

1. Telephone notes from Executive Director Briggs and Regional Water Board staff member Lisa McCann indicate they received communications from Mr. Shimek regarding meetings that Shimek had with the State Water Board and California Environmental Protection Agency ("CalEPA") Undersecretary Gordon Burns and calls with others with respect to the Shimek proposal (a proposal that, in large part, found its way in to amendments to the 2012 Conditional Waiver proposal offered by

[1] The emphasis on the discussion of the deprivation of constitutional rights is on the right of due process. The liberty interest involved is a part of the Fourteenth Amendment's guarantee of liberty that "denotes not merely freedom from bodily restraint but also the right of the individual to contact...." Board of Regents v. Roth (9172) 408 U.S. 564, 572. See also Golden Day Schools, Inc. v. State Dept. of Education (2000) 83 Cal.App.4th 695, 709-710. The bases upon which a deprivation and violation of Petitioner's constitutional right to due process is based also supports denial of their liberty interest.

Mr. Johnston after the close of the public participation section of the March 14 public meeting) (see Grower-Shipper Association Pet. Points and Auth. at p. 26, lines 21-14);

2. The Regional Staff had the Shimek Proposal in hand prior to the public participation portion of the March 14 meeting (e.g., Shimek told Undersecretary Burns that he had presented the proposal to the Regional Board staff and Shimek himself had met with members of the Regional Board staff concerning his proposal) (id. At p. 27, lines 1-9);

3. E-mails were sent and received by and between Regional Board Executive Officer Briggs and Mr. Johnston concerning amendments Mr. Johnston wanted to make to the 2012 Conditional Waiver (which mirrored the Shimek proposal) and which Mr. Briggs and members of his staff edited and added to apparently at Mr. Johnston's request) (id. at p. 27, lines 10-21);

4. Executive Officer Briggs, by an e-mail sent between he and Mr. Johnston dated March 13, 2012, did provide Mr. Johnston and Chairman Young with edited language to be used in the 2012 Conditional Waiver, an event occurring prior to the March 14 public meeting and Regional Board consideration of whether to adopt the 2012 proposal. Notably included in this e-mail was the following language which indicated prejudgment by Mr. Johnston on the Proposal **well before** the public presentations concerning the proposal was concluded:

> **"Mike [Johnston] here it is [Briggs' and the Staff's amendments to the Proposal]. Changes and new language in red. There's one bullet that has 2 bright highlights on it. I couldn't get rid of it. It doesn't matter anyway – we'll fix it later after the meeting when this is part of the Order. .... I'll send them to [Chairman] Jeff [Young]."**

Grower-Shipper Pet. Points and Auth., Ex. G, page 18 (Emphasis supplied); id at p. 27, lines 10-22.

5. During the March 14, 2012 meeting and after the public comment period had closed and the Regional Board was determining to either vote for or against the Proposal, the following statements were made by Mr. Johnston and Chairman Young concerning the amendment offered by Mr. Johnston which mirrored, in great part, the Shimek Proposal and which was offered by Mr. Johnston only after the close of the public participation section of the meeting:

> "MR. YOUNG: I think it's a great proposal [Johnston's amendment]. I think what you've [Johnston] done is taken what Staff has always said was achievable as part of what they have been proposing, and essentially put down in writing what it might look like, and make that part of what we're going to incorporation in the Order and the Monitoring Program. **So, how much of this did you write?**
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> MR. JOHNSTON: About half.
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> MR. YOUNG: Good. It's great.
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> MR. BRIGGS: Mr. Chair.
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> MR. YOUNG: Yes.
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> MR. BRIGGS: Mr. Johnston asked –
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> MR. JOHNSTON: In answer to your question about what I wrote, this was a back and forth between –
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> MR. YOUNG: I understand.
>
> MR. JOHNSTON: -- myself, Roger, Frances. I would imagine that Roger was consulting his Staff on it.
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> MR. YOUNG: Right.
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> Is this acceptable to Staff?
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> MR. BRIGGS: **That was the reason Mr. Johnston wanted to vet it instead of dropping it here was to see if it would be acceptable. Mr. Johnston asked me to help flesh out some ideas for a technical advisory committee. But I wanted just one – I think it's a typo of admission [sic]. In the last paragraph that you just referred to, the second line that parenthetical – I think my intent was for that to be an e.g., for example NCRS or RCD. And we should spell that out too, instead of using acronyms."**

Transcript of March 14, 2012 Meeting (Emphasis supplied).

This evidence and oral statements paint a very clear picture of the proscribed ex parte communications which led to and resulted in Mr. Johnston offering an amendment which "Staff has always said was achievable of what they have been proposing" only after the public comment section had closed.[2] This Amendment – relative to Condition 11 of the Order – had not previously been raised by the Staff and had not been a subject of public comment during the pre-trial period or, for that matter, the public participation portion of the "trial" on the Order in March 2012. Thus, the public was not afforded any opportunity to comment on or oppose the major changes in the 2012 Conditional Waiver proposed by Mr. Johnston and adopted by the Regional Board. That the law does not allow. Indeed, the law demands that when such ex parte communications have occurred that they render the underlying Proposal void. Further, such communications and their result also deprive Petitioners of their constitutional right to due process and liberty interest.

The communications detailed above as set forth in the Grower Shipper's Petition (with accompanying Memorandum of Points and Authorities) clearly constitute proscribed ex parte communications. This is particularly the situation in view of controlling California precedent establishing that the chain of communication between these various persons are all covered by California's APA and this Board's rules. First, that the ex parte communications to Mr. Johnston began with a non-employee of the Regional Board (Mr. Shimek) is of no moment since his communications form an integral part of the chain. As was stated by the California Supreme

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[2] The evidence presented by the Grower Shippers obviously makes out a prima facie case that the APA's proscription against ex parte communications has been violated. In that situation, the burden is thrown on the Regional Board and Mr. Shimek to refute it. See Lotus Car Ltd. v. Municipal Court (1968) 263 Cal.App.2d 264, 270. Additionally, "'[w]here the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue....'" Estate of Jones (2004) 122 Cal.App.4th 326, 337. In view of the clarity of the evidence presented by the Grower Shippers it is impossible to envision any evidence or, for that matter, any argument based on precedent that no violation occurred.

Court in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. ("Quintanar") (2006) 40 Cal.4th 1, 10 n. 8:

> "Each form of contact [such as between a prosecutor and a final agency decision maker on the one hand and those between a prosecutor and the decision maker's adviser, on the other] **equally compromises the protections of the APA's adjudicative bill of right sought to adopt: nothing in the APA contemplates permitting an agency to accomplish through secondhand communications what is forbidden through firsthand communications."**

This is, of course, consistent with provisions such as Govt. Code § 11430.10(a) which states:

> "While the proceeding is pending there shall be no communication, **direct or indirect**, regarding any issue in the proceeding, to the presiding officer from an employee ... of an agency that is a party or **from an interested person outside the agency**, without notice and opportunity for all parties to participate in the communication." (Emphasis supplied)

See also Quintanar, 40 Cal.4th at pp. 12-13 (quoting Commissioner's comment to the APA that "This provision is not limited to agency personnel, but includes participants in the proceeding not employed by the agency"). This, of course, reflects the "fairness principle" which, as noted in Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Bd. (2007) 149 Cal.App.4th 116, 125 (quoting Quintanar, 40 Cal.4th at p. 5),

> "directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private."

Second, Mr. Shimek, Executive Officer Briggs and other employees of the Regional Board who had direct or indirect ex parte contact with Mr. Johnston concerning the "amendments" are all definitionally "advocates" to whom the ex parte statutes and proscriptive rules of the State Board apply. As the California Supreme Court in Quintanar held: "By definition, an advocate is a partisan for a particular ... point of view...." See also Rondon v. Alcoholic Beverage Control Appeals Bd. (2007) 151 Cal.App.4th 1274, 1284 n. 2 (quoting Govt. Code § 11430.10, "While the proceeding is pending there shall be no communication, direct or

indirect, regarding any issue in the proceeding, to the presiding officer from … an interested person outside the agency, without notice and opportunity for all parties to participate in the communications").

Third, In terms of the timing of the ex parte communications, it is of no moment if they occurred prior to or during the trial stage (i.e., the public comment and testimony period preceding the March 14 issuance of the 2012 Conditional Waiver) or the decision-making stage (after the testimony period had ended and the Regional Board was engaging in pre-vote discussion of the Conditional Waiver, including within that the time when Mr. Johnston first offered to the Board as a whole and to the public his amendments). See Quintanar, 40 Cal.4th at p. 11 (rejecting that argument that "under the APA, limits on ex parte communications extend only to communications during the trial stage, not to those during the decision stage").

Fourth, the evidence of the ex parte communications referenced and quoted above (and attached as Exhibit G to the Grower Shipper's Petition) are all an integral and integrated part of the Record in this proceeding which may (and must) be considered by this Board. See, e.g., Quintanar, 40 Cal.4th at p. 15-16 n. 11, where the Supreme Court rejected a contrary argument, holding:

> "The Department argues that ex parte contacts are not in the record (a virtual tautology) and thus the Board cannot consider them or direct that they be added to the record, whether or not the Department has considered them; if this is so, then the Department may violate the APA without sanction. To read this … as the Department does, as further precluding inquiry into ex parte communications, would render the APA as it applies to the Department, and the Board's constitutional authority to ensure compliance, a dead letter. We reject such a seemingly absurd result."

Fifth, the ex parte rules apply equally to members of the Regional Board such as Mr. Johnston as well as the Chairman of the Board, Mr. Young (who, as noted, also was a recipient

of the ex parte communications and is equally tainted). As the California Supreme Court held in Quintinar, 40 Cal.4th at 9-10:

> "Article 7, modeled on provisions of the federal Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, broadly prohibits ex parte contacts between parties, including agency parties, and decision makers during administrative adjudicative proceedings. "While the proceeding is pending there shall be *no communication, direct or indirect, regarding any issue in the proceeding,* to the presiding officer from an employee or representative of an agency that is a party .... Without notice and opportunity for all parties to participate in the communication." A 'presiding officer' is defined as an officer who presides over an evidentiary hearing (§ 11405.80), but other provisions of article 7 expressly extend this prohibition to all decision makers, including agency heads and their delegees, whether or not they preside over an evidentiary hearing: "Subject to subdivision (b) [governing ratemaking proceedings], the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide din the proceeding is delegated." (§ 11430.10, subd. (a).) The Commission comments to section 11430.10 reiterates that section 11430.70 expands section 11430.10's scope: "This provision [section 11430.10] also applies to the agency head or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person)."" (Internal citations omitted, italics in original).

Sixth, "evidence" as used in the ex parte context is a word of expansive meaning and coverage. As noted in Matthew Zaheri Corp. v. New Motor Vehicle Bd. (1997) 55 Cal.App.4th 1305, 1317, relative to the general standard for improper ex parte communications:

> "The basic standard is stated several different ways: e.g., "regarding any issue in the proceeding," "upon the merits of a contested matter," "concerning a pending or impending proceeding." We do not assign significance to the varying terminology. "It is, in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue." (Heavey v. State Bar (1976) 17 Cal.3d 553, 559. **It extends to communications of information in which [persons] knows or should know the opponents would be interested. Construed in aid of its purpose, we conclude the standard generally bars any ex parte communication ... to the decisionmaker of information relevant to issues in the adjudication**." (Emphasis supplied)

Even in the context of regulatory proceedings involving the promulgation and adoption of rules and regulations – an endeavor to which ex parte communication law does not necessarily

attach and concerning which overriding due process concerns similar to those involved in quasi-judicial activities are not necessarily implicated -- the law requires that a further hearing be had under circumstances such as those existing here where "last minute" major revisions are made. For instance, Govt. Code § 11346.8 (c) provides in pertinent part:

> "No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 1346.5, unless the change is nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9."[3]

Thus, had the amendments offered by Mr. Johnston been made in the Regional Board's quasi-legislative capacity rather than in its quasi-judicial one, additional time and opportunity by the persons whose interests are affected by the amendments offered by him would have been required. Nothing less than that procedure should have occurred here. That it did not makes even more profound the conclusion that the rules proscribing ex parte communications have been violated and the due process rights of petitioner's have been negatively affected.

The result of all of this is, as argued for by numerous Petitioners (including Grower Shippers and the Jensens), is the violation of the due process rights and liberty interests of persons subject to the 2012 Proposal. After all, due process is preserved only where "rules .... prohibiting ex parte communications are preserved." Morongo Band of Mission Indians v. State Water resources Control Bd. (45 Cal.4th 731, 741. It is, however, violated when a basic fairness principle attaching to adjudicative hearings is not met: "One fairness principle directs that in

[3] The Regional Board qualifies as a "state agency" as defined by Govt. Code § 11000(a): "state agency includes every state office, officer, department, division, bureau, board, and commission."

adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's adviser's in private." Department of Alcoholic Beverage Control v. Alcoholic Beverages Control Appeal Bd. (2006) 40 Cal.4th 1, 4-5. When ex parte communications of the type involved here occur under the irrefutable circumstances present in this case, the due process right to a fair hearing under both the federal and California due process clauses occurs. U.S. Const. 14 Amend., Cal. Const., art. I, § 7, subd. (a). This is so since

> "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments."

Mathews v. Eldridge (1976) 424 U.S. 319, 332. Indeed, as held in Withrow v. Larkin (1975) 421 U.S. 35, 46-47:

> "A 'fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts." (Internal citations omitted)

No question then exists that Petitioners have a property interest of which they are deprived when due process is not afforded them due to ex parte communications in the Regional Board's adjudicatory quasi-judicial proceeding.

It violates due process for the Regional Board to conduct a hearing in which ex parte communications are made to the decision maker, such communications are not made known to the parties involved, and, importantly, when a decision is made in which it reveals the undisclosed communications (evidence) for the first time. See English v. City of Long Beach (1950) 35 Cal.2d 155, 158, where the California Supreme Court held that when "information [is] received without the knowledge of the parties and at a time and place other than that appointed for the hearing," and "the board secretly obtains information and bases its determination

thereon," the parties affected are denied a fair hearing. Id. at p. 159. The denial of that fair hearing is a denial of due process.

Before proceeding to a discussion of these various points it should be noted that we are mindful of the recent enactment by the Legislature of amendments to Water Code § 13287(a) dealing with ex parte communications with the Regional Water Board and this Board concerning adjudicatory proceedings such as the one that led to the enactment of the 2012 Conditional Waiver. See 2012 Cal. Legis. Service, Ch. 551 (S.B. 965), enacted September 25, 2012. (A true copy and correct copy of S.B. 965 (with Legislative Counsel's Digest) is attached hereto for the Board's convenience.) Since the legislation had not been passed at the time for the filing of petitions was required, we submit it at this time in response to the arguments raised by, among others, the Grower Shippers.

Section 956 makes great changes in the statutory regime governing ex parte communications with this Board and the Regional Board concerning adjudicatory matters including, notably, such matters as the present 2012 Conditional Waiver. See Cal. Water Code § 13287 (a)(2)(B) as amended). The amendments take effect January 1, 2013 and thus play no role in determining that the ex parte contacts with Regional Board Member Johnston (and Young) violate not only present law and rules of this Board but also the due process and liberty rights of Petitioners. This is so for several reasons including, primarily, that the amendments have no retroactive effect so as to play any role – even if this Board does not decide the issue until after January 1, 2013 – in determining that proscribed communications took place that violated not only the law but also Petitioners' constitutional rights. That the amendments have no retroactive application to the communications involved here is clear from controlling California law. See, e.g., Quarry v. Doe I (2012) 53 Cal.4th 945, where the California Supreme Court recently

reviewed and described California's rules for determining whether a statutory amendment is to be afforded a prospective and/or retroactive affect:

> "Our decisions have recognized that statutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of "'express language of retroactivity *or* ... other sources [that] provide a clear and unavoidable implication that the legislature intended retroactive application.'" Ambiguous statutory language will not suffice to dispel the presumption against retroactivity'; rather "' a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective.'" (Internal citations omitted, italic in original).

See also People v. Brown (2012) 54 Cal.4th 314, 319-322; Mateo v. Department of Motor Vehicles (2012) 209 Cal.App.4th 624, 632-34. A review of the amendment's text reveals no such "express language of retroactivity." Indeed, the terms of the amendment – particularly its explicit directive concerning the new procedures that must be used when a communication is made (see Cal. Water Code § 13287 (c) (1-3) as well as its mandate that the board "may prohibit ex parte communications for a period beginning not more than 14 days before the day of a board meeting at which the decision in the proceeding is scheduled for board action) – are clear indications that the Legislature intended the amendment to have only a prospective application.

In any event and assuming, arguendo, that the situation were otherwise and the amendment is afforded some retrospective application, that does not result in exonerating the ex parte communications involved here since they fell within the 14 day period described above. Thus, while the amendments may impact the way in which ex parte communications of the type involved here are handled by the Board when they occur after January 1, 2013, they most assuredly do not impact in any way the result required here relative to the communications made to Mr. Johnston. (Indeed, the change in the statute allows this Board a freedom to act freely with

regard to the remedy here due to the fact that the change in law would cause its present ruling in that regard to have only a limited, if any, precedential impact).

So, what should the Board do in light of the obvious violations by the Regional Board (particularly Messr. Johnston and Young) of the rules, statutes, and precedents concerning ex parte communications. There really is one remedy: i.e., reversal of the Regional Board's Order. The California Supreme Court ordered such a remedy in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 40 Cal.4th at p. 17:

> "The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences. We will not countenance them here. Thus, reversal of the Department's orders is required."

Accord Rondon v. Alcoholic Beverage Appeals Bd. (2007) 151 Cal.App.4th 1274, 1290, where in relying on Department of Alcoholic Beverage Control, 40 Cal.4th at p. 17, the Court concluded that reversal of the administrative bodies' order was required:

> "As long-standing California Supreme Court precedent teaches: "Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. [Citations.] The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial." (*English v. City of Long Beach, supra, 35 Cal.2d at pp. 158-159.*) "A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties." [¶] In this case, based on the violation of statutory protections designed to ensure due process and a fair hearing, we conclude that "reversal of the Department's orders is required." (Internal citations omitted)

Reversal of the Regional Board's 2012 Conditional Waiver and Order is thus the only remedy available and sufficient to meet the Regional Board's violation of the law, rules, and precedent regarding ex parte communications. That the violation of those matters may have been the result of innocent earnestness on the part of the then-newly appointed member Mr. Johnston is of no

moment to the existence of the violation since motive or intent is not an element when it comes to the use of ex parte communications. Indeed, even if the opposite were true Mr. Johnson's perhaps-innocent-earnestness is overcome by the actions of the other involved individuals – all of whom knew better – involved in the ex parte communications.

2. **The 2012 Conditional Waiver Order Is Illegal Since The Regional Board Failed To Comply With The Requirements Of Water Code § 13241 By Its Pre-Adoption Failure To Consider, Among Other Things, Various Economic Considerations Relating To The Impact Of The Order**

In formulating and issuing the 2012 Conditional Waiver and Order, the Regional Board failed to comply with Cal. Water Code § 13241, a key provision of the Porter-Cologne Water Act and thus acted in derogation of the limits on its authority. Resultantly, the Regional Board violated the due process rights of the entities and persons bound by the terms of the Conditional Waiver.

Section 13241 is a key provision of the Porter-Cologne statutory regime since it defines the duties of the regional boards when considering adoption of such things as the 2012 Conditional Agricultural Waiver. In pertinent part, it provides:

> "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: ...
>
> **(d) Economic considerations.**
> **(e) The need for developing housing within the region.**
> **(f) The need to develop and use recycled water."**

(Emphasis supplied). The import of this provision is obvious. When promulgating the terms of the 2012 Conditional Waiver and deciding that that agricultural, nursery, and viticulture growers are to be bound by various of its respective terms, Section 13241 mandates the Regional Board

to engage in a balancing process that necessarily factors in such things as "economic considerations" and "developing housing" when determining what conditions and restrictions are needed to serve those interests and, at the same time, not unreasonably impacting beneficial uses of water. Such a balancing is mandatory: i.e., pursuant to established rules of statutory interpretation and practice, the use of the word "shall" in the statute imposes an affirmative and mandatory duty on the Regional Board to consider and further accomplishment of the designated factors before and when adopting the Order. See, e.g., Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 443 ("shall" is normally construed as a mandatory term in statutes); Morris v. City of Marin (1977) 18 Cal.3d 901, 904 ("shall" imposes a mandatory duty); Coalition for Clean Air v. City of Visalia (2012) 209 Cal.App.4th 408, 423 ("'shall' identifies a mandatory element which all public agencies are required to follow..."); In re Anthony T. (2012) 208 Cal.App.4th 1019 ("The term 'shall' is used to express a command. (Webster's New Internation. Dict. (2002) p. 2085 col. 1 ["'shall' is mandatory"]). "Shall" in this context is a mandatory and thus creates a mandatory duty with which the Regional Board must comply or else be found to have violated the requirements of the statute. The Regional Board did not comply with that mandatory duty in the process of adopting the 2012 Agricultural Conditional Waiver and Order and thus doomed that Waiver and Order.

Indeed, a review of the Conditional Waiver and Order as well as its accompanying Record reveals that the Regional Board did not adequately – and, indeed, at all -- address these matters (other than, of course, the "need to develop and use recycled water" since such water is a key element and sine qua non of the Conditional Waiver and Order). This conclusion is borne out by the fact that the Record establishes that the Regional Board refused to even consider economic considerations and impact (as well as the impact and effect on developing housing) of

the then-proposed waiver in any context (including that of the California Environmental Quality Act (CEQA) analysis in which it refused to consider "economic" factors due to its view that they were not relevant even when they may have a direct relationship to environmental effects). It is also borne out by the need for the Record to affirmatively contain evidence of what the specific factors/evidence considered are as well as that such considerations were actually considered. Neither Section 13241 nor precedent permit the Board to merely assume they do not exist or, for that matter, fail to identify them and elucidate what impact they have on the decision to issue and formulate the 2012 Conditional Waiver. Further, even if it is assumed that members of the Regional Board have personal knowledge or beliefs concerning the economic factors involved arising from their life experience or prior dealings of the Regional Board (including consideration and adoption of the 2004 Conditional Waiver), such knowledge does not provide a basis for statutory compliance in the present context.[4] The simple reason for that is that such knowledge is not identified and is not a part of the record here and thus cannot be used to "fill in the blanks" of the Order and record themselves.

Since the record is bare of any evidence of the economic considerations that Section 13241 mandates be made and which were made by the Regional Board prior to adoption of the Order, it must be assumed that such matters were not considered. That failure in and of itself, and without more, renders the Order invalid and illegal. The result of this is a patent violation of the statutory basis for the Board taking any action at all concerning adoption of the 2012

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[4] Indeed, it defies common sense that any consideration of economic factors that may have been made relative to adoption of the 2004 Conditional Waiver could or should or would be attributed to the 2012 Conditional Waiver. After all, economic conditions as they existed in 2003-2004 are most certainly not the same or similar conditions to that which exist in 2011-2012 due to the vast economic upheavals that have occurred during the intervening 8 years as well as the broad expansion of the conditional waiver in 2012. A review of the record here, however, does not even establish that such economic considerations and Section 13241's mandate were considered, factored in to, or otherwise complied with in issuing the 2004 Conditional Waiver.

Conditional Waiver. That negatively impacts the legality of the Board's actions as a whole since it renders its Order categorically arbitrary, unreasonable, and capricious. Resultantly, the adopted 2012 Order violates the due process rights of all persons and entities made subject to its terms and conditions.

The Regional Board may, of course, have the untoward belief that its failure to set forth these considerations in the Record and in the Order itself is rendered nugatory by three matters: i.e.,

1. The Board members themselves had some form of personal knowledge of such matters (including that such considerations did not militate against adoption of the Order) that informed their votes adopting the 2012 Conditional Waiver;
2. Such knowledge and that they considered in it prior to (and as a part of the bases for passing the Order) does not need to be stated in the record; and,
3. Consideration of economic matters – although unstated in the record or in the Order itself – may be presumed from the adoption of the Order itself since the Board would not knowingly violate its own operative/authorizing statutes.

None of these three (or, for that matter, similar considerations) are of any moment and do not save the Order from its illegality and accompanying violation of due process rights.

In issuing the Order and the 2012 Conditional Waiver, the Regional Board was not sitting as a "regulatory" body but rather was acting as an adjudicatory quasi-judicial board, a matter which it freely admits and concerning which it repeatedly advised all parties. As such, due process rights attach to the conduct of the hearing and the means by which a decision to adopt or reject the 2012 Conditional Waiver was made. In this context then the question is what due process rights are owed by the regional Board in conducting a hearing. The law is clear that a key aspect of that right is the right of Petitioners, among others, to know (and the related duty of the Regional Board to disclose) evidence and the basis for its formulation and adoption of the terms of the 2012 Order and Conditional Waiver. That necessarily entails a duty by the Regional Board to disclose the "evidence" considered by it in reaching its decision in order to allow the

interested parties who will be subject to its terms to challenge or otherwise refute the "evidence" offered by the Board as underlying its decision. Should, as was the situation here, such evidence be disclosed only at the time the "decision" is rendered, a due process violation occurs. As held in English v. City of Long Beach (1950) 35 Cal.2d 155, 158:

> "The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties are not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present."

When "information [is] received without the knowledge of the parties and at a time and place other than that appointed for the hearing," and "the board secretly obtains information and bases its determination thereon," the parties affected are denied a fair hearing. Id. at p. 159. Additionally,

> "Administrative tribunals exercising quasi-judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test, and explain it."

La Prada v. Department of Water & Power (1945) 27 Cal.2d 47, 51-52. The denial of a fair hearing violates due process.

Since the burden and duty of introducing facts and evidence concerning, for instance, the existence or non-existence of economic considerations implicated by the proposed terms of the 2012 Conditional Waiver lay with the Regional Board, Petitioners are of course under no duty to establish the existence of economic matters that must or should have been considered by the Board prior to issuing the Order and the 2012 Conditional Waiver. That is a duty that is statutorily imposed on the Board and with which compliance must exist. Regardless of the

absence of such a duty, however, various of the Petitioners (including the Grower Shipper Alliance, Ocean Mist Farms, the Farm Bureau, Jensen Farms and others) did produce ample evidence establishing the economic impact and considerations that should have been considered by the Regional Board but that were ignored by the Board, not made a part of the record as considerations considered by the Board, and thus played no part in the adoption of the 2012 Order. Among these matters were:

1. The loss of agricultural production that would arise from setting aside land required by the 30-foot buffer zone (a matter that conflicts with the California Leafy Green Marketing Agreement (see www.ccof.org/leafygreens) and the "super metrics" adopted by the California food production industry to address food safety concerns);
2. Relatedly, the 30-foot buffer zone will cause literally thousands of acres of farmland now under cultivation to cease being under cultivation. The direct economic impact of that is obvious and non-speculative: fewer crops will be grown resulting in fewer crops being sold and otherwise being made available to the public which lowers profits and the funds available for use by the owner/operator to "grow" the Region's economy. All of these are a surefire means of affecting economic stagnation in an industry which is now just about the only California industry successfully working its way out of the current recession and economic downturn;
3. The economic market place reaction to lower profits for the farmer is, of course, an increase by the farmer in the sale price of his produce, a matter that directly translates into higher food costs to the public (which, like higher gasoline costs) further contributes to inflation and economic stagnation of the Region as well as California as a whole;

4. The decrease in farm land value that is the result of lowered production, a matter that will necessarily result in a significant decrease property taxes paid which, in turn, impacts the amounts of money available to local, county, and state governmental units (including this Board);

5. Just as a decrease in property taxes will result in further layoffs and furloughs of public employees, cutbacks in the number of laborers necessary to service the agricultural industry in the Region occasioned by having significantly fewer acres available for cultivation will occur. The results of that will obviously be a reduction in the monies being spent in the Region's economy, an increase in governmental benefits being paid to the unemployed, a movement of individuals out of the region, increased foreclosures of homes now being purchased by unemployed laborers, a decrease in housing being built or developed (due to a higher foreclosure-related inventory of housing being available in the market), and the resulting impact on the taxes that may be collected by the local and state governments. Indeed, a cascading detrimental economic effect and impact is likely to occur as a result of the Order;

6. The Order, although not itself specifying which technology is to be used by individual farms/nurseries/vineyards in order to comply with the Order's water requirements, clearly required a pre-enactment consideration of probable costs attendant to purchasing, maintaining, and operating the technologies necessary to comply with the pollution control guidelines)[5] will have a similar economic impact –

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[5] The conducting of the study of the economic considerations emanating from enactment of the Order cannot be explained away or evaded by the statutory limitation contained in Water Code § 13360(a) of the Regional Board's authority to order farmers, for instance, to acquire a given piece of machinery or other means necessary to comply with the Order's wastewater purification requirements:

e.g., farmers will have to charge more for their products in order to maintain their presently slim profit margins, the cost of living and inflation will increase due to the rising cost of agricultural products, laborers will either not be hired or will be terminated as cost-savings measures necessary to maintain the economic integrity of the farms (the effect of which will be the same as that mentioned above).

These types of economic considerations were overlooked, ignored, and did not in any way factor into setting the terms of the Order or in consideration of its impact on the farming, viticulture, and nursery industries in the Region. See, e.g., City of Arcadia v. State Water Resource Control Bd. (2006) 135 Cal.App.4th 1392, 1416-1418. That is a blatant violation of Section 13241 which, without more, requires rejection and reversal of the Order by this Board and a remand to the Regional Board with instructions to comply with the statute's requirements.

3. **This Board, In Its Stay Order, Has Already Found That Several Of The Terms And Provisions Of The Order Are Too Vague To Allow Compliance, Both Of Which Resultantly Violate The Petitioner's Constitutional Rights And Otherwise Require The Reversal Of The Order**

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

However, the fact that the Regional Board may not specify which given technology must be used in order to affect compliance with the discharge requirements does not mean that in conducting either the "economic consideration" analysis required by Section 13241 or, for that matter, the environmental impact analysis required under CEQA that such available means may be ignored so as to avoid conducting the required analysis in a legally sufficient way. That is, for purposes of example only, if the only technologically available means for purifying tail water to drinking water purity level is reverse osmosis, then the economic impact attending the purchase, operation, and maintenance of reverse osmosis machinery is an "economic consideration" that must be investigated just as the installation of such a machinery has a possibly significant environmental impact that must be factored into any CEQA analysis. So too is that the situation if "evaporation basins" are used, the construction of which would entail a further loss of agricultural land currently under cultivation.

This Board, in the context of its decision to grant a partial stay of the 2012 Conditional Waiver and Order made two remarkable findings: i.e., that Provision No. 33 (which deals with containment structures) and Provision No. 44.g (which deals with practice effectiveness and compliance) were vague and ambiguous and, hence, that Petitioners could not and need not comply with their respective requirements. With regard to Provision No. 33, this Board found:

> "Since the plain language of provision 33 does not align with the Central Coast Water Board's stated intentions for it, the Central Coast Water Board acknowledges that there may be misunderstanding of the intent of provision 33 within the agricultural community covered by the Agricultural Order… "

Stay Order, Slip Op. at 13. In turn and with regard to Provision 44.g, this Board held that

> "[W]e find that the provision as written is ambiguous, and that, with no further clarification of its meaning or guidance elsewhere in the Agricultural Order, it poses a challenge to dischargers seeking to comply with its requirements."

Id. at p. 15.

Those findings, without more, establish under settled principles of law that these two provisions violate the due process rights of Petitioners and others subject to their respective terms. See, e.g., Broadrick v. Oklahoma (1973) 413 U.S. 601, 607 (a statute, rule, or regulation is unconstitutionally vague if "men of common intelligence must necessarily guess its meaning"); Hastings v. Judicial Conference of the U.S. (D.C. Cir. 1987) 829 F.2d 91, 105 ("A vague law denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain what will result…"); Larson v. City & County of San Francisco (2011) 192 Cal.App.4th 1263, 1288-89 (applying these federal vagueness standards to California statutes, regulations, and rules).

Date: October 31, 2012

Respectfully submitted,

William Elliott

CALIFORNIA 2012 LEGISLATIVE SERVICE
2012 Portion of 2011-2012 Regular Session

Additions are indicated by **Text**; deletions by
* * *.
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

CHAPTER 551
S.B. No. 965
ADMINISTRATIVE LAW AND PROCEDURE—EX PARTE COMMUNICATIONS—HEARINGS—TRANSLATIONS

AN ACT to amend Section 11125.7 of the Government Code and to amend Section 13228.14 of, to add Section 13167.6 to, and to add Chapter 4.1 (commencing with Section 13287) to Division 7 of, the Water Code, relating to state and local government.

[Filed with Secretary of State September 25, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

SB 965, Wright. State and local government.

(1) Under existing law, the State Water Resources Control Board (state board) and the California regional water quality control boards (regional boards) implement the Federal Water Pollution Control Act and the Porter–Cologne Water Quality Control Act by prescribing waste discharge requirements for discharges to the waters of the state, as specified. Existing law authorizes the state board and the regional boards to hold hearings necessary for carrying out their duties, as specified.

Existing law, the Administrative Procedure Act, establishes the conduct of administrative adjudicative proceedings, which are defined as evidentiary hearings for determination of facts pursuant to which a state agency formulates and issues a decision. Existing law defines a decision as an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. While an adjudication is pending, the act prohibits, as an ex parte communication, any communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer, as defined, from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication. The act provides that if the above prohibition is violated, the presiding officer shall promptly disclose the content of the communication on record and give all parties an opportunity to address the communication, as specified. The act also provides that a violation of that prohibition may be grounds for disqualification of the officer who engaged in the ex parte communication.

This bill would provide that the ex parte communications provisions of the Administrative Procedure Act do not apply to specified proceedings of the state board or a regional board. The bill would define an ex parte communication for these purposes as an oral or written communication with one or more board members regarding

those specified state board or regional board proceedings. This bill would specify the instances in which an ex parte communication involving those specified proceedings is permissible.

The bill would authorize a board to prohibit ex parte communications for a period beginning not more than 14 days before the day of a board meeting at which the decision in the proceeding is scheduled for board action.

The bill would require all ex parte communications to be reported, as specified, by the interested person, regardless of whether the communication was initiated by the interested person.

The bill would authorize the state board or a regional board, in the event that an interested person fails to provide any required notice in the manner required by the bill, to use the remedies available under the administrative adjudication provisions of the Administrative Procedure Act.

(2) Existing law, the Bagley–Keene Open Meeting Act, generally requires that all meetings of a state body be open and public. The act requires that notice of public meetings and those held in closed session of a state body be given to any person who requests that notice in writing and that the agenda for those meetings be made available upon request without delay.

This bill would require the state board or a regional board to make each meeting agenda notice that the state board or a regional board provides available in both English and Spanish and would permit the state board or a regional board to make the agenda notice available in any other language.

Under existing law, the act requires that the agenda for meetings provide an opportunity for members of the public to directly address the body on any item of interest to the public that is within the subject matter jurisdiction of the body. The act permits the adoption of reasonable regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

This bill would require a state body subject to the act that limits time for public testimony to provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non–English speakers receive the same opportunity to directly address the body, with a specified exception.

The people of the State of California do enact as follows:

SECTION 1. Section 11125.7 of the Government Code is amended to read:

<< CA GOVT § 11125.7 >>

11125.7. (a) Except as otherwise provided in this section, the state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item. This section is not applicable if the agenda item has already been considered by a committee composed exclusively of members of the state body at a public meeting where interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the state body. Every notice for a special meeting at which action is proposed to be taken on an item shall provide an opportunity for members of the public to directly address the state body concerning that item prior to action on the item. In addition, the notice requirement of Section 11125 shall not preclude the acceptance of testimony at meetings, other than emergency meetings, from members of the public if no action is taken by the state body at the same meeting on matters brought before the body by members of the public.

(b) The state body may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public comment on particular issues and for each individual speaker.

(c)(1) Notwithstanding subdivision (b), when a state body limits time for public comment the state body shall provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non–English speakers receive the same opportunity to directly address the state body.

(2) Paragraph (1) shall not apply if the state body utilizes simultaneous translation equipment in a manner that allows the state body to hear the translated public testimony simultaneously.

(d) The state body shall not prohibit public criticism of the policies, programs, or services of the state body, or of the acts or omissions of the state body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

(e) This section is not applicable to closed sessions held pursuant to Section 11126.

(f) This section is not applicable to decisions regarding proceedings held pursuant to Chapter 5 (commencing with Section 11500), relating to administrative adjudication, or to the conduct of those proceedings.

(g) This section is not applicable to hearings conducted by the California Victim Compensation and Government Claims Board pursuant to Sections 13963 and 13963.1.

(h) This section is not applicable to agenda items that involve decisions of the Public Utilities Commission regarding adjudicatory hearings held pursuant to Chapter 9 (commencing with Section 1701) of Part 1 of Division 1 of the Public Utilities Code. For all other agenda items, the commission shall provide members of the public, other than those who have already participated in the proceedings underlying the agenda item, an opportunity to directly address the commission before or during the commission's consideration of the item.

SEC. 2. Section 13167.6 is added to the Water Code, to read:

<< CA WATER § 13167.6 >>

13167.6. For each meeting agenda notice that the state board provides pursuant to subdivision (b) of Section 11125 of the Government Code, the state board shall make the agenda notice available in both English and Spanish and may make the agenda notice available in any other language.

SEC. 3. Section 13228.14 of the Water Code is amended to read:

<< CA WATER § 13228.14 >>

13228.14. (a) Any hearing or investigation by a regional board relating to investigating the quality of waters of the state, prescribing waste discharge requirements, issuing cease and desist orders, requiring the cleanup or abatement of waste, or imposing administrative civil liabilities or penalties may be conducted by a panel of three or more members of the regional board, but any final action in the matter shall be taken by the regional board. Due notice of any hearing shall be given to all affected persons. After a hearing, the panel shall report its proposed decision and order to the regional board and shall supply a copy to all parties who appeared at the hearing and requested a copy.

(b) No party who appears before the panel is precluded from appearing before the regional board at any subsequent hearing relating to the matter. Members of the panel are not disqualified from sitting as members of the regional board in deciding the matter.

(c) The regional board, after making an independent review of the record and taking additional evidence as may be necessary, may adopt, with or without revision, or reject, the proposed decision and order of the panel.

(d) For each meeting agenda notice that a regional board provides pursuant to subdivision (b) of Section 11125 of the Government Code, a regional board shall make the agenda notice available in both English and Spanish and may make the agenda notice available in any other language.

SEC. 4. Chapter 4.1 (commencing with Section 13287) is added to Division 7 of the Water Code, to read:

d. 7 ch. 4.1 pr. § 13287

Chapter 4.1. Ex Parte Communications

<< CA WATER § 13287 >>

13287. (a) For the purposes of this section:

(1) "Board" means the state board or a regional board.

(2) "Ex parte communication" means an oral or written communication with one or more board members concerning matters, other than a matter of procedure or practice that is not in controversy, under the jurisdiction of a board, regarding a pending action of the board that satisfies both of the following:

(A) The action does not identify specific persons as dischargers, but instead allows persons to enroll or file an authorization to discharge under the action.

(B) The action is for adoption, modification, or rescission of one or more of the following:

(i) Waste discharge requirements pursuant to Section 13263 or 13377.

(ii) Conditions of water quality certification pursuant to Section 13160.

(iii) Conditional waiver of waste discharge requirements pursuant to Section 13269.

(3) "Interested person" means any of the following:

(A) Any person who will be required to enroll or file authorization to discharge pursuant to the action at issue before the board or that person's agents or employees, including persons receiving consideration to represent that person.

(B) Any person with a financial interest, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter at issue before a board, or that person's agents or employees, including persons receiving consideration to represent that person.

(C) A representative acting on behalf of any formally organized civic, environmental, neighborhood, business,

labor, trade, or similar association who intends to influence the decision of a board member on a matter before the board.

(b) Notwithstanding Section 11425.10 of the Government Code, the ex parte communications provisions of the Administrative Procedure Act (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a board action identified in paragraph (2) of subdivision (a). This section only applies to those actions.

(c) For the purposes of this section, and except as limited by subdivision (d), ex parte communications regarding a board action identified in paragraph (2) of subdivision (a) may be permitted as follows:

(1) All ex parte communications shall be reported by the interested person, regardless of whether the communication was initiated by the interested person.

(2) A notice of ex parte communication shall be filed with the board within seven working days of the communication. The notice may address multiple ex parte communications in the same proceeding, provided that notice of each communication identified therein is timely. The notice shall include all of the following information:

(A) The date, time, and location of the communication, and whether it was oral or written, or both.

(B) The identities of each board member involved, the person initiating the communication, and any persons present during the communication.

(C) A description of the interested person's communication and the content of this communication. A copy of any written, audiovisual, or other material used for or during the communication shall be attached to this description.

(3) Board staff shall promptly post any notices provided pursuant to paragraph (2) on the board's Internet Web site and distribute the notice on any available electronic distribution list concerning the action.

(d) A board may prohibit ex parte communications for a period beginning not more than 14 days before the day of a board meeting at which the decision in the proceeding is scheduled for board action. If a board continues the decision, it may permit ex parte communications during the interval between the originally scheduled date and the date that the decision is calendared for final decision, and may prohibit ex parte communications for 14 days before the day of the board meeting to which the decision is continued.

(e) If an interested person fails to provide any required notice in the manner required by this section, the board may use any of the remedies available pursuant to the administrative adjudication provisions of the Administrative Procedure Act (Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code), including the issuance of an enforcement order, or sanctions pursuant to Article 12 (commencing with Section 11455.10) of Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code.

CA LEGIS 551 (2012)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby swear under penalty of perjury that I have served this RESPONSE OF PETITIONERS ROSS N. JENSEN AND WILLIAM ELLIOTT TO PETITIONS OF OCEAN MIST FARMS AND RC FARMS, GROWER-SHIPPERS OF SANTA BARBARA COUNTY, ET AL., AND FARM BUREAU, ET AL. by e-mail sent to each of the persons and entities at the addresses listed in Attachment A hereto on this 31st day of October, 2012 from San Luis Obispo, California 93445.

I further swear that I am over the age of 18 and that I am not a party to the proceeding underlying the filing of this document.

Christine Robertson

I

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