

REMEDIAL PLAN FEATURES WITH TOPOGRAPHY

SGI THE SURVEY GROUP, INC.
 3478 BLISSBURK AVE. SUITE 100
 PLEASANT HILL, CA 94523

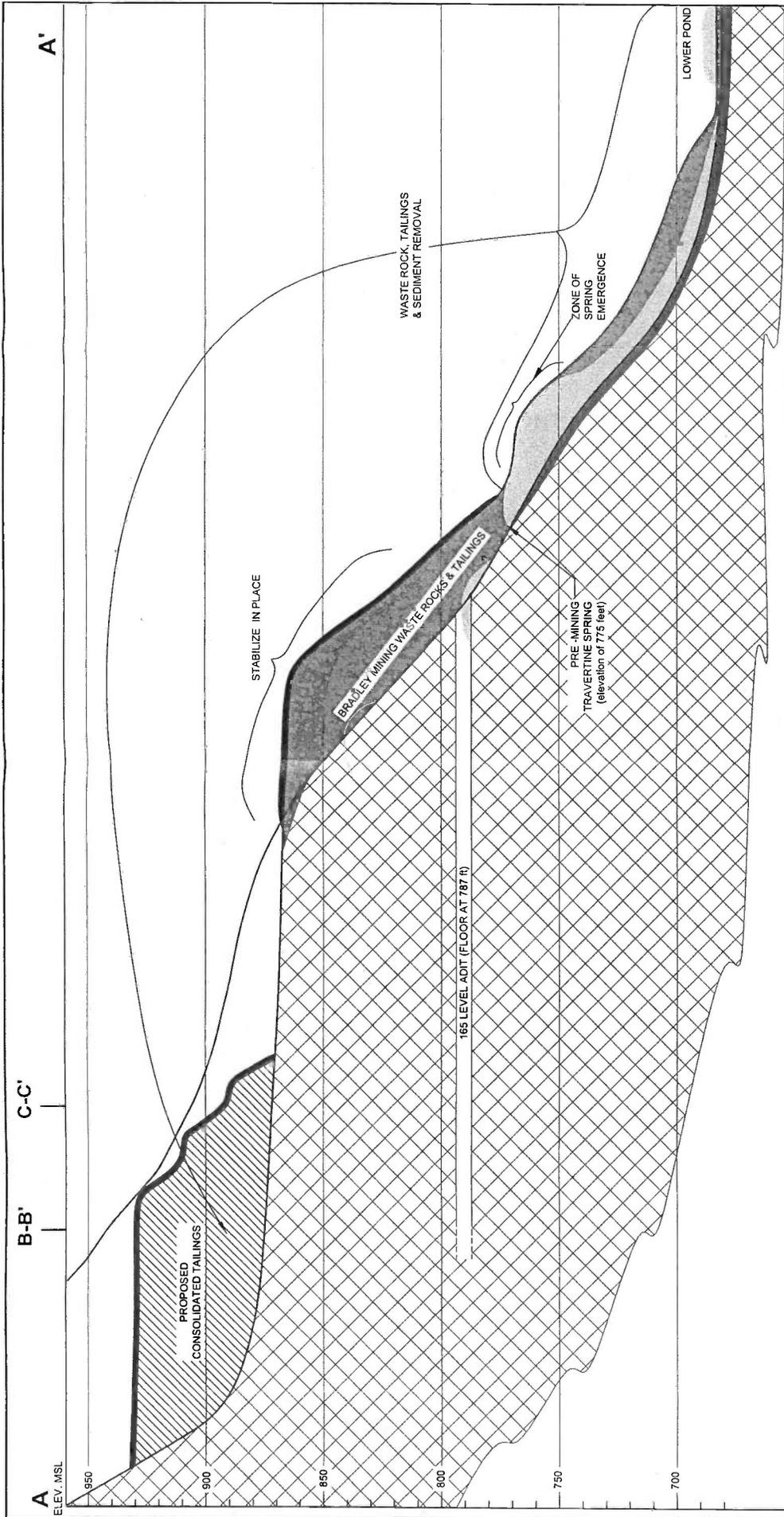
FIGURE 3-1

PROJECT NO.	DATE	DRAWN BY:	APP. BY:
01-SUN-855	05/09/92	GT	PH

MOUNT DIABLO MERCURY MINE
 2430 MORGAN TERRITORY ROAD
 CONTRA COSTA COUNTY, CA

LEGEND

- AREA OF MAIN TAILINGS PROPOSED FOR REMOVAL AND CONSOLIDATION IN MAIN PPT AREA
- AREA OF CALCINES TO BE REMOVED AND PLACED IN CONSOLIDATED WASTE AREA
- AREA OF CAPPED TAILINGS
- AREA OF LOWER POND FOR REMOVAL
- MINE WASTE CONSOLIDATION FOOTPRINT
- MINE WASTE CONSOLIDATION MIDDLE POND
- OUTLINE MIDDLE POND
- CROSS SECTIONS LOCATIONS
- SPRING
- DISCHARGE & SEEPS LOCATION OF TRANSDUCER SPRING
- 165 LEVEL ADIT BURIED PORTAL
- TOPOGRAPHIC CONTOUR INTERVAL = 2 FT



HORIZONTAL SCALE: 1"=100'
 VERTICAL SCALE: 1"=40'

LEGEND

	SITE TOPOGRAPHY 2010		CAPPING BY WESSMAN
	SITE TOPOGRAPHY 1938		PROPOSED CAPPING
	PROPOSED CONSOLIDATED TAILINGS AND SEDIMENT		TRAVERTINE DEPOSIT
	BRADLEY MINING WASTE ROCK AND TAILINGS		BEDROCK
	POND AND/OR SPRING WATER		

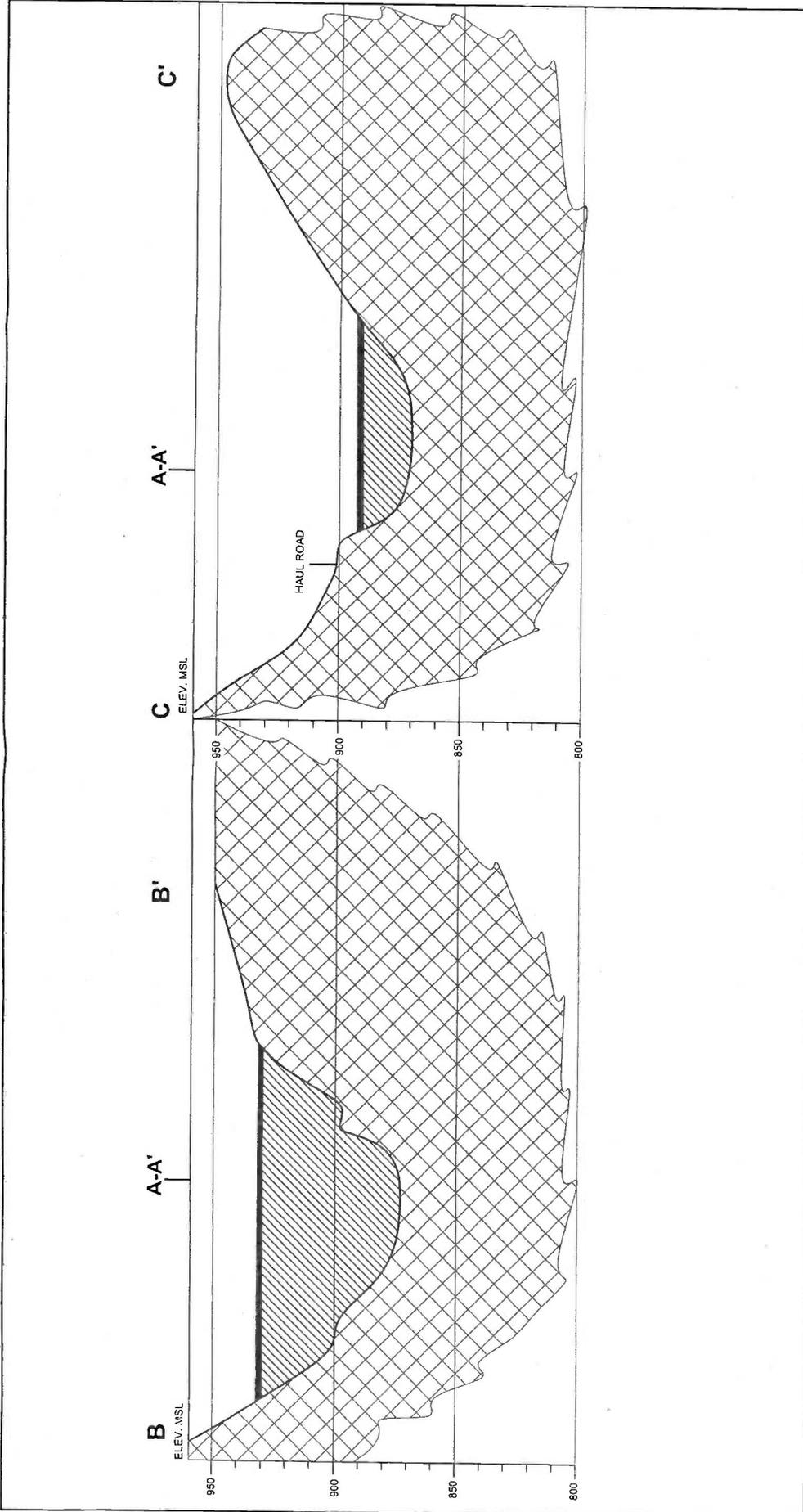
TOPOGRAPHIC CROSS SECTION A-A'

MOUNT DIABLO MERCURY MINE
 2430 MORGAN TERRITORY ROAD
 CONTRA COSTA COUNTY, CALIFORNIA

PROJECT NO.	DATE	DRAWN BY:	APP. BY:
01-SUN-050	04/29/12	ZA	PDH

THE SGI SOURCE GROUP, INC.
environmental
 3478 BUSKIRK AVENUE, SUITE 100
 PLEASANT HILL, CA 94523

FIGURE 3-2



LEGEND

- SITE TOPOGRAPHY 2010
- PROPOSED CAPPING
- PROPOSED CONSOLIDATED TAILINGS AND SEDIMENT
- BEDROCK

HORIZONTAL SCALE: 1"=100'
 VERTICAL SCALE: 1"=40'

CROSS SECTION B-B'
CROSS SECTION C-C'

THE SOURCE GROUP, INC.
 3478 BUSKIRK AVENUE, SUITE 100
 PLEASANT HILL, CA 94523

PROJECT NO.	DATE	DRAWN BY:	APP. BY:
01-SUN-0050	04/23/12	ZA	PDH

FIGURE 3-4



LEGEND

- LOWER CONE SURFACE REMOVAL AND PLACEMENT
- UNDERMINE REMOVAL AND PLACEMENT
- WASTE ROCK PLACEMENT
- EXISTING SURFACE
- EXISTING UNDERMINE
- EXISTING WASTE ROCK
- EXISTING SURFACE AND UNDERMINE

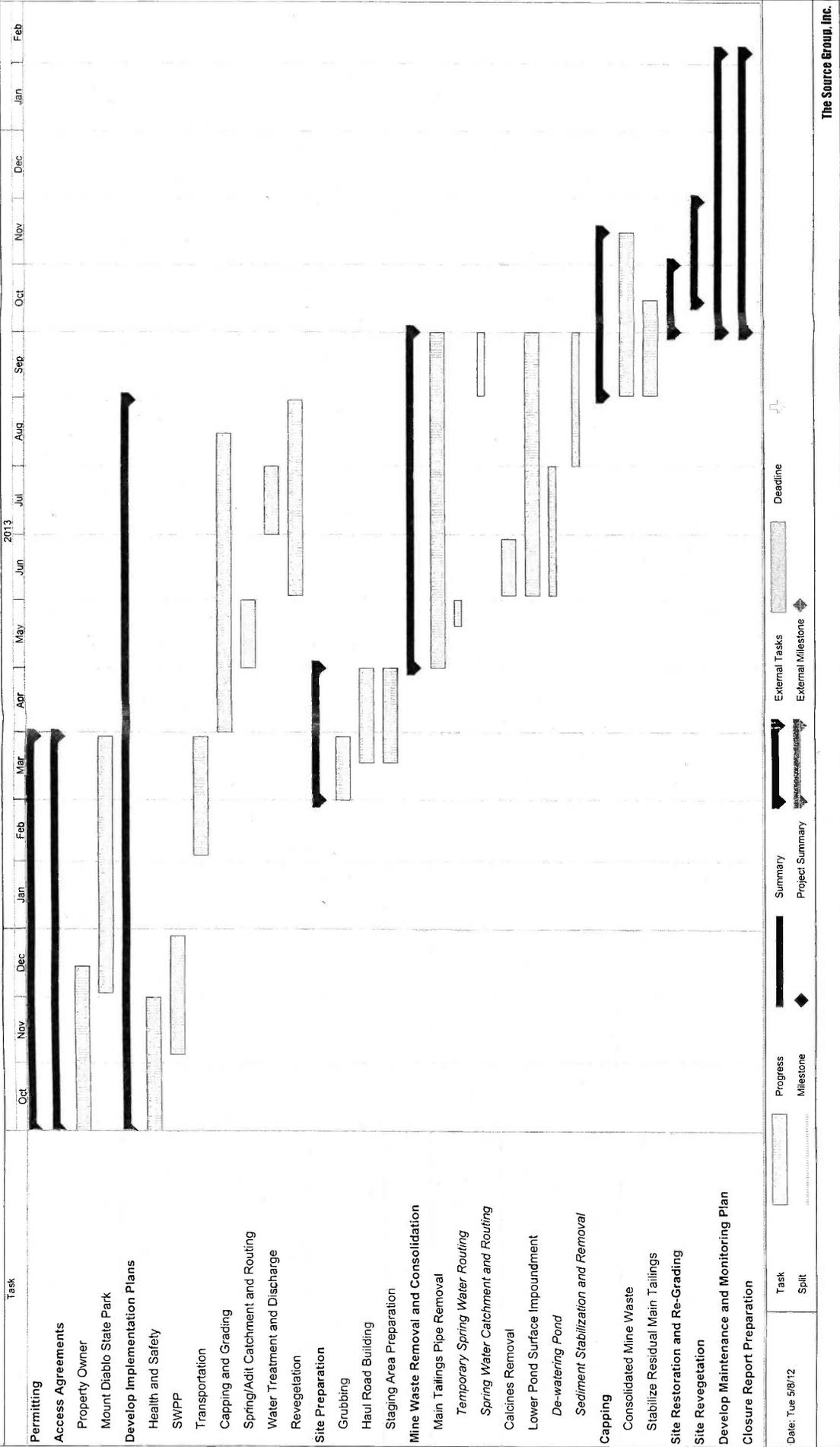
PROJECT NO.	DATE	REVISED	BY
11-82-246	8/20/82		ST

SGI
Source Group, Inc.
 1100 W. 10th St.
 PLUMASVILLE, IN 46783

Roads and Staging Areas

FIGURE 4-1

**Figure 5-1
Conceptual Project Schedule**



TABLES

TABLES

Table 2-1
 Mine Production Statistics
 Mount Diablo Mercury Mine
 Contra Costa County, California

PRODUCTION STATISTICS-MOUNT DIABLO MINE "MILL WORKINGS"						
Operator	Date	Cubic Yards of Ore Milled	Waste rock from tunnels, crosscuts, raises, shafts and stopes (cubic yards)	Dewater volume (acre-feet)	Mercury Produced, flasks	
Weich	1863	shaft and placer	NA	none	NA	
Unknown	1875-1877	NA	NA	NA	1000	
Mt. Diablo Quicksilver MC, operator Ericson leased to Bradley MC	1930-1936	NA	NA	NA	739	
leased Ronnie B. Smith	1936-1951	78,188 ⁽¹⁾	24,815 ⁽²⁾	161 ⁽³⁾	10,455	
DMEA and Smith	Sept 1951- June 1953	920 ⁽⁴⁾	NA	NA	125 ⁽⁵⁾	
leased to Cordero MC	June 1953 - Jan 1954	none	630 ⁽⁶⁾	minor	none	
leased to Nevada Scheelite Corp.	Jan 1954 - Feb 1954	none	67 ⁽⁷⁾	NA	none	
	Nov 1954 - Dec 1955	none	1,228 ⁽⁸⁾	19.5 ⁽⁹⁾	none	
	1956	none	see note ⁽¹⁰⁾	see note ⁽¹⁰⁾	none	
Total Cubic Yards of Material Taken Out			105,848 ⁽¹¹⁾			

Notes:

- ⁽¹⁾ Table 4, Ross 1958, reported 126,664 tons of ore milled. Converted here to cubic yards above based on conversion of 1.62 tons per cubic yard (cy).
- ⁽²⁾ Total length of workings 4,570 ft (Pampeyan 1963, p 25) x 5 feet x 7 feet x bulking factor plus 20% = 7,108 cy less (2) and (3). Included 550 ft of shafts and raises (935 cy) and stopes of 19,000 cy (Pampeyan, Plate 5).
- ⁽³⁾ Estimate 10 gpm for 10 years.
- ⁽⁴⁾ Used the ratio of ore milled to flasks produced for Bradley to estimate the amount of ore milled by Smith.
- ⁽⁵⁾ DMEA internal memo dated 2/4/57. ref doc no. 2:88/384
- ⁽⁶⁾ 300-ft DMEA shaft 4.5 ft x 8.5 ft (Ross 1958) plus 77 ft of tunnel at 5 ft x 7 ft on the 360 level w/ bulking factor of 20%.
- ⁽⁷⁾ 43 ft of tunnel on the 360 level x 5 feet x 7 feet w/ bulking factor of 20%.
- ⁽⁸⁾ 790 ft of crosscuts and drifts on the 360 level (Pampeyan, and Sheahan 1957) x 5 feet x 7 feet w/ bulking factor of 20%.
- ⁽⁹⁾ Best guess; 90 gpm for 27 days to dewater the mine (ref: DMEA payment records to Smith for same) and 200 days at 10 gpm.
- ⁽¹⁰⁾ In 1956 the Nevada Scheelite Company leased the mine and installed a deep-well pump to remove water which had risen to a point 112 feet below the collar of the shaft. Since the downstream ranchers objected to the discharge of acid mine water into the creek this work was suspended. Attention was then directed to the open pit where some exploration was done using wagon drills. A small tonnage of retort-grade ore was developed. Since this was not sufficient to satisfy the requirements of the company the lease was relinquished (Division of Mines, 1958).
- ⁽¹¹⁾ Sum of Ore Milled and Waste Rock

Table 2-2
Estimated Waste Volumes
 Mount Diablo Mercury Mine
 Contra Costa County, California

Waste Material For Removal and Consolidation	Surface Area (Square Feet)	Thickness (Feet)	Volume (Cubic Yards)
Main Tailings Pile (uncapped portion)			
Area 1 - Known Thickness	98,604	24	87,648
Area 2 - Estimated Thickness	17,650	15	9,806
Area 3 - Estimated Thickness	36,964	3.5	4,792
Calcines	20,364	10	7,542
Pond Sediments	72,570	3.5	9,407
Pond Impoundment Materials	8,112	8	2,404
Waste Below Impoundment	21,400	3	2,378
Total Waste For Removal			123,976

Notes:

- 1) Area 1 thickness determined by 1938 topo map comparison to 2010 topo map. Coverage was limited.
- 2) Pond sediment thickness is based on estimate provided by Iovenetti, 1989.
- 3) Remaining thickness values are estimates based on site review and topographic interpolation.

EXHIBIT 36

Central Valley Regional Water Quality Control Board

8 June 2012

Bill Morse
Sunoco, Inc.
1735 Market Street, Ste. LL
Philadelphia PA 19103-7583

SITE REMEDIATION WORK PLAN, MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

Central Valley Regional Water Quality Control Board staff has reviewed the Site Remediation Work Plan, Mount Diablo Mercury Mine (Work Plan), submitted on 9 May 2012. The Work Plan reviews the Mount Diablo Mine site status based on investigation results to date, proposes a remedial action approach and leaves detailed planning to be addressed in later submittals. The proposed remedial action involves excavating and transporting mine waste rock, calcines and Lower Pond sediments to a waste consolidation area; capping the consolidated wastes; capturing and re-routing spring/adit discharges to minimize their exposure to mercury contaminated wastes and soils; and restoring the Dunn Creek floodplain below the mine. The Work Plan in general provides: an evaluation of water quality; a health risk assessment; scopes of work for mine wastes removal, spring/adit discharge management, and long-term maintenance and monitoring; waste removal design methods and procedures; and a general project schedule.

We have three concerns that may be significant issues as Mount Diablo cleanup progresses:

1. An adequate supply of clean soil suitable for use as a soil cover should be identified as soon as possible.
2. We cannot be sure that the spring/adit discharges have not been impacted by interaction with mine waste until the existing waste pile has been removed.
3. Long-term monitoring and maintenance should be addressed early in the project planning process.

Staff concurs with the remedial action approach proposed in the Work Plan and recognizes that more detailed planning will occur at a later date. Water Board staff anticipates further enforcement to finalize the remedial action plan and require cleanup.

If you have any questions concerning this matter, please contact me at (916) 464-4614 or via email at ratkinson@waterboards.ca.gov.



ROSS ATKINSON
Engineering Geologist
Title 27 Permitting and Mines Unit

- cc: Patrick Pulupa, Office of the Chief Counsel, SWRCB, Sacramento
Julie Macedo, Office of Enforcement, SWRCB, Sacramento
Gary Riley, Superfund Project Manager, USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Laura Whitney, US Army corps of Engineers, Sacramento
Roy Stearns, Deputy Director, Dept. of Parks and Recreation, Sacramento
Stephen Bachman, State Parks, Mt Diablo Vista Dist., Petaluma
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
Paul Ward, Asst. General Counsel, Kennametal, Latrobe PA
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Joseph Freudenberg, Dilworth Paxson LLP, Philadelphia, PA
Paul Horton, The Source Group, Inc. Pleasant Hill

RDA:T:\R5S Sections\Title27 Permitting Confined Animal\Staff\AtkinsR\MtDiablo\RemedWrkPln_ok.doc

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JUN 11 2012

EDGCOMB LAW GROUP

EXHIBIT 37

**ASSURANCE COMPANY OF AMERICA, Plaintiff, v. CAMPBELL CONCRETE
OF NEVADA, INC., et al., Defendants.**

2:11-CV-00559-PMP-CWH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

2011 U.S. Dist. LEXIS 145845

**December 19, 2011, Decided
December 19, 2011, Filed**

COUNSEL: [*1] For Assurance Company Of America, Plaintiff: Abran E. Vigil, LEAD ATTORNEY, Timothy R. Mulliner, Ballard Spahr, Las Vegas, NV.

For Campbell Concrete of Nevada, Inc., Campbell Concrete, Inc., SRC Enterprises, Inc., Sterling Trenching, Inc., Southwest Management, Inc., Steven R Campbell, as Trustee, on behalf of Campbell Family Trust, on behalf of Campbell Concrete of Nevada, Inc., on behalf of SRC Enterprises, Inc., on behalf of Sterling Trenching, Inc., doing business as, doing business as, SRC Sole Proprietorship, Defendants: Andre J. Cronthall, PRO HAC VICE, Catherine K. La Tempa, PRO HAC VICE, Shepard Mullin Richter & Hampton LLP, Los Angeles, CA; Ryan M. Lower, Steve L. Morris, Morris Peterson, Las Vegas, NV.

JUDGES: PHILIP M. PRO, United States District Judge.

OPINION BY: PHILIP M. PRO

OPINION

ORDER

Before the Court is Defendant Steven R. Campbell's Motion to Dismiss; or, Alternatively, Motion for More Definite Statement (Doc. #26), filed on June 30, 2011. Plaintiff Assurance Company of America filed a Response (Doc. #32) on July 18, 2011. Defendant Steven R. Campbell filed a Reply (Doc. #34) on July 28, 2011.

Also before the Court is Defendants Campbell Concrete of Nevada, Inc.; Campbell Concrete, Inc.; and [*2] Sterling Trenching, Inc.'s Motion to Dismiss; or, Alternatively, Motion for More Definite Statement (Doc. #27),

filed on June 30, 2011. Plaintiff Assurance Company of America filed a Response (Doc. #31) on July 18, 2011. Defendants filed a Reply (Doc. #35) on July 28, 2011. The Court held a hearing on these Motions on September 27, 2011. (Mins. of Proceedings (Doc. #42).)

I. BACKGROUND

This is an insurance dispute for the recovery of unpaid deductibles and account stated. The plaintiff, Assurance Company of America ("Assurance"), issued four insurance policies to Defendants. The first policy covered the term September 1, 2000 to September 1, 2001 and covered as Named Insureds Campbell Concrete of Nevada, Inc.; Campbell Concrete, Inc.; Sterling Trenching FRC; and Southwest Management, Inc. (Def. Southwest Management Inc.'s Mot. to Dismiss (Doc. #17) ["MTD"], Ex. A at 1.) The second policy term covered September 1, 2001 to September 1, 2002, and covered as Named Insureds Campbell Concrete of Nevada, Inc.; SRC Enterprises, Inc.; Sterling Trenching FRC; SRC Sole Proprietorship; Southwest Management, Inc.; and the Campbell Family Trust. (Pl.'s Resp. to Southwest Management Inc.'s Mot. to [*3] Dismiss (Doc. #18) ["Opp'n to MTD"], Ex. 1 at 5, 7.) The third policy covered the period September 1, 2000 to September 1, 2001 and covered as Named Insureds Campbell Concrete, Inc.; SRC Enterprises, Inc.; Sterling Trenching Inc.; SRC Sole Proprietorship; and Southwest Management, Inc. (Southwest MTD, Ex. B at 1.) The fourth policy covered the term September 1, 2001 to September 1, 2002 and covered as Named Insureds Campbell Concrete Inc.; SRC Enterprises Inc.; Sterling Trenching Inc.; SRC Sole Proprietorship, and Southwest Management Inc. (Opp'n to MTD, Ex. 2 at 4-5.)

Pursuant to the policies, Assurance agreed to insure the named insureds for certain losses incurred as part of the named insureds' contracting businesses. Each of the four policies contained the following identical language regarding deductibles:

We may pay any part or all of the deductible amount to effect settlement of any claim or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.

(Opp'n to MTD, Ex. 1.) The policy defines "we" and "us" as Assurance, and "you" and "your" as "the Named Insured shown in the Declarations, and any [*4] other person or organization qualifying as a Named Insured under this policy." (Id.) Each of the four policies also contained a "Separation of Insureds" clause:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

(Id.)

Assurance brought suit in this Court, contending that it paid claims for Defendants, and Defendants owe Assurance for deductible payments Assurance made on Defendants' behalf in settling or paying those claims. Assurance also asserts a claim for account stated. Assurance contends it sent Defendants bills for at least some of the deductibles and Defendants did not contest they were liable for those sums.

Defendant Southwest Management, Inc. previously filed a Motion to Dismiss (Doc. #17), in which it argued that because the policies contained a separation of insureds clause, only the Named Insured against whom the claim was made owed the deductible. Southwest Management, Inc. also argued the account stated claim was too indefinite [*5] because it did not identify which Defendant owed how much and based on what circumstances. Assurance opposed the motion, arguing that because the policy stated that "you" were responsible for deductibles, and "you" was defined as any Named Insured, all Named Insureds were liable for the deductible regardless of whether the claim at issue was made against that Named Insured. Assurance also argued that it ade-

quately pled an account stated claim, as it identified the amount for which it billed Defendants and Defendants did not object or disclaim that they owed that amount. On July 1, 2011, the Court summarily denied Defendant Southwest Management, Inc.'s Motion to Dismiss (Doc. #28).

In the meantime, Defendant Steven R. Campbell ("Campbell") filed a Motion to Dismiss (Doc. #26), as did Defendants Campbell Concrete of Nevada, Inc.; Campbell Concrete, Inc.; SRC Enterprises, Inc.; and Sterling Trenching, Inc. (Doc. #27). These two motions raise the same issues regarding policy interpretation and lack of definiteness on the account stated claim as the prior motion. Campbell's motion also challenges his liability as a former president, director, or shareholder of some of the other Defendants [*6] under various provisions of California and Nevada law related to dissolved corporations.

II. DISCUSSION

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, the Court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the plaintiff's complaint. See *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Such allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Id.* at 555.

A. Separation of Insureds Clause

This Court already denied Defendant Southwest Management, Inc.'s Motion to Dismiss based on the same arguments presented by [*7] the moving Defendants. Defendants may ultimately prevail on this issue, but the Court concludes that at this stage, discovery relating to the understanding of the parties regarding the policy at issue is warranted. The Court therefore will deny Defendants' Motions to Dismiss on this basis.

B. Motion for More Definite Statement

The Court also previously denied Defendant Southwest Management, Inc.'s Motion to Dismiss or for a More Definite Statement on the account stated claim. California and Nevada law generally are in accord on what constitutes an account stated claim. "An account stated may be

broadly defined as an agreement based upon prior transactions between the parties with respect to the items composing the account and the balance due, if any, in favor of one of the parties." *Old West Enters., Inc. v. Reno Escrow Co.*, 86 Nev. 727, 476 P.2d 1, 2 (Nev. 1970). To establish an account stated claim, a plaintiff must show: "(1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount [*8] due." *Zinn v. Fred R. Bright Co.*, 271 Cal. App. 2d 597, 76 Cal. Rptr. 663, 665-66 (Cal. App. Ct. 1969) (citations omitted).

However, Nevada appears to be more strict on what a plaintiff must allege in terms of agreement about the amount due. California implies the promise if the creditor sends a statement to the debtor and the debtor fails to object to the statement within a reasonable time. *Id.*; *Levy v. Prinzmetal*, 134 Cal. App. 2d Supp. 919, 286 P.2d 1023, 1025 (Cal. App. Dep't Super. Ct. 1955) ("Thus if a creditor renders to a debtor a bill or invoice reflecting a charge in a stated amount arising out of transactions previously had between them, and the debtor makes no protest as to the amount shown due, his silence is equivalent to express assent to the correctness thereof, and gives rise to an account stated . . ."). In contrast, the Nevada Supreme Court indicated in *Old West Enterprises* that "silence on the part of the one receiving the account" may suffice to raise a rebuttable inference of an implied agreement between the parties, but "the circumstances must be such as to support an inference of agreement as to the correctness of the account." 476 P.2d at 2-3. In *Saye v. Paradise Memorial Gardens, Inc.*, the Nevada Supreme Court [*9] affirmed the district court's dismissal of an account stated claim where the plaintiff "purportedly submitted a document entitled 'Statement of Account' . . . demanding reimbursement for goods and services rendered." 92 Nev. 526, 554 P.2d 274, 275 (Nev. 1976). The Nevada Supreme Court found "no agreement, express or implied, regarding the obligation, nor the amount thereof, [was] apparent . . . from the record." *Id.* Consequently, it appears the bare allegation that a plaintiff sent a defendant a statement and the defendant did not respond will not suffice.

Here, Assurance alleges Assurance and Defendants entered into the insurance contracts as set forth above, that Defendants received the benefits of the insurance contracts, that Assurance paid deductibles which Defendants owe, that Assurance invoiced Defendants and demanded payment for amounts due, and Defendants did not dispute, challenge, or object to the invoices. Assurance also alleges specific amounts due on the statement of account under the Nevada policies (\$29,128.53) and California policies (\$176,581.50). These allegations suffice under

California law, as silence in the face of a statement of account raises an inference of agreement [*10] that the amount is owed. It is less clear under Nevada law that Assurance's allegations are sufficient without some further "circumstances" to support an inference that Defendants agreed to pay the obligation, including the amount owed. The *Saye* case suggests that merely sending an invoice to which a defendant does not respond is not sufficient. This Court already has denied Defendant Southwest Management, Inc.'s Motion on the same basis, and it is not clear from Nevada law what more Assurance would have to allege to show an implied promise to pay the amount set forth in the statement of account to which Defendants did not object. The Court therefore similarly will deny Defendants' alternative Motions for a More Definite Statement.

C. Steven R. Campbell

Defendant Campbell challenges the claims against him on additional grounds not applicable to the entity Defendants. Campbell argues he is not liable as a director or shareholder for any of the Nevada corporate defendants because under Nevada law a trustee of the assets of the dissolved corporation is liable only for debts the corporation owed at the time of dissolution, and Assurance expressly pled that the obligations at issue here did [*11] not arise until after dissolution. Campbell argues that he cannot be liable as a shareholder of Campbell Concrete Inc. because that company is a dissolved California corporation, and under California law, any claims against a shareholder must be brought within four years after dissolution of the corporation or the running of the statute of limitations, whichever is earlier. Campbell argues that because Campbell Concrete Inc. was dissolved in January 2004, any complaint against it had to be filed by January 2008, and this suit was not filed until 2011. Campbell also argues he is not liable as a director of Campbell Concrete Inc. because any claim against him as a director had to be brought within three years of dissolution.

The Complaint asserts claims against Campbell in several capacities: (1) as the president, director, and shareholder for Nevada entities Campbell Concrete of Nevada, Inc., SRC Enterprises, Sterling Trenching, Inc., and Southwest Management, Inc.; (2) as the president, director, and shareholder of Campbell California; (3) as the sole proprietor of SRC Sole Proprietorship; and (4) as the trustee for the Campbell Trust. Campbell does not challenge his status in the case [*12] with respect to (3) and (4) except with respect to the separation of insureds clause argument discussed previously. Consequently, the Court will deny the motion with respect to those two capacities.

1. Nevada Corporations

Under Nevada law as it existed at the time the companies at issue in this case dissolved, upon the dissolution of a Nevada corporation, "the directors become trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, real and personal, and divide the money and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations." *Nev. Rev. Stat. § 78.590* (2010).¹ A corporation's dissolution "does not impair any remedy or cause of action available to or against it or its directors, officers or shareholders arising before its dissolution and commenced within 2 years after the date of the dissolution." *Id. § 78.585* (2010). Further, the persons who become trustees under § 78.590 are subject to suit "for the debts owing by the corporation at the time of its dissolution, and shall be jointly and severally responsible for such debts, to the amounts of the moneys [*13] and property of the corporation which shall come into their hands or possession." *Id. § 78.595* (2010). The Nevada Supreme Court interpreted § 78.585 to apply only to pre-dissolution claims, and "the finality of post-dissolution claims [is] determined by the statutes of repose or limitation applicable to the post-dissolution cause of action." *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 575, 97 P.3d 1132, 1138 (Nev. 2004).

1 In 2011, Nevada amended the relevant provisions, including repealing § 78.585. However, the parties have not suggested that the amendments apply retroactively to corporations which dissolved prior to 2011.

The Complaint alleges that Campbell Concrete of Nevada, Inc.; SRC Enterprises; and Sterling Trenching, Inc. were dissolved on January 1, 2008. There is no allegation that Southwest Management, Inc. has been dissolved, and therefore Campbell's argument has no application to Assurance's claims against him with respect to Southwest Management, Inc.

As to the other Nevada entities, § 78.595 limits liability as a director to "debts owing by the corporation at the time of its dissolution." Assurance expressly pleads that the present obligations did not arise until after [*14] dissolution. Consequently, Campbell has no liability as a former director for disbursing the dissolved corporations' assets because the present debts were not known at the time of dissolution.

However, § 78.595 refers only to Campbell's status as a director, not as a shareholder. Under Beazer, the two-year bar for claims against a shareholder of a dissolved corporation in § 78.585 applies only to pre-dissolution claims. Because Assurance alleges its claims arose post-dissolution, the two-year bar does not apply to Campbell in his role as shareholder. It is not clear, however, whether Nevada allows suit against a

shareholder for a post-dissolution claim. Beazer makes the following ambiguous statement in a footnote:

Whether the dissolved corporation can be sued under the name of the corporation after the expiration of the two-year period or an action should be brought against directors or shareholders as trustees will depend on the timing of the suit and whether the corporation is still in the process of winding up its affairs. See *NRS 78.590*; *NRS 78.600*; *Seavy v. I.X.L. Laundry Co.*, 60 Nev. 324, 108 P.2d 853 (1941).

97 P.3d at 1138 n.35. Section 78.590 discusses liability of directors [*15] as trustees upon dissolution but says nothing about shareholders. Section 78.600 discusses appointment of trustees or receivers to wind up a corporation but likewise says nothing about shareholders. Seavy involved a situation where the individual stockholders were personally liable because although they dissolved the corporation, they continued to operate the business, and did not simply wind up the business's affairs. 108 P.2d at 856. Seavy does not hold or suggest that where a corporation observes all corporate formalities, properly winds up its affairs, and distributes any remaining assets to shareholders, a shareholder becomes a trustee to creditors with unknown post-dissolution claims.

Nevada's statutory provisions provide that shareholders are not liable for the corporation's debt unless specifically provided for by statute or in the articles of incorporation. See *Nev. Rev. Stat. § 78.225* ("Unless otherwise provided in the articles of incorporation, no stockholder of any corporation formed under the laws of this State is individually liable for the debts or liabilities of the corporation."), § 78.747 ("Except as otherwise provided by specific statute, no stockholder, director [*16] or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation."). No statutory section provides for suit against a shareholder for post-dissolution claims for corporate funds distributed to the shareholder.

Assurance does not identify any law supporting such a claim except for Beazer and the trust fund theory, which Beazer acknowledged some courts have adopted but did not specifically adopt itself. Beazer's holding loses some significance if a person can sue a corporation for claims discovered post-dissolution but cannot recover any disbursed assets from shareholders. But California has interpreted its own law in exactly this fashion:

We perceive nothing unreasonable or improbable in a construction that permits enforcement of postdissolution claims against dissolved corporations but not against their shareholders. . . .

At some point, shareholders should be permitted to recover their investments in a defunct corporation and put the funds to other uses free of claims by the dissolved corporation's creditors. . . . Because the distribution of assets occurs before dissolution, [*17] not after, and because no provision need be made for postdissolution claims, recognizing a plaintiff's right to sue a dissolved corporation on a postdissolution claim will not delay or complicate either the distribution of assets or the filing of the certificate of dissolution.

Once the corporation's assets have been properly distributed to the shareholders, the assets are beyond the reach of plaintiffs who possess claims that arose after dissolution. This means that bringing suit against a dissolved corporation on a postdissolution claim will often be a pointless exercise, because the corporation will have no assets with which to satisfy a judgment against it.

Penasquitos, Inc. v. Superior Ct., 53 Cal. 3d 1180, 1190-91, 283 Cal. Rptr. 135, 812 P.2d 154 (Cal. 1991) (internal citations omitted). The California Supreme Court noted that a plaintiff likely will not bring a claim against a dissolved corporation where there is no prospect of recovery, but such a suit may be worth pursuing if the plaintiff can recover from "the dissolved corporation's liability insurance, from undistributed assets, or from assets of the corporation discovered after dissolution." *Id.* at 1191; see also *Canarelli v. Eighth Jud. Dist. Ct.*, ___ P.3d ___, 2011 Nev. LEXIS 89, 2011 WL 5508990, *5 (Nev. 2011) [*18] (recognizing the "practical problems created for plaintiffs who bring post-dissolution claims against corporations who have successfully wound up their affairs," but noting "[o]nly the Legislature can reconsider the Model Business Corporation Act of 1984, which extends the statute of limitations against corporations for post-dissolution claims in a manner that addresses not only the right to pursue claims but also the party who must be responsible for defending the corporation in post-windup litigation."). Although Nevada has not given clear guidance on the point, the Court concludes Campbell is not liable as a shareholder for any

post-dissolution claims that were unknown at the time the Nevada corporations were dissolved, as there is no statutory basis for such a claim and Assurance has not identified any case law showing Nevada has adopted the trust fund theory in the face of statutory provisions limiting shareholder liability.

2. California - Campbell Concrete, Inc.

Under California law, the board of a dissolving corporation may distribute to shareholders any remaining assets after it has determined that "all the known debts and liabilities of a corporation in the process of winding [*19] up have been paid or adequately provided for." *Cal. Corp. Code* § 2004. California provides that a plaintiff may assert claims against a shareholder of a dissolved corporation, "whether arising before or after the dissolution of the corporation," "to the extent of their pro rata share of the claim or to the extent of the corporate assets distributed to them upon dissolution of the corporation, whichever is less." *Cal. Corp. Code* § 2011(a)(1)(B). A plaintiff must bring suit against the shareholder either prior to the applicable statute of limitations expiring or within four years "after the effective date of the dissolution of the corporation," whichever is earlier. *Cal. Corp. Code* § 2011(a)(2). The effective date is the date the corporation files the certificate of dissolution with the Secretary of State. *Cal. Corp. Code* § 1905.1. A director, on the other hand, is liable for distributing assets of a dissolved corporation to shareholders only if he does so "without paying or adequately providing for all known liabilities of the corporation." *Cal. Corp. Code* § 316(a)(2); see also *id.* § 316(c) (providing that a plaintiff may bring suit against the directors if the plaintiff's "debts or [*20] claims arose prior to the time" the director distributed the assets to the shareholders).

Assurance alleges Campbell Concrete, Inc. was a California corporation that was dissolved on May 6, 2004. The Court will dismiss the claims against Campbell based on his capacity as shareholder or director of Campbell Concrete, Inc. Assurance expressly pleads that its causes of action arose after dissolution. Campbell as director therefore is not liable because these obligations were not "known" at the time the dissolved corporation's assets were distributed under *section 316(a)(2)*. He also is not liable as a shareholder because *section 2011(a)(2)* requires that any such claim be brought within four years after dissolution or prior to the expiration of the statute of limitations, whichever is earlier. Here, four years after dissolution would be May 2008. This case was not filed until 2011. Assurance's claims against Campbell as shareholder therefore are untimely.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Steven R. Campbell's Motion to Dismiss; or, Alternatively, Motion for More Definite Statement (Doc. #26) is hereby GRANTED in part and DENIED in part. The motion is granted in that Plaintiff [*21] Assurance Company of America's claims against Defendant Steven R. Campbell are hereby dismissed to the extent they are based on Steven R. Campbell's role as an officer, director, or shareholder of Campbell Concrete of Nevada, Inc.; SRC Enterprises; Sterling Trenching, Inc.; or Campbell Concrete, Inc. The Motion is denied in all other respects.

IT IS FURTHER ORDERED that Defendants Campbell Concrete of Nevada, Inc.; Campbell Concrete, Inc.; and Sterling Trenching, Inc.'s Motion to Dismiss; or, Alternatively, Motion for More Definite Statement (Doc. #27) is hereby DENIED.

DATED: December 19, 2011

/s/ Philip M. Pro

PHILIP M. PRO

United States District Judge

EXHIBIT 38



1 of 3 DOCUMENTS

In the Matter of the Petitions of ALUMINUM COMPANY OF AMERICA; ALCOA CONSTRUCTION SYSTEMS, INC.; and CHALLENGE DEVELOPMENTS, INC., For Review of Waste Discharge Requirements Order No. 92-105 of the California Regional Water Quality Control Board, San Francisco Bay Region. Our File Nos. A-792, A-815 and A-815(a)

Order No. WQ 93-9

State of California
State Water Resources Control Board

1993 Cal. ENV LEXIS 17

July 22, 1993

BEFORE: [*1] John Caffrey, Marc Del Piero, James M. Stubchaer, Mary Jane Forster, John W. Brown

OPINIONBY: BY THE BOARD

OPINION:

On March 18, 1992, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), adopted waste discharge requirements in Order No. 92-028. The Order established cleanup and closure requirements for an inactive sulfur mining site located in the Oakland Hills. The Order was issued to Ridgemont Development Company and Ridgemont Development Company dba Watt Homes of Northern California, as the current owners of the site, and to Alcoa Aluminum Company of America (Alcoa), as a former owner. Alcoa subsequently filed a petition for review of Order No. 92-028 with the State Water Resources Control Board (State Water Board or Board), alleging that Alcoa was improperly named as a discharger.

On August 19, 1992, the Regional Water Board adopted a new order, No. 92-105, superseding Order No. 92-028. Order No. 92-105 differed from Order No. 92-028 by the addition of several new responsible parties. n1 These included two corporations, Alcoa Construction Systems, Inc. (ACS) and Challenge Developments, Inc. (CDI), which were subsidiaries of a subsidiary of Alcoa. [*2] After adoption of Order No. 92-105, the two subsidiaries filed petitions for review with the Board, contending that they were not liable for cleanup of the site. Alcoa also renewed its petition for review.

n1 Order No. 92-105 lists Ridgemont Development, Inc. and Watt Residential, Inc. and Watt Industries/Oakland, Inc. dba Ridgemont Development, Inc. as the current property owners. The following parties were also named as dischargers: Watt Industries/Oakland, Inc.; Watt Residential, Inc.; Watt Housing Corporation; CDI; ACS; AP Construction Systems, Inc.; F. M. Smith and Evelyn Ellis Smith; Realty Syndicate; and Alcoa.

The three petitions are factually and legally related. They have, therefore, been consolidated for purposes of review by the Board. See 23 C.C.R. Sec. 2054.

I. BACKGROUND

The Leona Heights Sulfur Mine was apparently operated from the early 1900s to about 1930 by the Leona Chemical Company. n2 The site, which comprises about two acres, is located in a steep ravine in the hills of Oakland. [*3] Sulfur-bearing ore was mined at the site for the manufacture of sulfuric acid. The site is currently inactive.

n2 According to technical reports submitted to the Regional Water Board by consultants for Ridgmont Development Company, historical documents identify Leona Chemical Company as the operator. However, other evidence in the record indicates that the operator may have been either Oakland Chemical Company and Leona Chemical Company or Stauffer Mining Company.

Remnants of previous mining activity consist of mine adits, or horizontal mine tunnels, extending into the hillside; iron rails; residual crushed ore, or mine tailings; and waste rock. The site contains three tailings piles, which produce drainage when they come in contact with water. The drainage is highly acidic and contains elevated concentrations of dissolved metals. n3 A spring-fed perennial stream emerges from a mine adit buried in one of the tailings piles. Ephemeral streams also pass through the site. Runoff flows from the site enter a storm [*4] drain, which discharges to Lake Aliso on the Mills College Campus and ultimately discharges to San Leandro Bay via another storm drain system.

n3 The results of surface water samples of drainage from the mine showed pH values ranging from 2.9 to 4.4 units. The applicable water quality objective for pH in that watershed is 6.5 to 8.5. Copper concentrations measured during wet weather were as high as 32,000 micrograms per liter (ug/l). The water quality objective for copper is 40 ug/l. Similarly, zinc levels were high, ranging up to 13,000 ug/l, as compared to the objective of 327 ug/l.

On July 22, 1991, Ridgmont Development Company submitted a report of waste discharge, consisting of a mine closure and post-closure maintenance plan, for the site. On March 18, 1992, the Regional Water Board adopted waste discharge requirements in Order No. 92-028 for cleanup and closure of the site. These requirements were superseded by requirements adopted on August 19, 1992 in Order No. 92-105.

II. CONTENTIONS AND FINDINGS [*5]

1. Contention: Alcoa contends that it cannot be considered a discharger under Order No. 92-105 because it was never an owner or operator of the Leona Heights Sulfur Mine. Alcoa further contends that it cannot be considered liable as either the successor or alter ego of CDI or ACS.

Findings: Alcoa was neither an owner nor an operator of the Leona Heights site. CDI and ACS both held an ownership interest in the mining site at one time. CDI has been dissolved, and ACS was sold to another company. Ridgmont Development Company urges the Board, therefore, to hold Alcoa liable as the alter ego of CDI and ACS.

In 1964 CDI, a California corporation, became a wholly owned subsidiary of Alcoa Properties, Inc., a Delaware corporation, which is a subsidiary of Alcoa. From 1972 to 1980, CDI held a 50 percent interest in a partnership which owned the mining site. In April of 1990 CDI was dissolved.

ACS was also a wholly owned subsidiary of Alcoa Properties, Inc. From 1980 through 1986 ACS held a 50

percent interest in a partnership, known as Caballo Hills Development Company, which became Ridgemont Development Company. In October of 1986 Alcoa Properties, Inc. sold all of the [*6] stock of ACS to AP Ventures, Inc. AP Ventures, Inc. changed the name of ACS to AP Construction Systems, Inc. and, two months later, conveyed all of AP Construction Systems, Inc.'s partnership interest in Ridgemont Development Company to Watt Housing Corporation. AP Ventures, Inc. is still apparently in existence as a real estate investment trust.

There is no evidence in the record indicating that Alcoa was in fact the successor of CDI or ACS. Further, we conclude that there is insufficient evidence in the record to hold Alcoa liable as the alter ego of CDI or ACS.

In certain circumstances, a parent corporation will be held liable for the actions of its subsidiary. In those cases, the parent corporation is said to have acted as the alter ego of the subsidiary. n4

n4 Generally, the shareholders of a corporation are not liable for the actions of the corporation. The shareholders are said to be protected by the corporate veil. However, in certain circumstances the courts have disregarded the corporate entity and held the individual shareholders liable as the alter ego of the corporation. See 9 Witkin, Summary of California Law (9th ed. 1989), Corporations, Sec. 12, pp. 524-526. The alter ego doctrine is based on equitable considerations. Thus, the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require. *Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 301, 216 Cal.Rptr. 443, 702 P.2d 601 (1985).

Whether it is appropriate to pierce the corporate veil in a given case will depend on the particular circumstances of that case. *Id.* at 300. In general, two factors must be present. These are: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." *Id.*, citing *Automotriz del Golfo de Cal. v. Resnick*, 47 Cal.2d 792, 796, 306 P.2d 1 (1957). The same principles apply where the shareholder sought to be held liable is another corporation instead of an individual. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal.App.3d 1220, 1249, 1 Cal.Rptr.2d 301 (1991).

[*7]

More is required, however, than solely a parent-subsidary corporate relationship to create liability of a parent for the actions of its subsidiary. *Walker v. Signal Companies, Inc.*, 84 Cal.App.3d 982, 1001, 149 Cal.Rptr. 119 (1978). Rather, where, in addition to stock ownership, there is relatively complete management and control by the parent so "as to make [the subsidiary] merely an instrumentality, agency, conduit, or adjunct of" the parent, the alter ego doctrine will be applied. *McLoughlin v. L. Bloom Sons Co., Inc.*, 206 Cal.App.2d 848, 851-852, 24 Cal.Rptr. 311 (1962).

In this case, circumstantial evidence suggests some degree of involvement by Alcoa in the affairs of CDI and ACS. The evidence indicates, for example, that: (1) Alcoa, CDI, and ACS have been jointly represented by the same counsel throughout the proceedings before the Regional Water Board and this Board; (2) correspondence from Alcoa to the Regional Water Board indicated that Alcoa at one time held an interest in the mining site; n5 (3) the principal executive office and the business address of all of the officers and directors of CDI was the Alcoa headquarters in Pittsburgh; (4) Robert [*8] D. Buchanan, a senior financial officer for Alcoa, also served as a director and vice president of CDI and a director of ACS; and (5) three of the four directors and four of the officers of ACS had their business address at the Alcoa's Pittsburgh office.

n5 See, e.g., letter dated January 23, 1992, from Alcoa to the Regional Water Board ("As you know, Alcoa has not had an interest in this site for several years. Moreover, for the period of time that Alcoa did have an interest in the property, it had no involvement in the day-to-day operations."), and letter dated March 9, 1992, from Alcoa to the Regional Water Board ("Alcoa, which owned the property at issue [the Leona Heights site]

from 1975-1986, was named as a 'discharger' . . ."). Alcoa contends that this correspondence was written before all of the relevant records on the site were retrieved from archives.

On the other hand, Alcoa has introduced evidence into the record indicating that Alcoa was not the alter ego of CDI and ACS. According to the affidavit [*9] of Buchanan, both CDI and ACS were fully capitalized, independently operating companies, with their own boards of directors, assets, and bank accounts. See Exhibit D to petition of Alcoa. Further, the Board notes that Alcoa was one step removed from the two subsidiaries through an intermediary corporation, Alcoa Properties, Inc. On balance, the Board concludes that the evidence in the record is insufficient to support the conclusion that Alcoa exercised the type of pervasive management and control over CDI and ACS which would render Alcoa liable as the alter ego of the two subsidiaries. n6

n6 The Board notes that CDI, a California corporation, was dissolved in 1990. Under California law, if any assets of a dissolved corporation have been distributed to the shareholders, in this case, Alcoa Properties, Inc., an action may be brought against the shareholders. See Corps Code Sec. 2011(a)(1)(B). The Regional Water Board may, therefore, wish to consider whether it would be appropriate to add Alcoa Properties, Inc. to Order No. 92-105.

[*10]

In reaching this conclusion, the Board is aware of the difficulties the Regional Water Boards face when asked to determine whether a particular entity should be considered a discharger. This is particularly true when the determination involves resolution of fairly complex legal issues. And, as the Board noted in Order No. WQ 84-6, "[f]ewer parties named in the order may well mean no one is able to clean up a demonstrated water quality problem". P. 11. Nevertheless, "[t]here must be substantial evidence to support a finding of responsibility for each party named". Id. at pp. 10-11.

2. Contention: CDI contends that it cannot be considered a discharger under Order No. 92-105 because CDI's ownership interest in the mining site predated this Board's regulations on mining wastes.

Finding: CDI held an ownership interest in the Laurel Heights Sulfur Mine from 1972 to 1980. The Board adopted regulations governing the land disposal of mining wastes in 1984. See 23 C.C.R. Sec. 2570-2574.

The mining regulations address both active and inactive mining waste management units. See id. Sec. 2570. They specify siting, construction, monitoring, closure and post-closure maintenance [*11] criteria for these land disposal units. See id. Secs. 2572-2574. Order No. 92-105 implements relevant portions of the mining regulations. See, e.g., Order No. 92-105, Discharge Spec. B.1 (monitoring), Prov. C.2 (financial responsibility).

CDI cites California case law holding that regulations affecting substantive rights may only be applied prospectively to support its position that CDI cannot be held liable. CDI assumes that its liability for cleanup is predicated on the mining regulations. This assumption is erroneous.

Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of administrative regulations. *Union of American Physicians and Dentists v. Kizer*, 223 Cal.App.3d 490, 505, 272 Cal.Rptr. 886 (1990). As a general rule, statutes are not to be given a retroactive interpretation unless that is clearly the legislative intent. *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207, 246 Cal.Rptr. 629, 753 P. 2d 585 (1988). However, as the court stated in *Union of American Physicians and Dentists v. Kizer*, *supra*:

" . . . a statute is not retroactive unless 'it substantially changes [*12] the legal effect of past events.' [Citations omitted.] 'A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citations omitted.]" 223 Cal.App.3d at 505.

The adoption of this Board's mining regulations did not change the legal effect of past events. CDI was unquestionably a waste discharger under the law in effect when CDI held an ownership interest in the mining site. Since 1949 when the Dickey Water Pollution Act, the predecessor of the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq., was enacted, drainage from inactive or abandoned mines has been considered a discharge of waste which is subject to regulation by the Regional Water Boards. See *26 Ops.Cal.Atty.Gen. 88, 90 (1955)*; *27 Ops.Cal.Atty.Gen. 182, 183-185 (1956)*. See also *People v. New Penn Mines, Inc.*, *212 Cal.App.2d 667, 673-674, 28 Cal.Rptr. 337 (1963)* (drainage from mines subject to Regional Water Board regulation). n7 The dischargers are those with legal control over the property. Id.

n7 The legislative history of the Porter-Cologne Water Quality Control Act indicates that the prior Attorney General opinions on mine tailing runoff and liability of the landowner were intended to be incorporated into the definition of "waste" under the act. *63 Ops.Cal.Atty.Gen. 51, 56 (1980)*.

[*13]

Further, even though CDI ceased being an owner in October 1980, CDI could legally be required to clean up the site. Water Code Section 13304 authorizes the Regional Water Board to mandate cleanup by both past and present dischargers. Dischargers who stopped discharging prior to January 1, 1981, are liable under Section 13304 if their acts were in violation of existing laws or regulations at the time they were discharging. Water Code Section 13304(f).

CDI's acts or failure to act were in violation of at least two laws in effect during CDI's land ownership. Since 1872, California law has prohibited the creation or continuation of a public nuisance. See Civ. Code Sec. 3490. Water pollution can constitute a public nuisance. See *People v. Truckee Lumber Co.*, *116 Cal. 397, 48 P. 374 (1897)*. A successor property owner, such as CDI, who fails to abate a continuing nuisance created by a prior owner is liable in the same manner as the prior owner. See *City of Turlock v. Bristow*, *103 Cal.App. 750, 284 P. 962 (1930)*. Additionally, since 1949 California law has prohibited the discharge of waste in any manner which will result in a pollution, contamination, or nuisance. [*14] Health & Safety Code Sec. 5411. For these reasons, the Board finds that the Regional Water Board acted properly in including CDI in Order No. 92-105 as a discharger.

3. Contention: ACS contends that it cannot be held liable because all liability for the site has vested in the current property owner. Alternatively, ACS requests that, if ACS is not removed from Order No. 92-105, the current landowner be held primarily liable and other parties secondarily liable.

Finding: In 1986 AP Ventures, Inc. purchased all of the stock of ACS and changed the name of ACS to AP Construction Systems, Inc. Shortly thereafter, AP Ventures, Inc. contracted with Watt Housing Corporation to convey all of AP Construction Systems, Inc.'s interest in the partnership, Ridgemont Development Company, to Watt Housing Corporation. ACS contends that, by virtue of this agreement, Watt Housing Corporation has acquired all liability for the site.

ACS' contention is without merit. The private contractual arrangements between successive owners of a site are not binding on the Regional Water Boards or this Board and are not determinative of an entity's status as a discharger. Cf. State Water Board Order [*15] No. WQ 86-2, pp. 9-10.

ACS also apparently argues that because a partnership can own property in its own name, liability incurred by the partnership flowing from its land ownership is retained by the partnership, rather than the individual partners. Whether the property in question, in this case, was held in the name of the partnership or the individual partners is not clear from the record. In any event, ACS' contention is inconsistent with California law. Contrary to ACS' assertion, a partnership is not an entity like a corporation, but rather is an association of individuals. See Corps. Code Sec. 15006(1); 9 Witkin, Summary of California Law (9th ed. 1989), Partnerships, Sec. 15, pp. 412-413. In general, the individual partners are jointly and severally liable for the obligations of the partnership. See Corps. Code Sec. 15015. This liability is not

discharged simply because one leaves the partnership. *Alioto v. United States*, 593 F.Supp. 1402, 1413 (1984), citing California Corporations Code Secs. 15013, 15015, 15036.

Having concluded that ACS was properly named in Order No. 92-105, the Board now turns to ACS' request that it be considered secondarily liable for [*16] compliance. The Board concludes that application of this concept is not appropriate here. The current landowners, like ACS and CDI, are considered waste dischargers primarily due to their land ownership. None of these parties actually engaged in the mining activities which resulted in the ongoing discharge. The mine operators, the entity which created the problem, are no longer in existence. Therefore, all of the parties to Order No. 92-105 stand on essentially the same footing and should be treated alike. n8

n8 All of this Board's orders addressing primary versus secondary liability have made a distinction between those parties who were considered responsible parties due solely to their land ownership (or, in one case, their possession of a long-term lease) and those parties who actually operated the facility or otherwise caused the discharge in question. See Order Nos. WQ 86-11 (landowner and operator named in waste discharge requirements; operator primarily responsible for compliance); 86-18 (landowner and manufacturer of semiconductors named in site cleanup requirements; manufacturer primarily responsible); 87-5 (mine operator and landowner named in waste discharge requirements; operator primarily responsible); 87-6 (landowner and lessees/manufacturers of semiconductors named in site cleanup requirements; lessees primarily responsible); 89-1 (landowners and operator of crop dusting business named in cleanup and abatement order; operator primarily responsible); 89-8 (possessor of long-term lease included in cleanup and abatement order together with the parties who caused the release of pollutants; lessee considered secondarily liable along with the landowners); 92-13 (landowners held secondarily liable in cleanup and abatement order; operators considered primarily liable). This distinction has been made primarily for equitable reasons. The Board has concluded that the initial responsibility for cleanup should be with the operator or the party who created the discharge. See e.g., Order No. WQ 89-1, p. 4. The Board has cited several factors which are appropriate for the Regional Water Boards to consider in determining whether a party should be held secondarily liable. These include: (1) whether or not the party initiated or contributed to the discharge; and (2) whether those parties who created or contributed to the discharge are proceeding with cleanup. See Order Nos. WQ 87-6 and 89-8.

[*17]

4. Contention: CDI and ACS contend that additional parties who held an ownership interest in the site since the creation of the mine should be included in Order No. 92-105.

Finding: For the reasons explained previously, those parties who held an ownership interest in the mining site since the creation of the mine drainage can be considered waste dischargers. To the extent that any of these parties, in addition to those already named in Order No. 92-105, can be identified and located by petitioners, the Regional Water Board may consider including them in Order No. 92-105. We note that the Regional Water Board has demonstrated a willingness to consider inclusion of additional responsible parties in the waste discharge requirements in question here. n9

n9 All other contentions raised by petitioners, which are not discussed in this order, are denied for failure to raise substantial issues appropriate for review. 23 C.C.R. Sec. 2052(a)(1). See *People v. Barry*, 194 Cal.App.3d 158, 139 Cal.Rptr. 349 (1987).

[*18]

III. CONCLUSIONS

1. There is insufficient evidence in the record to hold Alcoa liable as a discharger under Order No. 92-105.

2. Both CDI and ACS were properly named in Order No. 92-105 as dischargers.
3. All parties to Order No. 92-105 should be considered primarily liable for compliance with the order.

IV. ORDER

IT IS HEREBY ORDERED that Regional Water Board Order No. 92-105 is hereby amended to remove references to Alcoa as a discharger on pages 1 and 5 of the Order.

IT IS FURTHER ORDERED that the petitions of Alcoa, ACS, and CDI are otherwise dismissed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities Law Mining Industry Underground Mining Control & Closure Real Property
Law Mining Regulation Real Property Law Torts General Overview

EXHIBIT 39



1 of 99 DOCUMENTS

In the Matter of the Petitions of OCEAN MIST FARMS AND RC FARMS; GROWER-SHIPPER ASSOCIATION OF CENTRAL CALIFORNIA, GROWER-SHIPPER ASSOCIATION OF SANTA BARBARA AND SAN LUIS OBISPO COUNTIES, AND WESTERN GROWERS For Review of Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 Discharges from Irrigated Lands, Monitoring and Reporting Program Order Nos. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03, and Resolution No. R3-2012-0012 Issued by the Central Coast Regional Water Quality Control Board

Order No. WQ 2012-0012

State of California
State Water Resources Control Board

2012 Cal. ENV LEXIS 67

September 19, 2012

BEFORE: [*1] Chairman Charles R. Hoppin, Vice Chair Frances Spivy-Weber, Board Member Steven Moo, Board Member Felicia Marcus, Board Member Tam M. Doduc

OPINIONBY: BY THE BOARD

OPINION:

SWRCB/OCC FILE A-2209(c) -- (d)

ORDER ON REQUESTS FOR STAY

On March 15, 2012, the Central Coast Regional Water Quality Control Board (Central Coast Water Board) adopted Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 for Discharges from Irrigated Lands, and associated Monitoring and Reporting Programs (MRPs) Order Nos. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03, and Resolution No. R3-2012-0012 (collectively referred to herein as the Agricultural Order n1). The State Water Resources Control Board (State Water Board) received timely petitions for review of the Agricultural Order from five groups of petitioners: Monterey Coastkeeper, Santa Barbara Channelkeeper, San Luis Obispo Coastkeeper (collectively, Keepers); Ocean Mist Farms and RC Farms (collectively, Ocean Mist); Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, and Western Growers (collectively, Grower-Shipper); California Farm Bureau Federation, Monterey [*2] County Farm Bureau, San Benito County Farm Bureau, San Luis Obispo County Farm Bureau, San Mateo County Farm Bureau, Santa Barbara County Farm Bureau, Santa Clara County Farm Bureau, and Santa Cruz County Farm Bureau (collectively, Farm Bureau); and Jensen Family Farms, Inc., and William Elliott (collectively, Jensen).

n1 When referring to the Monitoring and Reporting Program Orders individually, this Order will use "Tier 1 MRP," "Tier 2 MRP," and "Tier 3 MRP," respectively.

Ocean Mist and Grower-Shipper submitted complete requests that the State Water Board stay certain provisions of the Agricultural Order pending our resolution of the petitions for review on the merits. n2 On August 30, 2012, we conducted an evidentiary hearing to consider the requests for stay. The parties to the hearing included the Central Coast Regional Board, all five of the petitioners, and Environmental Defense Center, the only non-petitioner that sought party status for the hearing, and evidence submitted by all parties was considered in [*3] the Board's decision. For ease of reference in our discussion, we refer generally to Ocean Mist, Grower-Shipper, Farm Bureau, and Jensen as "the Agricultural Petitioners."

n2 Farm Bureau submitted a statement that it supported the stay request submitted by Grower-Shipper. Jensen requested a stay, but failed to support the request with any declarations, and as a result Jensen's stay request does not meet the minimum standards set by State Water Board regulations, as discussed in Section II of this Order, *infra*.

This Order addresses only the requests for stay submitted by Ocean Mist and Grower-Shipper. For the reasons set forth below, we grant the requests in part and deny the remainder of the stay requests.

I. BACKGROUND

The Central Coast Region has approximately 435,000 acres of irrigated land. The Agricultural Order, adopted pursuant to Water Code section 13269, regulates the discharge of irrigation return flows and storm water from irrigated lands in the region and supersedes a conditional waiver of waste [*4] discharge requirements in effect since 2004 (2004 Agricultural Order). n3 The provisions of the Agricultural Order address discharges to both surface water and groundwater.

n3 While the 2004 Agricultural Order expired in 2009, the Central Coast Water Board or its Executive Officer administratively extended it several times.

The Agricultural Order defines three tiers of agricultural dischargers based on the risk of water quality impacts. A number of criteria are considered in determining the appropriate tier for a discharger. These include the distance of the discharger's farm to a surface waterbody listed as impaired by toxicity, pesticides, nutrients, turbidity, or sediment; whether the discharger applies chlorpyrifos or diazinon; and whether the discharger grows crop types with high potential to discharge nitrogen to groundwater. The Agricultural Order categorizes dischargers that pose the highest threat to water quality as Tier 3 dischargers, and such dischargers face more requirements, including additional monitoring [*5] requirements, compared to dischargers posing a lower threat to water quality in Tiers 1 and 2. The Central Coast Water Board testified that only 110 of the 3,680 dischargers that had submitted Notices of Intent for coverage under the Agricultural Order as of August 2012 are currently categorized as Tier 3 dischargers.

The Central Coast Water Board staggered compliance deadlines for various provisions of the Agricultural Order over the 5-year term of the Agricultural Order. Several provisions that Ocean Mist and Grower-Shipper requested be stayed, including installation of backflow prevention devices, reporting of methods and results for practice effectiveness verification, calculation of the nitrate loading risk, photo documentation of existing conditions of any impaired adjacent streams or wetlands, and submission of annual compliance information for Tier 2 and 3 dischargers, are due on October 1, 2012. Several other provisions of the Agricultural Order, including groundwater monitoring and reporting requirements, determination of typical nitrogen uptake for crop types, and initiation of individual surface water monitoring by Tier 3 dischargers, are due by October 1, 2013. Still [*6] other provisions, including the requirement to manage, construct, and maintain containment structures to avoid percolation of waste to groundwater and to maintain riparian vegetative covers and riparian areas, are not qualified by any time schedule. In addition, the Agricultural Order requires the dischargers to comply with applicable TMDLs and to comply with all water quality standards and applicable water quality control plans.

II. LEGAL STANDARD FOR STAY REQUESTS

Our regulations recognize the extraordinary nature of a stay remedy and place a heavy burden on any person requesting a stay of a regional water quality control board action. n4 California Code of Regulations, title 23, section 2053, subdivision (a), n5 provides that a stay shall be granted when petitioners allege facts and produce proof of all the following three elements:

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

Failure to allege facts and produce proof of **each** of the foregoing [*7] elements will result in a denial of the stay request. The regulations specifically require that a request for stay "shall be supported by a declaration under penalty of perjury of a person or persons having knowledge of the facts alleged." n6 In addition to considering requests for stays, however, the State Water Board may, upon its own motion, stay the effect of a regional board action. n7

n4 State Water Board Order WQ 97-05 (*Ventura County Citizens*), p.4.

n5 All future regulatory references herein are to California Code of Regulations, title 23, section 2053, unless otherwise noted.

n6 § 2053, subd. (a).

n7 *Id.* at subd. (c).

The issue of whether a stay is appropriate must be judged in the temporal sense -- a petitioner must prove there will be substantial harm if a stay is not granted for the period of time while the petitions for review are pending resolution by the State Water Board on the merits. n8 The issue before us is not whether the Agricultural Petitioners might eventually prevail [*8] on the merits of their claims or whether they will suffer harm over the term of the Agricultural Order, but the narrower issue of whether the Agricultural Petitioners have carried their burden of proving all three elements during the period of time while the State Water Board is reviewing the petitions on the merits. n9

n8 Petitioners projected that the petitions for review may be pending before the State Water Board through December 2013. Due to the extremely important nature of the Agricultural Order, however, the State Water Board will give these petitions for review a high priority. The State Water Board expects that it will resolve these petitions for review in less than a year.

n9 State Water Board Order WQ 2006-0007 (*Boeing Company*), p.4.

In the last decade, we have issued a handful of decisions granting or denying a stay. Stay determinations are very fact-specific, and most decisions are designated as non-precedential. n10 Therefore the analysis in one decision may have limited applicability to [*9] the analysis of another. One position from a non-precedential decision that has nevertheless been repeated in a few of our decisions is that the State Water Board "will not grant a stay merely because the party requesting it must incur some expense, even a substantial one." n11 We take this opportunity to disapprove that statement. A substantial cost alone may meet the first prong of a stay determination if the requesting party shows that it constitutes substantial harm. Such a conclusion is consistent with the language of our regulations, and the purposes of extraordinary, interim relief.

n10 Precedential decisions have included State Water Board Orders WQ 2006-0007, *supra*, and WQ 2001-09 (*Pacific Lumber Company*).

n11 State Water Board Order WQO 2003-0010 (*County of Sacramento*) (non-precedential order), at p. 4.

Another position consistently emphasized in our decisions is the extraordinary nature of a stay. n12 On this point, we re-affirm our position that a stay is indeed extraordinary relief that [*10] is granted in few cases. The fact that we are staying some of the requested provisions in the Agricultural Order is in no way a departure from the our long-stated position regarding the high bar for granting a stay, but rather an acknowledgment that this case is in fact extraordinary in some respects. Most stay requests filed with the State Water Board involve a single discharger with clearly defined obligations and clear costs. Here, many of the costs are to be incurred by a whole sector of the Central Coast economy. Further, we have heard genuine confusion from the dischargers as to what they must do to comply with some of the provisions. Our review of the Agricultural Order and the testimony during the hearing finds some of the confusion is warranted. Going forward, we continue to view a stay as an extraordinary remedy and expect a party seeking a stay to fully meet its burden under all three prongs of section 2053, subdivision (a) before granting a stay.

n12 See fn. 4 of this Order.

III. CONTENTIONS AND [*11] FINDINGS

Generally, the Agricultural Petitioners argue that dischargers will suffer substantial harm if they are required to comply with certain provisions of the Agricultural Order because they will incur excessive implementation costs pending State Water Board review of their petitions on the merits. These provisions include requirements for TMDL compliance; installation of backflow prevention devices; management, construction, and maintenance of containment structures to avoid percolation of waste to groundwater; maintenance of riparian vegetative cover in aquatic habitat areas and maintenance of riparian areas; reporting of practice effectiveness and compliance; groundwater monitoring, submission of an annual compliance form; determination of nitrate loading risk factors and typical crop nitrogen uptake, photo monitoring of streams and riparian and wetland habitat; and individual surface water discharge monitoring. The Agricultural Petitioners additionally argue that dischargers will suffer substantial harm because they will face immediate liability from non-compliance with the Agricultural Order's requirement that they comply with water quality standards. n13

n13 The Agricultural Order uses the phrase "water quality standards," which generally is a federal term referring to designated uses and water quality criteria to protect designated uses for waters of the United States. (40 C.F.R. § 131.3.) Throughout this order, we use the phrase as the Central Coast Water Board did, recognizing that it encompasses not only federal water quality standards, but also beneficial uses and water quality objectives for waters of the state, and further recognizing that the Agricultural Order does not serve as a federal authorization to discharge under the Clean Water Act (33 U.S.C. § 1251).

[*12]

In addition, the State Water Board received numerous non-evidentiary submissions and heard policy statements from agricultural groups and dischargers, as well as from their representatives in the California legislature, pointing to hardship complying with Agricultural Order provisions. Among other issues, the submissions relate that the Agricultural Order is difficult to decipher and additional time is needed to clarify requirements and develop tools and templates for compliance; compliance with many of the Agricultural Order provisions will require dischargers to hire additional employees or consultants, leading to significant expense; and dischargers are having difficulty finding appropriate consultants to help comply with the requirements of the Agricultural Order. n14

n14 Submissions received in response to June 26, 2012, letter from Chief Counsel Michael Lauffer, providing parties and interested persons an opportunity to respond to the requests for stay; written policy statements received in response to the August 21, 2012, Revised Notice of Public Hearing on Stay Request, and policy statements delivered at the August 30, 2012, hearing.

[*13]

There is significant disagreement between the Agricultural Petitioners and the Central Coast Water Board as to the economic cost of compliance with the terms of the Agricultural Order during the time period the petitions may be pending before the State Water Board. We held an evidentiary hearing on August 30, 2012, in order to elicit additional evidence and testimony from the parties. We specifically requested that the parties submit evidence to support and verify their proffered cost estimates -- provision by provision. After consideration of the parties' submissions and testimony presented, we make the following findings regarding each of the provisions of the Agricultural Order that Ocean Mist or Grower-Shipper, or both, requested be stayed.

A. Water Quality Standards Compliance (Agricultural Order Provisions 22 & 23)

The Agricultural Petitioners argue that provisions 22 and 23 of the Agricultural Order expose dischargers to immediate liability due to non-compliance. n15 In its responses to the requests for stay, and in testimony at the August 30, 2012, hearing on the stay requests, the Central Coast Water Board explained that discharges from agricultural lands cause wide-spread [*14] exceedances of water quality standards. To address those exceedances, the Central Coast Water Board expects compliance with provisions 22 and 23 to be achieved by dischargers over a number of years, not immediately. n16 It did not, however, include an explicit compliance schedule for these provisions in the Agricultural Order.

n15 Agricultural Order provisions 22 and 23 read as follows:

22. Dischargers must comply with applicable water quality standards, as defined in Attachment A, protect the beneficial uses of waters of the state and prevent nuisance as defined in Water Code section 13050.

23. Dischargers must comply with applicable provisions of the Central Coast Region Water Quality Control Plan (Basin Plan) and all other applicable water quality control plans as identified in Attachment A.

n16 See Agricultural Order, finding 10 and provision 12, and Attachment A, finding 2; Schroeter Testimony (Aug. 30, 2012); Thomas Testimony (Aug. 30, 2012).

Because provisions 22 and 23 are not qualified [*15] by any compliance schedule, the Agricultural Petitioners argue that the Agricultural Order requires immediate compliance with water quality standards and will inevitably leave the dischargers vulnerable to enforcement action and civil liability. The Agricultural Petitioners also point to the groundwater and individual surface water monitoring requirements of the Agricultural Order n17 to argue that the required data may be used by the Central Coast Water Board to establish violations of water quality standards.

n17 Tier 1 MRP, Part 2; Tier 2 MRP, Part 2; Tier 3 MRP, Parts, 2 and 5. The groundwater monitoring data and the individual surface water data must be reported by October 1, 2013 and March 15, 2014, respectively.

On these points, the Agricultural Petitioners do not meet the high bar set by section 2053, subdivision (a) for establishing substantial harm. While the Agricultural Petitioners are correct that the Agricultural Order contains no explicit compliance schedule for meeting water quality standards, n18 the [*16] Central Coast Water Board has made it sufficiently clear in the Agricultural Order that it will not take enforcement action against a discharger that is implementing and improving management practices to address discharges impacting water quality. n19 For example, provision 12 of the Agricultural Order states that "[d]ischargers who are subject to this Order shall implement management practices, as

necessary, to improve and protect water quality and to achieve compliance with applicable water quality standards." Finding 10 of the Agricultural Order clarifies this statement further: n20

This Order requires compliance with water quality standards. . . . Consistent with the Water Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy, 2004), dischargers comply by implementing and improving management practices and complying with other conditions, including monitoring and reporting requirements. This Order requires the discharger to address impacts to water quality by evaluating the effectiveness of management practices . . . and taking action to reduce discharges. If the discharger fails to address impacts to water quality by [*17] taking the actions required by this Order, including evaluating the effectiveness of their management practices and improving as needed, the discharger may then be subject to progressive enforcement and possible monetary liability.

n18 Table 4 at page 38 of the Agricultural Order sets "milestones" for compliance. The Table sets out that "measurable progress towards water quality standards in waters of the State or the United States" should be ongoing, but that water quality standards are expected to be met in waters of the state or the United States by October 1, 2016.

n19 Because the Agricultural Order is not a National Pollutant Discharge Elimination System (NPDES) permit issued under the federal Clean Water Act (33 U.S.C. § 1251 et seq.), dischargers are generally not subject to third-party lawsuits. Accordingly, only the Central Coast Water Board or the State Water Board may enforce the terms of the Agricultural Order and assess liability for violations of the Agricultural Order.

n20 See also, Agricultural Order, Attachment A, finding 2.

[*18]

In State Water Board Order WQ 2006-0007 (*Boeing Company*), we rejected the possibility of enforcement actions as a basis for the requested stay. We expressed concern with the possibility of enforcement actions as the basis of a stay in general, and further stated that, under the facts of that particular case, a stay could not be justified, even though the regional water quality control board had already issued notices of violation. "In this case, in any event, the State Water Board finds that the possibility, or even probability, of enforcement actions does not justify a stay because it is very unlikely that these [enforcement] actions would be concluded during the time a stay would remain in place." n21 Given the statements in the findings of the Agricultural Order, as well as the Central Coast Regional Board's oral and written testimony regarding compliance with water quality standards through implementation and improvement of management practices, it is extremely unlikely that the dischargers will be subject to enforcement actions predicated on provisions 22 and 23 while the petitions are pending before State Water Board.

n21 State Water Board Order WQ 2006-0007 (*Boeing Company*), at p. 10.

[*19]

In addition, provisions 22 and 23 of the Agricultural Order are substantially the same as provisions contained in the Central Coast Water Board's 2004 Agricultural Order. The 2004 Agricultural Order, too, prohibited dischargers from causing or contributing to conditions of pollution or nuisance in violation of Water Code section 13050, and exceedances of any numeric or narrative water quality standards. It also required dischargers to comply with all applicable water quality control plans. n22 As a result, dischargers should have been making progress towards complying with water quality standards' provisions since 2004. Arguing that substantial harm exists now -- eight years after initial adoption of the provisions -- does not support the extraordinary, interim remedy of a stay. Nor would it maintain the

status quo, as a stay is designed to do. Instead, Agricultural Petitioners are effectively requesting that the stay roll back the clock to prior to 2004.

n22 2004 Agricultural Order, Part II, D.1-3.

Furthermore, the [*20] fact that the Central Coast Water Board has maintained substantially the same requirement regarding water quality standards for eight years reveals that the Agricultural Petitioners also fail to meet the second and third prongs necessary to be granted a stay request (lack of substantial harm to others or to the public interest and substantial questions of fact and law). The public interest would be substantially harmed by dischargers failing to continue to make progress to meet water quality standards provisions that have been in place for so long. Further, since these provisions have been in place for the duration of the 2004 Agricultural Order and are now part of the 2012 Agricultural Order, there can be no genuine issue of fact or law as to the Central Coast Water Board's application of the provisions or authority to [re-]adopt these same water quality standards provisions.

In sum, we reject the claim of immediate, potential liability as a basis for granting a stay of provisions 22 and 23. The failure to satisfy any single element of our stay regulations is sufficient grounds to deny a stay. We further find that substantial harm to the public interest would occur if a stay were [*21] issued. And, no questions of fact or law (substantial or otherwise) exist here. As a result, we deny the request that these provisions be stayed.

B. TMDL Compliance (Agricultural Order Provision 24)

The Agricultural Petitioners argue substantial harm from the Agricultural Order's requirement to comply with applicable Total Maximum Daily Loads (TMDLs). We disagree.

Initially, the various TMDLs are already included as part of the Central Coast Water Board's water quality control plan. It appears that the Agricultural Order's expansive description of water quality standards and requirements to comply with plans and policies would embrace TMDLs. As a result, for the same reasons that we deny a stay of water quality standards provisions 22 and 23, we would deny a stay of provision 24.

Moreover, a discharger's implementation of the Agricultural Order will constitute compliance with certain applicable TMDLs. In other words, the TMDL provision does not lead to any costs above and beyond what is already required by the Agricultural Order. n23 In addition, the Agricultural Order is simply the implementation vehicle for TMDL compliance -- it does not require dischargers to do anything [*22] more than would be required of them under the applicable TMDLs. Last, as with the water quality standards provisions discussed above, this provision also carries over from the 2004 Agricultural Order. n24

n23 See Pajaro River Nitrate TMDLs and Salinas River Chlorpyrifos and Diazinon TMDLs at http://www.waterboards.ca.gov/centralcoast/water_issues/programs/tmdl/303d_and_tmdl_projects.shtml. (Last visited September 8, 2012.)

n24 See 2004 Agricultural Order, Part II, D.6.

As a result, we find no harm to dischargers in the absence of a stay, because this provision does not create any additional obligations beyond other operative provisions of the Agricultural Order. In addition, we find substantial harm to the public interest if a stay is granted and no questions of fact or law, because a substantially similar provision has been in place since 2004. We deny the request to stay provision 24.

C. Backflow Prevention Devices (Agricultural Order Provision 31)

The Agricultural Petitioners argue substantial [*23] harm from the requirement to install backflow prevention devices for any irrigation system that is used to apply fertilizers, pesticides, fumigants, or other chemicals.

Backflow prevention devices are employed to prevent fertilizers and pesticides applied through an irrigation system from flowing directly back down a groundwater well or to surface water, causing pollution. Under Department of Pesticide Regulation requirements, dischargers must already install backflow prevention devices for chemigation. n25 Dischargers impacted by this requirement are therefore primarily those that use irrigation systems for fertigation.

n25 Cal. Code Regs., tit. 3, § 6610.

Grower-Shipper submitted declarations asserting that the requirements regarding the types of backflow prevention devices that may be required are vague and that costs may range between \$ 20 and thousands of dollars for the device itself, and between \$ 1,000 and \$ 3,000 to install each device. n26 Jensen declared that the total cost of installing backflow devices [*24] on its six ranches were expected to be approximately \$ 20,400. n27 By contrast, the Central Coast Water Board estimated the cost to install backflow devices at the high end to be \$ 435 per farm as a one-time cost, including the cost of the device and installation. n28

n26 Zelinski Decl. (Aug. 25, 2012), PP 4-10; Campbell Decl. (Aug. 24, 2012), P 7; Mercer Decl. (Aug. 25, 2012), P 6; Zelinski, Campbell, and Mercer Testimony (Aug. 30, 2012).

n27 Jensen Decl. (Aug. 25, 2012) P 5.

n28 Submission by Central Coast Water Board in Response to Revised Notice of Public Hearing on Stay Request (Aug. 27, 2012) (hereinafter cited as Central Coast Water Board Submission (Aug. 27, 2012)), pp. 15-16; Thomas Testimony (Aug. 30, 2012); Schroeter Testimony (Aug. 30, 2012). To support its cost estimate testimony, the Central Coast Water Board cited to costs projected by Pacific Ag Water in Santa Maria, CA, documented in Technical Memorandum: Cost Considerations Concerning Conditional Waiver of Discharge Requirements for Discharge from Irrigated Lands, Appendix F to the Staff Report for Board Meeting Item 14, March 2011, Central Coast Water Board, p. 20, Table 5. At the August 30, 2012, hearing, counsel for Grower-Shipper entered a general evidentiary objection to the Central Coast Water Board's submissions, without identifying the specific basis for the objection to any particular evidence proffered by the Central Coast Water Board. We do not consider such a general evidentiary objection sufficient to exclude proffered evidence without specific identification of the evidence to which the party objects and the reason for that objection. (See Gov. Code, § 11513, subd. (d) [stating that hearsay evidence is not in itself sufficient to support a finding *over timely objection*].) In any case, there is no need to resolve here whether the projected costs by Pacific Ag Water constitute hearsay evidence, since we do not rely on them for a determination of substantial harm.

[*25]

We recognize that there are variable costs associated with the installation of backflow devices, but decline to decide if those costs rise to the level of substantial harm to the dischargers. Given the clear harm to the environment and to the public interest of having fertilizers and other chemicals flow back to a groundwater well or to surface water, we find that the Agricultural Petitioners cannot show lack of substantial harm under the second prong of the stay inquiry.

Additionally, we disagree that the backflow prevention requirement is so open-ended as to leave dischargers unable to comply. Provision 31 states that "backflow prevention devices used to protect water quality must be those approved by U.S. EPA, DPR, CDPH, or the local public health or water agency," providing the dischargers with general guidance on acceptable devices. Nor does it appear that the provision improperly dictates the manner of compliance in contradiction of Water Code section 13360, subdivision (a), because Provision 31 does not specify the type of backflow prevention device that must be installed. Accordingly, there are no substantial issues of fact or law that have been raised by the Agricultural [*26] Petitioners that would meet their burden under the third prong.

The State Water Board will nevertheless exercise its discretion under section 2053, subdivision (c), to stay the effect of provision 31 until March 1, 2013. The Agricultural Order currently requires backflow prevention devices to be installed by October 1, 2012. A delay of five months in the effect of the provisions will provide dischargers an opportunity to consult with the Central Coast Water Board and achieve installation of cost-effective backflow prevention de-

vices, approved as stated in provision 31, and appropriate for the particular physical characteristics of each point of installation.

We hereby stay provision 31, but only to March 1, 2013.

D. Containment Structures (Agricultural Order Provision 33)

The Agricultural Petitioners argue substantial harm from the requirement to "manage, construct, or maintain" containment structures "to avoid percolation of waste to groundwater" and to "minimize surface water overflows." The Agricultural Petitioners offered testimony from several witnesses explaining that excessive compliance costs would be incurred by farm owners and operators in all tiers to design and construct [*27] new containment structures, or replace or upgrade existing containment structures/retention ponds (including lining such containment ponds) in order to comply with the Agricultural Order. Cost estimates (including design, construction and maintenance costs) ranged from \$ 260,000 to well over \$ 1 million per farm analyzed by the Agricultural Petitioners' witnesses. n29

n29 *See* Huss Decl. (Aug 24, 2012), P 5; Grice Decl. (Aug. 26, 2012), PP 3-11; Mercer Decl. (Aug. 25, 2012), P 7; Giannini Decl. (Aug. 24, 2012), P 8; Huss, Grice, and Mercer Testimony (Aug. 30, 2012).

In response, the Central Coast Water Board's response to the stay request and the testimony proffered by Assistant Executive Officer Michael Thomas argued that there is no requirement to line containment structures. n30 Instead, the Central Coast Water Board argues dischargers simply need to make "iterative" progress and report to the Central Coast Water Board on such discharge progress, estimating costs at \$ 1,440 for dischargers to evaluate ponds, [*28] with no incurred capital costs to dischargers because lining is not a requirement of the provision. n31

n30 Central Coast Water Board Submission (Aug. 27, 2012) at pp. 17-18; Thomas Testimony (Aug. 30, 2012).

n31 Schroeter Testimony (Aug. 30, 2012); Thomas Testimony (Aug. 30, 2012).

With respect to substantial harm to dischargers, we find the Agricultural Petitioners' arguments persuasive. We see no language within the Agricultural Order that would inform dischargers of the Central Coast Water Board's "iterative" implementation expectations of provision 33.

Furthermore, while acknowledging in its testimony that farmers were confused about the provision's expectations, the Central Coast Water Board proffered no clarifying solution to the declarants who argued that they would need to line or redesign ponds in order to comply with provision 33's requirement that dischargers "manage, construct, or maintain" containment structures to "avoid percolation of waste to groundwater" and "minimize surface water overflows." [*29] In fact, under cross examination, Mr. Thomas stated that he knew of no other tool or practice besides liners that would guarantee compliance with provision 33 as written. n32

n32 Thomas Testimony (Aug. 30, 2012).

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 acknowledged that there may be misunderstanding of the intent of provision 33 within the agricultural community covered by the Agricultural Order, n33 and the high costs proffered by the Agricultural Petitioners may derive from the Agricultural Order's ambiguity, the State Water Board agrees with the Agricultural Petitioners that there may be substantial harm on a region-wide basis if a stay is not granted.

n33 *Ibid.*

The Agricultural Petitioners assert that there will be no harm to the public [*30] interest if provision 33 is stayed. In response, the other parties urged the State Water Board to consider that staying this provision would exacerbate groundwater pollution from agricultural discharge, which is of great concern in the Central Coast region. We find on balance, however, that provision 33 as drafted could have a deterrent effect on dischargers' use and/or construction of containment structures, which in turn would generate more surface water discharge. Thus, with respect to this second prong, we find that the Agricultural Petitioners satisfy their burden that during the course of State Water Board review of the petitions on the merits, no harm to the public interest would emanate from staying provision 33.

Last, as stated in the discussion of the first prong above, we find provision 33 to be sufficiently vague in its compliance expectations and deadlines that substantial questions of fact exist (i.e., when and how provision 33 applies to Petitioners' farms) to find in favor of Petitioners on the third prong as well.

The request to stay provision 33 is hereby granted.

E. Maintenance of Riparian Areas (Agricultural Order Provision 39)

In its response to the Agricultural [*31] Petitioners' request for stay, the Central Coast Water Board clarified that provision 39 of the Agricultural Order does not require dischargers to take any restorative action, although dischargers may choose to include restorative work as part of a suite of agricultural best management practices. n34 Instead, dischargers are to minimize removal of riparian vegetation, but need not deviate from their historic farming practices. n35 The Agricultural Petitioners have indicated that they were satisfied with this explanation, and have abandoned their cost argument. n36 As a result, the request to stay provision 39 is denied.

n34 Submission by Central Coast Water Board in response to June 26, 2012, letter from Chief Counsel Michael Lauffer, providing parties and interested persons an opportunity to respond to the requests for stay (July 13, 2012), pp. 20-21.

n35 Central Coast Water Board Submission (Aug. 27, 2012), pp. 18-19; Thomas Testimony (Aug. 30, 2012).

n36 Farm Bureau and Grower-Shipper Response to Revised Notice of Hearing on Stay Request (Aug. 27, 2012), p. 4, P C. Ocean Mist proffered no cost evidence for this provision. We note that Jensen declared that provision 39 would require him to maintain a 30-foot riparian buffer area on the boundaries of his farms. (Jensen Decl. (Aug. 25, 2012), P7). Provision 39 does not address buffer zones and the buffer plan provisions of the Agricultural Order have deadlines outside the consideration of this Order.

[*32]

F. Practice Effectiveness and Compliance (Agricultural Order Provision 44.g.)

The Agricultural Petitioners contend that provision 44.g., requiring inclusion in the Farm Plan of a description and results of methods used to verify practice effectiveness, will cause dischargers substantial harm. n37

n37 In its Request for Stay and Petition dated April 16, 2012, Ocean Mist referenced the development of a Farm Plan as one of the provisions leading to substantial harm. In his declaration dated August 24, 2012, and testimony, Dale Huss of Ocean Mist Farms referred to several provisions of the Farm Plan, including the requirements to identify irrigation and storm water runoff discharge locations (provision 44.c.), reporting of farm water quality management practices, such as fertilizer management and management of tile drain discharges (provision 44.f.), and the requirement for reporting practice effectiveness and compliance (44.g.). (Huss Decl. (Aug. 24, 2012), PP 5-10.) Counsel to Ocean Mist clarified at the August 30, 2012, Hearing that Ocean Mist remained concerned with provision 44.g. and those other portions of the Farm Plan addressing nitrates. (Statement by Counsel William Thomas (Aug. 30, 2012)). However, dischargers were subject to the requirement to prepare a Farm Plan under the 2004 Agricultural Order and substantially similar or identical requirements are identified or referenced in that Order. Where the requirements of the Farm Plan represent incremental increases in the amount

and type of information that was required to be contained in the 2004 Farm Plan, we do not agree that this constitutes substantial harm to the dischargers.

[*33]

The requirement to report practice effectiveness and compliance was not a component of the Farm Plan under the 2004 Agricultural Order and constitutes a new requirement under the Agricultural Order. What may constitute appropriate methods to evaluate practice effectiveness and compliance is not clearly laid out in provision 44.g. or elsewhere in the Agricultural Order. The Central Coast Water Board testified that provision 44.g. does not dictate how a discharger must evaluate practice effectiveness and that the Central Coast Water Board anticipates that standard farming practices (such as evaluating irrigation efficiency to determine water use and nutrient budgeting to determine fertilizer applications), combined with visual inspection and record keeping, will be sufficient to evaluate practice effectiveness. n38 The Central Coast Water Board additionally pointed to its draft annual compliance form sections on practice effectiveness as examples of the type of practices it would expect to be reported. The Central Coast Water Board also clarified that the provision does not require dischargers to demonstrate effectiveness, but rather only to report the methods and results. n39

n38 Central Coast Water Board Submission (Aug. 27, 2012), pp. 20-23. Thomas and Schroeter Testimony (Aug. 30, 2012).

[*34]

n39 Central Coast Water Board Submission (Aug. 27, 2012), Exh. 23; Schroeter Testimony (Aug 23, 2012).

By contrast, Dr. Marc Los Huertos testified for Grower-Shipper that the use of the term "verify" in provision 44.g. implies the need to accurately measure the potential pollutant load before and after the implementation of a practice and as a result dictates the development of a study design and of statistical analysis of the results. He estimated that this type of study could cost \$ 28,640 per year per practice. n40

n40 Los Huertos Decl. (Aug. 26, 2012), PP 6-17; Los Huertos Testimony (Aug. 23, 2012).

We acknowledge the Central Coast Water Board's testimony that 44.g. does not require the type of study and sampling asserted by Dr. Los Huertos. In this regard, we cannot say that the Agricultural Petitioners have met their burden of showing substantial harm. Even if the Petitioners were able to show substantial harm, we recognize [*35] that practice effectiveness and compliance determination is an essential component of improving water quality management practices in the iterative manner described in the Agricultural Order and that it significantly advances the interest of the environment and public.

However, we 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. n41 The Agricultural Petitioners have advanced extreme interpretations of the provision that magnify the burden on dischargers, but there appears also to be genuine confusion about what types of practices are contemplated by the provision. n42 Accordingly, we will exercise our discretion under section 2053, subdivision (c) and stay provision 44.g. on our own motion pending resolution of the petitions.

n41 We do not find the examples in the draft Annual Compliance Form sufficient to overcome the confusion concerning methods of compliance with this Farm Plan provision.

n42 This confusion would have risen to the level of a "substantial issue of fact" had the State Water Board needed to consider the third prong of the stay under section 2053, subdivision (a).

[*36]

Provision 44.g. is hereby stayed.

G. Groundwater Monitoring (Agricultural Order Provision 51; Tiers 1, 2, and 3 MRPs; Part 2, Sections A-1--5, B)

The Agricultural Petitioners contend substantial harm from the provisions requiring monitoring of private domestic drinking water and agricultural groundwater wells.

Groundwater monitoring and reporting requirements vary by tier. Tier 1 and 2 dischargers must sample at least one groundwater well and all drinking water wells twice in the first year of the permit. Tier 3 dischargers must additionally sample the wells once annually thereafter. Tier 1 and Tier 2 dischargers may submit existing data in lieu of monitoring and dischargers in any tier may opt to conduct cooperative monitoring and reporting. Costs accordingly vary by the number of wells on the farm, by the tier, and by the availability of existing data or cooperative monitoring options.

Grower-Shipper produced testimony that annual sampling in the first year (i.e., two sampling events) for a single well would cost approximately \$ 4,600 in the Salinas area and \$ 6,800 in the Santa Maria area. n43 The Central Coast Water Board introduced quotes from laboratories that offered [*37] to sample, analyze, and report data for one sampling event for one well at \$ 155-\$ 180, n44 significantly lower than the cost asserted by Grower-Shipper.

n43 Clark Decl. (Aug. 24, 2012), PP 8-11.

n44 Central Coast Water Board Submission (Aug. 27, 2012), Exh. 21; Schroeter Testimony (Aug. 30, 2012). As stated in footnote 28, a general objection to the Central Coast Water Board's evidence made by Grower-Shipper's counsel was not sufficient to reject any particular piece of evidence. In any case, the laboratory quotes in Exhibit 21 are records made in the regular course of business that would survive a hearsay objection. (Evid. Code, § 1271.)

We find that, in light of the evidence provided by the Central Coast Water Board, the Agricultural Petitioners have failed to meet their burden as to establishing substantial economic harm from compliance with the groundwater monitoring provisions of the Agricultural Order. Further, even if the Agricultural Petitioners had met their burden of showing substantial harm, they [*38] did not meet their burden on either of the other two prongs. We emphasize that we find the arguments made by the Central Coast Water Board and the environmental parties and community regarding drinking water safety extremely compelling. We are keenly aware of the need to act quickly and decisively on addressing nitrates in groundwater. We consider sampling of groundwater wells an essential component of the Agricultural Order's requirements, the stay of which would cause substantial harm to public health. Further, the Central Coast Water Board has clear authority to require groundwater monitoring under Water Code sections 13267 and 13269. Although a review on the merits is pending, for the purposes of considering the requests for stay only, n45 it appears that the Central Coast Water Board has shown that the costs of groundwater monitoring and reporting bear a reasonable relationship to the benefits. The record contains estimates of the costs of groundwater monitoring; n46 and the Agricultural Order lays out the public health concerns with nitrates in groundwater in significant detail. n47 Accordingly, the Agricultural Petitioners have not met their burden of showing substantial issues [*39] of law or fact.

n45 During our review on the merits, we may consider whether the scope and frequency of monitoring require adjustments.

n46 See Technical Memorandum: Cost Considerations Concerning Conditional Waiver of Discharge Requirements for Discharge from Irrigated Lands, Appendix F to the Staff Report for Board Meeting Item 14, March 2011, Central Coast Water Board, p. 34.

n47 See Agricultural Order, finding 6.

We deny the stay request for Agricultural Order provision 51, Tier 1, 2, and 3 MRPs Part 2, sections A, provisions 1-5, and section B.

H. Determination of Nitrate Loading Risk Factors/Total Nitrogen Applied (Agricultural Order Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C); Determination of Typical Crop Nitrogen Uptake (Agricultural Order Provision 74)

The Agricultural Petitioners contend that calculation by Tier 2 and Tier 3 dischargers of their nitrate loading risk factors and total nitrate loading risk level will cause substantial harm. They also contend that the provision [*40] requiring Tier 2 and Tier 3 dischargers with high nitrate loading risk factors to report typical crop nitrogen uptake will cause substantial harm.

The Central Coast Water Board designed these provisions of the Agricultural Order to measure the relative risk of loading nitrate to groundwater based on the nitrate hazard index using two alternate methods, one including the crop type, the irrigation system type, the irrigation water nitrate concentration and the soil type; and the other using the Nitrate Groundwater Pollution Hazard Index developed by University of California Division of Agriculture and Natural Resources (UCANR). These provisions apply to Tier 2 and 3 dischargers. A result of "high" nitrate loading risk triggers certain other requirements of the Agricultural Order, including the reporting of total nitrogen applied per crop, per acre, per year to each farm, and the determination of typical crop nitrogen uptake for each crop type produced.

The Central Coast Water Board asserted in its testimony that calculation of the nitrate loading risk factor would require approximately four hours. If a discharger hired a consultant to make the calculations, four hours would result in [*41] approximately \$ 720 in costs. n48 For Grower-Shipper, the owner of Bob Campbell ranches testified that the cost of making the calculation for his farming operation could be \$ 40,000. n49 Farm consultant Kay Mercer additionally testified that the provisions related to nitrate loading risk factors and nitrogen uptake could require the development of a database, which would cost the dischargers thousands of dollars. n50 And Consultant Lowell Zelinski declared that the nitrate loading risk factor methodologies of the Agricultural Order are simplistic and inaccurate. n51

n48 Central Coast Water Board Submission (Aug. 27, 2012), pp. 29-20; Thomas and Schroeter Testimony (Aug. 30, 2012).

n49 Campbell Decl., (Aug. 24, 2012), P 13; Campbell Testimony (Aug. 30, 2012).

n50 Mercer Decl. (Aug. 25, 2012), PP 9-29; Mercer Testimony (Aug. 30, 2012).

n51 Zelinski Decl. (Aug. 25, 2012), PP15-20; Zelinski Testimony (Aug. 30, 2012).

We find that the evidence provided by the Agricultural Petitioners is not sufficient [*42] to meet their burden of showing substantial harm from the provision requiring nitrate risk factor calculation. We will nevertheless exercise our discretion to stay these provisions on our own motion under section 2053, subdivision (c). As stated under the discussion of groundwater monitoring, we believe that addressing nitrates in the groundwater is an extremely high priority and recognize the need to act decisively on that priority. Precisely for that reason, we also recognize that the methodologies for calculation of nitrate loading risk factors must provide meaningful and reliable information. While we will review the methodologies during our review on the merits, the Agricultural Petitioners have raised enough concerns and questions about the reliability of the methodologies -- showing substantial questions of fact as to the third prong -- that we are hesitant to ask dischargers to weather the confusion and uncertainty of compliance while the petitions are being resolved. Despite our strong support for the Central Coast Water Board's efforts to address groundwater pollution, we do not believe that a stay will significantly harm the public interest and the environment in the short [*43] term. Nitrogen impacts on groundwater from fertilizer applications generally take years to accumulate to such a level as to impact a drinking water supply. Short term public health concerns will be adequately addressed by the groundwater monitoring provisions that we have declined to stay.

Because we are staying the requirement to calculate the nitrate loading risk factors, we will also stay the requirement to determine typical crop nitrogen uptake that is triggered by a high nitrate loading risk factor calculation. We will not, on the other hand, stay the requirement for reporting total nitrogen applied under Tiers 2 and 3 MRPs, Part 2, sec-

tion C, provision 5, which is also triggered by a high nitrate loading risk factor. That reporting is not due until October 1, 2014.

The stay request for Agricultural Order provision 68 and 74, and Tiers 2 and 3 MRPs, Part 2, section C, provisions 1-4 is hereby granted. The stay request for Tiers 2 and 3 MRPs, Part 2, section C, provision 5 is hereby denied.

I. Photo Monitoring of Streams and Riparian and Wetland Habitat (Agricultural Order Provisions 69, 80(a) as Incorporated into 69; Tiers 2 and 3 MRPs; Part 4)

As a preliminary matter, [*44] Grower-Shipper identifies provision 80(a), through its incorporation into provision 69 (photo monitoring), as one of the provisions that will lead to economic harm if not stayed. Provision 80 requires submission of a Water Quality Buffer Plan by October 1, 2016, for Tier 3 dischargers adjacent to or containing an impaired water body. We do not read provision 69's reference to provision 80 to require compliance with the maintenance of a buffer by the photo monitoring deadline of October 1, 2012. The Central Coast Water Board also confirmed in its Response to the Stay Requests that compliance with this provision is not due until October 1, 2016. n52 We therefore deny the request to stay provision 80(a).

n52 Central Coast Water Board, Response to Stay Requests at p. 30 (July 13, 2012).

Provision 69 requires Tier 2 and Tier 3 dischargers with farms adjacent to impaired water bodies to, among other things, photo monitor the condition of perennial, intermittent, or ephemeral streams and riparian and wetland area habitat. [*45] On August 15, 2012, the Interim Executive Office of the Central Coast Water Board issued a "Photo Monitoring and Reporting Protocol" (Protocol), to assist dischargers in meeting the requirements of the Agricultural Order's photo monitoring provisions. n53

n53 Protocol available at:

http://www.waterboards.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/resources4growers/photomonitoring_protocol15aug2012.pdf (Last visited September 8, 2012.)

The Central Coast Water Board projects that the photo monitoring provision applies to fewer than 800 of the approximately 3,800 dischargers in the region. It estimates that the overall cost of the photo monitoring (including equipment, time and reporting) criteria set forth in the Protocol is \$ 1,440 per half mile. n54 Grower-Shipper offered the testimony of Bob Campbell, who estimated that the cost to photo monitor the 11 miles of riparian property of his Tier 2 farms that are adjacent to impaired water bodies would be \$ 60,000 (i.e., upwards of \$ 2,700 per half [*46] mile -- in other words, a \$ 29,000 discrepancy between his estimate and the Central Coast Water Board's estimate). n55 Mr. Campbell explained that his costs would be higher than estimated by the Central Coast Water Board because his property's frontage has numerous "bends and curves," which would require his consultant to take additional photographs from multiple points to obtain the line of site required by the Protocol. n56

n54 Central Coast Water Board Submission (Aug. 27, 2012), pp. 31-32; Thomas and Schroeter Testimony (Aug. 30, 2012).

n55 Campbell Decl. (Aug. 24, 2012), P 14; Campbell Testimony (Aug. 30, 2012).

n56 Campbell Testimony (Aug. 30, 2012).

It is apparent to us that the Agricultural Petitioners' challenge to provision 69 would fail under section 2053, subdivision (a). The provision itself has relatively minimal costs for most dischargers. The provision itself is of great benefit to the public, because it creates photographic riparian baselines across the region. And, there is no dispute [*47] of fact or law here regarding the application of the provision to farms, or the Central Coast Water Board's authority to require photo monitoring.

While the stay request fails to satisfy section 2053, subdivision (a), we will nonetheless stay provision 69 under our own motion pursuant to section 2053, subdivision (c) until June 1, 2013. We are extending the deadline within provision 69 not because of the provision itself, but because of the limited implementation avenues the Central Coast Water Board has afforded dischargers by means of its Protocol. The Protocol, by allowing only fixed-point photographic lines of site, unnecessarily increases costs for farmers such as Mr. Campbell, where topography magnifies the number of fixed-point photographs. Mr. Campbell could obtain the same photo monitoring results the Central Coast Water Board seeks at much lower costs, if the Central Coast Regional Board would permit the use of other photo documentation methods, such as aerial photography or the use of elevated vantage points in its Protocol. The State Water Board is selecting June 1, 2013, so that the vegetation will be more readily visible, as it will not be in its dormant state.

Provision [*48] 69 is hereby stayed until June 1, 2013, so that the Central Coast Water Board has time to amend and revise its Protocol to allow dischargers to conduct photo monitoring of their farms' riparian habitat using alternative photo documentation methods.

J. Annual Compliance Form (Agricultural Order Provision 67; Tiers 2 and 3 MRPs; Part 3)

The Agricultural Petitioners argue that dischargers face indeterminable data management costs associated with the Annual Compliance Form provisions of the Agricultural Order. Grower-Shipper offered the testimony of Kay Mercer to explain the complexities and costs associated with dischargers hiring consultants, tracking and maintaining data, and developing database systems in order to comply with the Annual Compliance Form provisions of the Agricultural Order, in particular those provisions requiring reporting of nitrate loading risk factors by October 1, 2012, and future reporting on total nitrogen applied and on certain elements of the Irrigation and Nutrient Management Plan. n57 She testified that it was difficult to estimate the database creation and management costs associated with the Annual Compliance Form, because the Central Coast Water [*49] Board had not posted its online form yet. n58

n57 Mercer Decl. (Aug. 25, 2012), PP 8-29; Mercer Testimony (Aug. 30, 2012). *See also* Zelinski Decl. (Aug. 25, 2012), PP 21-25; Giannini Decl. (Aug. 24, 2012), P 12; Huss Decl. (Aug 24, 2012). In general, costs attributed to the Annual Compliance Form by dischargers are primarily those associated with nitrate loading risk factor calculations, total nitrogen loading calculations, and other monitoring and reporting independently required by provisions elsewhere in the Agricultural Order.

n58 Mercer Decl. at P 8.

In response, the Central Coast Water Board submitted a draft version of its Annual Compliance Form, and the five-page form does not require the complex database development tools that Grower-Shipper's witness estimated. n59 The Central Coast Water Board asserts that the Annual Compliance Form reporting can be done without hiring consultants, based on information that is already readily available to the dischargers or required to be compiled by other provisions [*50] of the Agricultural Order, and by using online forms created and managed by the Central Coast Water Board that contain drop down menus -- thereby facilitating ease of reporting. The Central Coast Water Board estimates the cost for these provisions to be the time spent by the discharger to review the information and enter it on-line -- at no more than \$ 1,440 per farm. n60

n59 Central Coast Water Board Submission (Aug. 27, 2012), Exh. 23.

n60 Central Coast Water Board Submission (Aug. 27, 2012), p. 26.

Accordingly, we find that the Agricultural Petitioners have not met their burden on any of the three stay prongs for *most* of the content within the Annual Compliance Form. First, dischargers would need to invest little money, effort or time to complete the five pages of drop-down menus and checklists created by the Central Coast Water Board. Second, we agree with the Central Coast Water Board that the data and information mined from the Annual Compliance form is necessary to evaluate: (1) general compliance [*51] with the Agricultural Order; (2) the effectiveness of management practices, treatment or control measures; and, (3) any changes in farming practices. n61 Staying the entire Annual Compliance Form until we resolve the petitions on the merits would harm the public interest. Third, we find no issue of fact

here, as the Annual Compliance Form exists, albeit in draft form, and has been submitted into evidence in draft form. There is no issue of law, as no party disputes the Central Coast Water Board's authority to require an Annual Compliance Form.

n61 *Ibid.*

As discussed previously, some information required to be reported on the Annual Compliance Form is information pertaining to provisions stayed by other parts of our order. Consistent with the holdings in Sections III.H. (Nitrate Loading) and III.I. (Photo Monitoring) of this Order, Part 3, Section A.1.k. in the Tiers 2 and 3 MRPs (Nitrate Loading Reporting) is hereby stayed until we resolve the petitions on the merits. Further, we extend the compliance date of [*52] Part 3, Section A.1.m. in the Tiers 2 and 3 MRPs (Photo Monitoring) until June 1, 2013, for inclusion in the 2013 version of the Annual Compliance Form (for October 2013 reporting). Last, in its September 13, 2012, comment letter in response to our September 10, 2012, draft version of this Order, the Central Coast Water Board requested that we stay the Annual Compliance Form's submission deadline until December 1, 2012, in order to give dischargers two additional months to comply. We agree that such a temporary extension is reasonable and warranted in light of our other findings in this Order. The Central Coast Water Board released a Sample Annual Compliance Form on September 6, 2012, that will now need to be revised for consistency with this Order. We therefore, on our own motion pursuant to section 2053, subdivision (c), stay the submission deadline for Part 3, Section A.1.a.-j. and l. in the Tiers 2 and 3 MRPs to December 1, 2012. n62 The Central Coast Water Board is directed to revise the Sample Annual Compliance Form consistent with the requirements set forth in this Order within two weeks of the date of this Order. The Central Coast Water Board shall not require dischargers to [*53] submit any information on the Annual Compliance Form that has been stayed by this Order.

n62 With regard to provisions 3.A.1. n.-q. of the Annual Compliance Form requirements, we note that compliance deadlines are outside of the one year time period in which we expect to resolve the petitions on the merits.

K. Individual Surface Water Discharge Monitoring and Reporting (Agricultural Order Provisions 72 & 73; Tier 3 MRP, Part 5)

Provisions 72 and 73 require Tier 3 dischargers to prepare an individual sampling and analysis plan (SAP) and quality assurance project plan (QAPP) by March 15, 2013, and initiate individual surface water discharge monitoring by October 1, 2013. n63

n63 The reporting requirements for the individual surface water monitoring do not take effect until March 15, 2014. (Agricultural Order, provision 73.)

Because the State [*54] Water Board expects that it will resolve the petitions on the merits prior to October 1, 2013, n64 it is not necessary to address the Agricultural Petitioners' request to stay the requirement to initiate individual surface water discharge monitoring at this time. Accordingly, here we only consider the costs of the preparation of the SAP and QAPP. n65

n64 See footnote 8 of this Order.

n65 We understand that the actual sampling costs will be higher than the cost of preparation of the SAP and QAPP. (See Central Coast Water Board Submission (August 27, 2012), p. 33; Thomas and Schroeter Testimony (August 30, 2012)); Clark Decl. (Aug. 24, 2012), PP 4-7.)

Grower-Shipper has submitted declarations, estimating the cost of preparation for the required SAP and QAPP at 28,800. n66 The Central Coast Water Board asserts that the cost of the preparation of the QAPP will range between \$ 750 and \$ 3,000, assuming the availability of a ready-to-use template requiring 5-20 hours to complete. n67 The Central Coast Water Board [*55] asserts that such a template will be made available prior to the compliance date. n68

n66 Johnson Decl. (Aug. 24, 2012), PP 6-14.

n67 Central Coast Water Board Submission (Aug. 27, 2012), p. 33.

n68 *Id.* at 32-33.

Grower-Shipper's estimates for the cost of SAP and QAPP strike us as inflated, based on the State Water Board's experience with preparation of such documents. The State Water Board has prepared templates and directions for such documents in other contexts. n69 These are generally relatively inexpensive documents to prepare, but necessary precursors to monitoring. Additionally, the Central Coast Water Board testified that only 110 dischargers are currently classified as Tier 3 dischargers which pose the highest threat to water quality based on the criteria established by the Central Coast Water Board. We accordingly find that as to the SAP and QAPP, the Agricultural Petitioners have not met their burden to show substantial harm.

n69 *See, e.g.*, the State Water Board's Surface Water Ambient Monitoring Program's online tools, available at http://www.waterboards.ca.gov/water_issues/programs/swamp/tools.shtml (last visited September 10, 2012), providing guidance on QAPPs. We acknowledge that the cost of a SAP may be variable, but do not find that the preparation of a SAP under the Agricultural Order requires the level of effort projected by the agricultural petitioners. For example, the selection of monitoring points is limited to characterization of irrigation run-off (Tier 3 MRP, Part 5, Section A.7) and need not incorporate characterization of storm water sheet flow across fields, as suggested by Ocean Mist (Huss Testimony (Aug. 30, 2012); Ocean Mist, Comment Letter on Draft Stay Order (Sept. 14, 2012).

[*56]

The Agricultural Petitioners assert that there will be no harm to the public interest if the SAP and QAPP provisions are stayed. Without knowing whether we will ultimately uphold the individual surface water monitoring requirements, the most that can be said is that a SAP and a QAPP are very important for assuring that the monitoring data can be used for its intended purpose, which is certainly a matter of public interest.

In the third prong of the stay analysis, we find that the Agricultural Petitioners did not meet their burden of showing substantial questions of fact or law specific to the requirement that Tier 3 dischargers prepare a SAP and QAPP. The cost of preparing a SAP and QAPP is reasonably related to the benefit of having meaningful monitoring data, and the requirement is clearly within the Central Coast Water Board's legal authority under Water Code sections 13267 and 13269.

We deny the request to stay provisions 72 and 73 and Tier 3 MRP, Part 5.

ORDER

IT IS HEREBY ORDERED that certain provisions of the Agricultural Order are stayed as follows:

- . Provision 31 (Backflow prevention devices): compliance deadline stayed, but only until March 1, 2013;
- . Provision [*57] 33 (Containment structures): stayed until the petitions are resolved on the merits;

- . Provision 44.g. (Practice effectiveness and compliance): stayed until the petitions are resolved on the merits;
- . Tiers 2 and 3 MRPs, Part 3, Section A.1.a.-j, and l. (Annual Compliance Form): compliance deadline stayed, but only until December 1, 2012;
- . Tiers 2 and 3 MRPs, Part 3, Section A.1.k. (Annual Compliance Form: Nitrate Loading Risk Factors): stayed until the petitions are resolved on the merits;
- . Tiers 2 and 3 MRPs, Part 3, Section A.1.m. (Annual Compliance Form: Photo Monitoring): compliance deadline stayed, but only until June 1, 2013 (for reporting in October 2013);
- . Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C, provisions 1-4 (Determination of nitrate loading risk factors): stayed until the petitions are resolved on the merits;
- . Provision 69; Tiers 2 and 3 MRPs, Part 4 (Photo monitoring): compliance deadline stayed, but only until June 1, 2013; and,
- . Provision 74 (Typical crop nitrogen uptake): stayed until the petitions are resolved on the merits.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Water Quality Clean Water Act Water Quality Standards Real Property Law Water Rights Beneficial Use Real Property Law Water Rights Riparian Rights