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7 **On behalf Of Petitioners, JENSEN FAMILY FARMS, INC.,**  
8 **AND WILLIAM ELLIOTT, Respectively**

9 **CALIFORNIA WATER RESOURCES CONTROL BOARD**

10 **In re: Matter of the Petitions of Ocean Mist )**  
11 **Farms and RC Farms, Grower-Shipper )**  
12 **Association of California, et al., Farm )**  
13 **Bureau, et al., )**  
14 **SWRCB/OCC FILE A-2209 (a – e)**  
15 **COMMENTS OF PETITIONERS**  
16 **JENSEN FAMILY FARMS, INC. AND**  
17 **AND WILLIAM ELLIOTT**  
18 **(SWRCB/OCC FILE 1-2209 (e) TO A-**  
19 **2209(a)-(e) AND PROPOSED ORDER**  
20 **WQ 2013-**

1           **I.       Introduction**

2           A proposed order draft has been prepared for the State Water Resources Control Board  
3 (“State Board”) relative to various of the Petitions filed challenging the Conditional Waiver of  
4 Waste Discharge Requirements (“Ag Waiver”) adopted by the Central Coast Regional Water  
5 Control Board (“Regional Board”). In great part, however, that proposed order either ignores or  
6 misconstrues the arguments raised in the petitions that establish the Ag Waiver’s overall  
7 illegality and unconstitutionality as well as its lack of wisdom and practicality. When it does  
8 address the merits of some (but assuredly not all or even a majority) of those arguments, the  
9 result is an occasional modification which “tweaks” some of the Ag Waiver’s more blatantly  
10 unsupported or illegal terms but otherwise leaves untouched the Ag Waiver’s fundamental flaws  
11 and illegalities. The proposed order thus neither goes far enough nor makes sufficiently core  
12 program changes so that the Ag Waiver takes on a form that can withstand judicial challenge  
13 should the State Board, as it likely will do, substantially adopt the order as proposed. This is  
14 further exacerbated by the Proposed Order’s paucity of references to and evidentiary citations to  
15 the Administrative Record when this Board can only base its decision on the law and evidentiary  
16 matters contained in the Administrative Record. In other words, the proposed order fails to  
17 provide a vehicle by which the State Board may fulfill its statutory obligations to protect the  
18 waters of California. Instead, by failing to make necessary program changes and to clean up the  
19 dubious procedures underlying the Regional Board’s adoption of the Ag Waiver, the State Board  
20 merely continues down a path that will lead to further delay in making purer water a reality in the  
21 Central Coast Region.  
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24           The arguments made in the concurrently filed comments of the California Farm Bureau  
25 Federation, Ocean Mist Farms and RC Farms, and the Grower-Shipper Association regarding

1 Regional Board Order No. R-3-20112-0011, in combination with those raised here, establish the  
2 Ag Waiver -- even if the proposed order was adopted -- remains inappropriate, improper, illegal,  
3 exceeds the statutory authority of the Regional Board and State Board, and otherwise violates the  
4 due process and equal protection rights of Petitioners and similarly situated agricultural entities  
5 and persons.<sup>1</sup> The reasons for this are, at a minimum:

- 6 1. Illegal and unauthorized ex parte communications – originating with Steven  
7 Shimek, an advocate for adoption of a stringent draconian Ag Waiver and  
8 spokesman for the Monterey Coastkeepers/The Otter Project -- were made  
9 through Regional Board Executive Officer Roger Briggs acting as a conduit for  
10 Mr. Shimek to members of the Regional Board concerning, among other things,  
11 the language of specific amendments Regional Board Member Michael Johnston  
12 (“Johnston”) offered and the Regional Board adopted. Due to the timing of the  
13 amendments and ex parte nature of the communications leading to their  
14 preparation, the public and interested persons were denied input and discussion  
15 prior to the adoption of such matters;
- 16 2. The Regional Board failed – and the proposed order does not correct – to comply  
17 with the requirements of the Porter-Cologne Water Quality Control Act, Cal.  
18 Water Code § 13000 et seq., and specifically § 13241 thereof, by failing to  
19 conduct the requisite study and consideration of economic factors impacting the  
20 Central Reason prior to adoption of the Ag Waiver. Indeed, the reason offered  
21 for the failure – e.g., that since the Regional Board is precluded, by the terms of  
22 Water Code § 13360, from dictating the means by which agriculture is to meet  
23 the compliance goals it cannot make economic evaluations of the impact of the  
24 use/cost of such compliance means – is makeweight, unsupportable, and post-  
25 textual since the Ag Waiver itself dictates at least one means of compliance (the  
30-foot buffer zone), the obvious economic impacts of which are easily, albeit  
minimally, possible of quantification and discussion since it involves the loss of  
thousands of acres of presently farmed agricultural land;
3. The 3-Tier categorization regime that is the centerpiece and operative linchpin of  
the Ag Waiver and its requisite operative feature, even as amended by the

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<sup>1</sup> We adopt and incorporate by reference as though set forth herein, the arguments and  
evidence offered by Petitioners Grower-Shippers Association et al., California Farm Bureau, and  
Ocean Mist Farms/RC Farms except insofar as they may be inconsistent with the arguments and  
evidence contained herein.

1 proposed order, violates the constitutionally protected due process and equal  
2 protection to those made subject to its terms by, among other things: (a) failing to  
3 factor into the definition of which operations go into Tier 1 (for instance) the  
4 levels of sedimentation and turbidity contained in run-off or other waters leaving  
5 the specific farm or agricultural operation which would more properly make it a  
6 Tier 2 farm/operation; (b) failing to take into consideration and definition for  
7 placement in a specific tier the geology of the soil and subsoil strata of individual  
8 farms or operations as well as the mechanisms for return of water used for  
9 irrigation to the aquifer or surface bodies of water specifically obtaining to that  
10 farm; (c) by exceeding the Regional Board's statutory authority under the Porter-  
11 Cologne Act so that the Ag Waiver deals with, among other things, groundwater;

12 4. The Ag Waiver insofar as it mandates a minimum 30-foot buffer zone relative to  
13 impaired bodies of water violates the constitutional rights of persons/entities  
14 subject to its terms in that: (a) it fails to specify the initial point of measurement  
15 for the 30-foot zone (for instance, whether the zone begins at the bank of the  
16 water body, or its middle, or mean high tide/flow level just to name a few) and is  
17 thus vague, ambiguous, overinclusive and overbroad to a degree that it violates  
18 due process; and (b) it affects a "regulatory" or other taking of real property for  
19 which the State Board, the Regional Board, or the State of California is liable for  
20 payment;

21 5. The Ag Waiver failed to adequately comply with the requirements of California's  
22 Environmental Quality Act ("CEQA") and its implementing regulations by  
23 determining that only a negative declaration was needed, thereby failing to  
24 accurately or adequately assess and consider the significant impacts of the Ag  
25 Waiver on the environment as a whole.

17 Consideration by the State Board of the Ag Waiver, the Petitions of the agricultural or  
18 agriculturally-aligned parties, and the Proposed Order at and after the July 23, 2013 workshop  
19 should result in a granting, in whole or in substantial part, of the Petitions and negation of the Ag  
20 Waiver. The proposed order refers to the prior actions of this Board in creating an "expert  
21 panel" that will study the nature and causes of nitrate pollution as well as the best means for  
22 dealing with it relative to a recent study done by the University of California at Davis. See  
23 Proposed Order at p. 2 n. 2. That "expert panel" must be allowed to complete its work and make  
24 its recommendations that will hopefully inform the creation of an effective and legal Ag Waiver  
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1 regime by the Regional Board and also provide a conforming operative template to be used  
2 throughout the State by other Regional Board's having jurisdiction over agricultural lands.  
3 Taking any amendatory action relative to the present Ag Waiver that will allow its present  
4 implementation and operation pending the outcome of the Expert Panel is quite simply putting  
5 the proverbial cart before the proverbial horse. This is particularly so since, as established by  
6 reference to the Administrative Record of the present Ag Waiver, that Waiver is based not on  
7 reliable scientific evidence but, rather, on generalizations and assumptions not tied to the reality  
8 of conditions in the Central Coast Region as well as unsupportable anecdotal "evidence."

9 In reaching this conclusion it is important to realize and accept the reality – rather than just  
10 giving it lip-service -- that the vast majority of the members of the agricultural sector of the  
11 Central Coast Region's economy do not intentionally "foul their own nests" by polluting their  
12 drinking wells or sources of irrigation water. Rather (and this is something that, at most, the  
13 Regional Board only afforded lip service), they believe in the necessity of water purification, in  
14 ending the abuse of a few of their numbers who do over- and wrongly-use pesticides and  
15 fertilizers, and in nurturing the land and environment in and on which they live and from which  
16 they earn their livings. They further believe that these matters must be done responsibly and  
17 through a workable partnership between the industry and California's administrative bodies  
18 charged with protection of the Region's water resources. The Ag Waiver most assuredly was  
19 neither created under nor reflects that workable partnership. In fact, the harsh light of day  
20 reveals that it is not the most – or anywhere near the best – means by which water purification  
21 can be responsibly accomplished with the least amount of overall negative impact on the  
22 environment of the Region as a whole.  
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1                   **II.     Argument<sup>2</sup>**

2                           **A.   Adoption Of The Ag Waiver Was Tainted By The Presence Of**  
3                           **Illegal And Proscribed Ex Parte Communications Which Resulted**  
4                           **In The Violation Of Petitioner’s Constitutional Right To Due**  
5                           **Process**

6                   The relatively unique structure and operative scheme for the conduct of public  
7                   meetings of the Regional Board should have – but most assuredly did not – make it more  
8                   sensitive to the public and constitutional concerns that preclude ex parte communications  
9                   between advocates or interested parties relative to the Ag Waiver and members of the Regional  
10                  Board.<sup>3</sup> Unlike the incorrect characterizations of all the Petitioner’s positions upon which the  
11                  Proposed Order is based, we do not complain that proscribed ex parte communications, without  
12                  involvement by a third party advocate, necessarily existed between Regional Board Executive  
13                  Officer Roger Briggs and Regional Boardmember Michael Johnston. Of course, Mr. Briggs (or  
14                  his successor as Executive Officer) may have contacts with the Board members concerning the  
15                  matters under discussion in order to provide them with advice or guidance. But the matters of  
16                  which we complain are different. First, the communications between Messrs. Johnston and  
17                  Briggs concerned draft language that had been worked on prior to the close of the public

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18                  <sup>2</sup>       The factual background of the Ag Waiver and the State Board’s prior consideration  
19                  thereof relative to the requests for a stay made by several of the agricultural petitioners is fully  
20                  set forth in the proposed order and need not be repeated here. In these regards, the facts but not  
21                  the factual shading are incorporated herein.

22                  <sup>3</sup>       One of the troubling practices of the Regional Board – and certainly not one which the  
23                  State Board practices or allows relative to its own meetings – is who is seated with the board  
24                  members on the members panel. Unlike the practice of any other State, county, or municipal  
25                  board with which we are personally familiar or have any anecdotal evidence, the Executive  
                  Officer as well as the Board’s attorney sit among and are interspersed between members of the  
                  Regional Board during the meetings leading up to and including the meeting at which the Ag  
                  Waiver was adopted. Indeed, the Executive Officer and attorney often engage in off-the-record  
                  sub voce conferences with Board members during meetings. Since the appearance of propriety  
                  and fairness is often more important to the public than its actual existence, these matters appear  
                  to create a fertile ground from which ex parte communications may arise and are sources of  
                  suspicion by the public as to how the Board reaches its decisions.

1 participation section of the meeting but which, frankly and obviously, was purposefully withheld  
2 from specific discussion during the public discussion section and mentioned only after that  
3 section had closed. Second and separately, the initiating presence of a third party – Steven  
4 Shimek, the representative of the Monterey Coastkeepers/The Otter Project, and advocate for a  
5 draconian ag waiver program – changes the dynamic of the Briggs-Johnston communications  
6 and the fact that Mr. Briggs acted as a conduit between Mr. Shimek and Board member Johnston  
7 informs an illegal ex parte communication and resultant violation of Petitioner’s due process  
8 rights. After all, it cannot be denied that such an “ex parte” conduit situation is proscribed under  
9 California law regardless of the context. As the California Supreme Court held in Department  
10 of Alcoholic Beverage Control ex rel. Quintinar v. Alcoholic Beverage Control Appeals Bd.

11 (“Quintinar”) (2006) 40 Cal.4<sup>th</sup> 1, 10 n. 8:

12  
13 “Each form on contact [such as between a prosecutor and a final agency decision  
14 maker on the one hand and those between a prosecutor and the decision maker’s  
15 adviser, on the other hand] **equally compromises the protection that the APA’s  
16 adjudicative bill of right sought to adopt: nothing in the APA contemplates  
17 permitting an agency to accomplish through secondhand communications  
18 what is forbidden through firsthand communications.**” (Emphasis supplied)

19 This both reflects and is grounded on the “fairness principle” which

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21 “directs that in adjudicative matters, one adversary should not be permitted to  
22 bend the ear of the ultimate decision maker or the decision maker’s advisers in  
23 private.”

24 Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Bd. (2007) 149 Cal.App.4<sup>th</sup> 116,  
25 125 (quoting Quintinar, 40 cal.4<sup>th</sup> at p. 5).

26 The State Board Staff’s proposed order, however, poo-poops not only the existence of ex  
27 parte communications but also the effect those communications had on the Regional Board’s  
28 final Ag Waiver, including amendments thereto adopted by the Regional Board and offered by

1 Mr. Johnston.<sup>4</sup> In doing so, however, the proposed order misconstrues and misstates the facts  
2 (about which no dispute should exist since all judgments and considerations must be made in  
3 favor of Petitioners once they have, as done here, met their initial burden of persuasion) as well  
4 as the law which commands that such conduital ex parte communications render the Ag  
5 Waiver inoperative. When the proposed order is distilled to its essence, what is left is the Staff's  
6 inapt characterization that while the communications at issue might "kind-a sort-a maybe" look  
7 troublesome, they really amount to nothing because: (1) the subject and language of the  
8 Johnston amendment even if it did mirror Shimek's proposal had been (albeit not at the March  
9 15 meeting when offered for the first time) been subject to public discussion before in a general  
10 way and in another context and in another meeting removed in time from the March 15, 2012  
11 amendment, (2) the subject of the amendment (group monitoring) had been discussed generally  
12 by the public during meetings leading up to adoption of the Ag Waiver, and (3) "so what"  
13 because the proposed order recommended changes to the Shimek-to-Briggs-to-Johnston-to-the-  
14 Regional-Board and which changes could be discussed by the public during this Board's July 23  
15 "workshop." In other words, the proposed order does not come to grips or effectively negate that  
16 the entire Briggs-Johnston communication was illegal and constitutionally infirm since Briggs  
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20 <sup>4</sup> It should be noted that both Mr. Shimek and Mr. Briggs qualify as "advocates" to whom  
21 the ex parte statutes and State Board rules apply. As noted in Quintinar, 40 Cal.4<sup>th</sup> at 12, "By  
22 definition, an advocate is a partisan for a particular point of view..." Mr. Shimek was thus an  
23 advocate for Monterey Coastkeepers and Mr. Briggs was surely an advocate for the Ag Waiver  
24 proposed by his own Staff. See also Rondon v. Alcoholic Beverage Control Appeals Bd. (2007)  
25 1512 Cal.App.4<sup>th</sup> 1274, 1284 n. 2, quoting Govt. Code § 11430(10) ("While the proceeding is  
pending there shall be no communication, direct or indirect, regarding any issue in the  
proceeding, to the presiding officer [which includes Johnston as a member of the Regional  
Board] from .... an interested person outside the agency, without notice and opportunity for all  
parties to participate in the communications.") To deny that Mr. Briggs was an advocate defies  
common sense, ignores the role he played, and is sheer sophistry. To deny that Mr. Shimek is an  
advocate is just plain wrong.



1 acted as an undisclosed conduit of third-party Shimek’s suggestions to the Board which led to  
2 consideration of those suggestions by the Board **after** the public session had closed.

3 The true facts relating to those communications are simply stated. The Regional Board’s  
4 hearing which resulted in the Ag Waiver’s adoption was held on March 14 and 15, 2012. While  
5 March 14 was spent in presentations of their respective positions by members of the public as  
6 well as of the agricultural community, limited rebuttal was presented on March 15 from the  
7 agricultural community, the Regional Board’s staff, and in deliberations by the Regional Board  
8 once the public participation aspect of the meeting had closed. Only at this point where public  
9 participation ended was an amendment offered by Mr. Johnston that, by his own admission, had  
10 been **earlier** prepared by Mr. Johnston in conjunction with Mr. Briggs and Ms. McChesney  
11 (attorney for the Board):

12 “I gather you are aware, Mr. Chairman, because it was shared with you, although  
13 none of the other members, is **I worked with the Executive Officer and counsel**  
14 **over the last week or two on a couple of different pieces of language.** And the  
principal stuff in there is – well, three things really.”

15 March 15, 2012 Transcript 94:5-11 (emphasis supplied). During the discussion of that  
16 amendatory language (the “Johnston Proposal”), the following was stated:

17 “MR. YOUNG: I think it is a great proposal. **I think want you’ve done is taken**  
18 **what Staff has always said was achievable as part of what they have been**  
19 **proposing, and essentially put down in writing what it might look like, and**  
20 **make that part of what we’re going to incorporate in the Order and the**  
**Monitoring Program.** So how much of this did you write?”

21 MR. JOHNSTON: About half. ....

22 MR. JOHNSTON: In answer to your question about what I wrote, this was a  
back and forth between .... myself, Roger [Briggs], Frances [McChesney]. And I  
23 would imagine that Roger was consulting other Staff on it. ...

24 MR. YOUNG: ... **Is this acceptable to Staff [sic]?<sup>5</sup>**

25 <sup>5</sup> “Is this acceptable to Staff” is a most revealing question since it strikes directly at the  
absence of meaningful independence of the Board in fulfilling its statutory mandate. At no point  
does Porter-Cologne or other sections of the Water Code state that it is for the Staff to decide

1 MR. BRIGGS: That was the reason Mr. Johnston wanted to vet it instead of  
2 dropping it here was to see if it would be acceptable [to the Staff]. ....”  
(Emphasis supplied)

3  
4 Evidence obtained after March 15 and presented as Exhibit G to the Petition of the  
5 Grower-Shipper Assoc. Central California, et al, establish the proscribed communications.<sup>6</sup> The  
6 evidence<sup>7</sup> is irrefutable. The Regional Board Staff (specifically Lisa McCann and Mr. Briggs)  
7 received communications from Steven Shimek regarding meeting that he had with the State  
8 Water Board and California Environmental Protection Agency (“CalEPA”) Undersecretary  
9 Gordon Burn and others (including Rick Tomlinson of the Grower-Shippers Association) with

10  
11 what is acceptable to it in the setting of policy and that such acceptability is the overarching  
12 element that must or even should be considered by the Regional Board. The Regional Board was  
13 never meant to be a “rubber stamp” for its, at least theoretically, subservient staff or allow the  
14 Staff’s view of what is necessary to protect against water pollution automatically be the Regional  
15 Board’s. See, e.g. Water Code §§ 13201 (delineating, with specificity, the qualifications of each  
16 representative board member), 13223 (a) (providing broad power for the board to delegate any of  
its powers and duties to its “executive officer” except the powers relating to “the issuance,  
modification, or revocation of any water quality control plan, water quality objectives, or waste  
discharge requirement”), 13225 (delineating duties of the board without reference to its Staff  
being the driving force as to the setting of policy). **One can but wonder what would have  
happened had the answer to the question been “no.”**

17 <sup>6</sup> That evidence of the ex parte communications – while not physically included in the  
18 Administrative Record – may nonetheless be considered by the State Board. As the Supreme  
Court stated in Quintinar, 40 Cal. 4<sup>th</sup> at pp. 15-16 n. 11:

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

24 <sup>7</sup> As used in the ex parte context, “evidence” in terms of proving the existence of  
25 proscribed communications must be afforded an expansive meaning and coverage. See, e.g.,  
Matthew Zaheri Corp. v. New Motor Vehicle Bd. (1997) 55 Cal.App.4<sup>th</sup> 1305, 1317.

1 regard to what is known as the “Shimek proposal.” (That proposal is quoted in length and  
2 compared to the Briggs-Johnston amendment below.) See, e.g., Exhibit G, including Roger  
3 Briggs telephone conversation notes -- (a) “tc Shimek ... Steve took draft to Sacto...”); (b)  
4 “Steve Shimek ... Here @ Wed. Would like to meet only w/ people re. supplemental”; (c)  
5 “Steve Shimek – getting calls, wanted to be sure I’m OK” – and Ms. McCann’s telephone  
6 conversation notes 3/8/12 (“Shimek re conversation /w Rick Tomlinson [and] Gordon Burns.”  
7 So too did the Regional Board Staff have the actual Shimek Proposal presented by him to  
8 CalEPA as well as meet with Mr. Shimek concerning it. See Exhibit G (Declaration of Rick  
9 Tomlinson).

10 With these as a baseline, e-mails between Mr. Johnston and Mr. Briggs establish that  
11 Executive Officer Briggs provided edits to Mr. Johnston for the Ag Waiver, and provided Mr.  
12 Johnston with a final version – with edits in red to identify the new language added by Briggs to  
13 the Johnston proposal as submitted to the Staff – after Ms. McChesney had the opportunity to  
14 review them. Exhibit G at pp. 22-24.<sup>8</sup> Part of the red highlighted edits includes New Condition  
15 11 (which is what the Johnston amendment was directed at) and which, in turn, is essentially the  
16 Shimek proposal. See Exhibit G pp. 15, 17 (March 10, 2012 e-mail from Briggs to Johnston –  
17 “Mike, Here are possible edit for the order (two docs here)”; March 12, 2012 e-,ail from  
18 Johnston to Briggs requesting that copies of the language be left at the hotel desk for Mr.  
19 Johnston who was checking in the hotel to attend the Regional Board meeting); March 13, 2012  
20 e-mail from Briggs to Johnson conveying the final language of the Johnston proposal  
21 amendment and that copies would also be provided to Regional Board Chair Jeff Young). In  
22 other words, prior to the first day of the hearing (March 14) Mr. Johnston and Mr. Young had  
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24  
25 <sup>8</sup> Sadly, no copy of Mr. Johnston’s proposed amendment as drafted by him and before it  
was coopted by Mr. Briggs to reflect Mr. Shimek’s proposal is available in the Administrative  
Record.

1 copies of the Johnston proposal adding Condition No. 11 to the Ag Waiver. However, neither  
2 the existence nor specifics of this Johnston proposal were mentioned to the public at the March  
3 14 and 15, respectively, sessions of the Regional Board's meeting. That awaited the closing of  
4 the public comment session.

5 A side-by-side comparison of the Shimek Proposal and the Johnston Proposal (after being  
6 coopted by Mr. Briggs) reveals their striking similarity which, common sense dictates is not a  
7 matter of coincidence. Rather, it was a matter of design and intent. The Shimek Proposal is as  
8 follows:

9 "Inserted between Staff Proposal Condition 10 and 11:

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

18 Projects will be evaluated for, among other things:

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

31 Project proposals will be evaluated by a committee comprised of [Two?] Three  
32 researchers or academics skilled in agricultural practices and/or water quality, one  
33 farm advisor (NRCS or RCD), one grower representative, one environmental  
34 representative, one environmental justice of environmental health representative,  
35 and one RWQCB staff member. The TWQCB Executive Officers has sole

1 discretion in giving final approval of any project after receiving project evaluation  
2 results and recommendations from the committee.”

3 See Tomlinson Decl, Ex. I (Shimek Proposal). In comparison, the Johnston Proposal (after Mr.  
4 Briggs was finished with it) stated:

5 “New Condition 11 (all new language):

6 Dischargers may form third party groups to develop and implement alternative  
7 water quality management practices (i.e. group projects) or cooperative  
8 monitoring and reporting programs to accompany with this order. At the  
9 discretion of the Executive Officer, Dischargers that are a participant in a third  
10 party group that implements Executive Officer-approved water quality  
11 improvement projects ore Executive Officer-approved alternative monitoring and  
12 reporting programs may be moved to a lower Tier (e.g., Tier 3 to Tier 2, Tier 2 to  
13 Tier 1) and/or provided alternative project-specific timelines and milestones.

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

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

Project proposals will be evaluated by a Technical Advisory Committee (TAC)  
comprised of: two researchers or academics stilled in agricultural practices and/or  
water quality, one farm advisor (NRSC or RCD), one grower representative, one

1 environmental representative, and one Regional Board Staff. The TAC must have  
2 a minimum of five members to evaluate project proposals and make  
3 recommendations to the Executive Officer. The Executive Officer has discretion  
4 to approve any project after receiving project evaluation results and  
5 recommendations from the committee. If the Executive Officer denies approval,  
6 the third party group may seek review by the Regional board. As stated in the  
7 NPS Policy, management practice implementation is not a substitute for  
8 compliance with water quality requirements. If the project is not effective in  
9 achieving water quality standards, additional management practices by individual  
10 Dischargers or the third party group will be necessary.”

11 Id., Exhibit G pp. 22-23, 14-15.

12 Discounting the perpetuating phenomena described in Ecclesiastes I, Chap. 1, vs. 9-10,<sup>9</sup>  
13 the similarities between the Shimek Proposal and the Johnston Proposal cannot be seen as being  
14 coincidental. That is, both set forth a very similar process for third party groups, they both allow  
15 for the lowering of tier designation subject to Executive Officer approval, they both include  
16 almost the same exact elements for projects to be evaluated, and both require review by a  
17 Technical Advisory Committee that is composed of the identically-described individuals.  
18 Indeed, there is a marked verbatim overlap between the two. Under all of the circumstances  
19 these matters lend themselves to only one conclusion: Mr. Briggs acted as a conduit from Mr.  
20 Shimek to Mr. Johnston. That is both illegal and disserves the public interest that must served by  
21 all public employees and agencies.

22 Putting the best possible spin on these facts in favor of the Regional Board, Mr. Johnston  
23 prior to March 2013 was trying to formulate what he considered to be a possible amendment to  
24 the Ag Waiver. The reality, however, cannot be spun. Mr. Briggs “assisted” him by providing

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25 <sup>9</sup> Ecclesiastes I, ch. 1, vs. 9-10 (King James Version, 2000), state:

“The things that hath been, it is that which shall be; and that which is done is that  
which shall be done; and there is nothing new under heaven. Is there anything  
whereof may it be said, so, this is new, it hath been already of old time, which  
was before us.”

1 him with the Shimek Proposal (the product of a person clearly interested in the outcome of the  
2 proceeding). Mr. Shimek – realistically presuming the lack of altruism on his part – supplied  
3 the language of his proposal to Mr. Briggs in the hope and expectation that it would somehow  
4 find its way into the final Ag Waiver. That was done outside the presence and with no notice to  
5 the other parties such as Petitioners or the public generally. The procedure used, in fact,  
6 deprived them and us of the ability to confront and discuss the Johnston proposal. What is even  
7 stranger and leads inexorably to the conclusion that proscribed ex parte communications from  
8 Mr. Shimek through Mr. Briggs to Mr. Johnston were involved is the fact that Mr. Shimek could  
9 easily have presented his Proposal as a part of his numerous public appearances before the  
10 Regional Board – including notably his 24-minute presentation of March 13, 2012 -- but  
11 mysteriously chose not to do so. That way, no public comment on his proposal was to be elicited  
12 or allowed. Rather than use the public front door, they used the private back door. Just as  
13 obviously, Mr. Johnston or Mr. Briggs or the Regional Board or the Staff of the Regional Board  
14 could have presented that proposal during the public comment section so that it could be vetted  
15 by the public and the agricultural industry that were ultimately subjected to its terms. That it was  
16 not violated the law and the due process rights of Petitioners and other similarly situated persons.

17  
18 The result of all of this is, as argued for by numerous Petitioners, the violation of the due  
19 process rights and liberty interests of persons subject to the 2012 Proposal. After all, due  
20 process is preserved only where “rules .... prohibiting ex parte communications are preserved.”  
21 Morongo Band of Mission Indians v. State Water resources Control Bd. (45 Cal.4<sup>th</sup> 731, 741. It  
22 is, however, violated when a basic fairness principle attaching to adjudicative hearings is not  
23 met: “One fairness principle directs that in adjudicative matters, one adversary should not be  
24 permitted to bend the ear of the ultimate decision maker or the decision maker’s adviser’s in  
25

1 private.” Department of Alcoholic Beverage Control v. Alcoholic Beverages Control Appeal  
2 Bd. (2006) 40 Cal.4<sup>th</sup> 1, 4-5. When ex parte communications of the type involved here occur  
3 under the irrefutable circumstances present in this case, the due process right to a fair hearing  
4 under both the federal and California due process clauses occurs. U.S. Const. 14 Amend., Cal.  
5 Const., art. I, § 7, subd. (a). This is so since

6 “Procedural due process imposes constraints on governmental decisions which  
7 deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the  
8 Due Process Clause of the Fifth or Fourteenth Amendments.”

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

11 “A ‘fair trial in a fair tribunal is a basic requirement of due process. This applies  
12 to administrative agencies which adjudicate as well as to courts.” (Internal  
13 citations omitted)

14 No question then exists that Petitioners have a property interest of which they are deprived when  
15 due process is not afforded them due to ex parte communications in the Regional Board’s  
16 adjudicatory quasi-judicial proceeding. The proposed order does not discuss, refute or even deal  
17 with these legal conclusions and their obvious controlling application here.

18 It violates due process for the Regional Board to conduct a hearing in which ex parte  
19 communications are made to the decision maker, such communications are not made known to  
20 the parties involved, and, importantly, when a decision is made in which it reveals the  
21 undisclosed communications (evidence) for the first time. See English v. City of Long Beach  
22 (1950) 35 Cal.2d 155, 158, where the California Supreme Court held that when “information [is]  
23 received without the knowledge of the parties and at a time and place other than that appointed  
24 for the hearing,” and “the board secretly obtains information and bases its determination  
25



1 thereon,” the parties affected are denied a fair hearing. *Id.* at p. 159. The denial of that fair  
2 hearing is a denial of due process.<sup>10</sup>

3 The proposed order seems to indicate that even if proscribed ex parte communications  
4 and resulting due process violations did exist here they have no effect since the proposed order  
5 suggests that certain changes be made in the Johnston Proposal (Condition 11), which changes  
6 would be subject to public discussion. Without mentioning the term, it thus appears that the  
7 proposed order assumes that this post-adoption public discussion moots the underlying violation.  
8 That is wrong as a matter of law. An apt analogy to the situation existing here is to changes  
9 having been made to a regulatory program while an underlying decision is on appeal and the  
10 settled law that such changes neither moot out the appeal nor mitigate the underlying  
11 constitutional deprivations. The continued existence of proscribed conduital ex parte  
12

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13 <sup>10</sup> Before proceeding to a discussion of these various points it should be noted that we are  
14 mindful of the recent enactment by the Legislature of amendments to Water Code § 13287(a)  
15 dealing with ex parte communications with the Regional Water Board and this Board concerning  
16 adjudicatory proceedings such as the one that led to the enactment of the 2012 Conditional  
17 Waiver. That section plays no role here due to its not having been made retroactive by the  
legislature. *See, e.g., Quarry v. Doe I* (2012) 53 Cal.4<sup>th</sup> 945, where the California Supreme  
Court recently reviewed and described California’s rules for determining whether a statutory  
amendment is to be afforded a prospective and/or retroactive affect:

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

24 See also People v. Brown (2012) 54 Cal.4<sup>th</sup> 314, 319-322; Mateo v. Department of Motor  
25 Vehicles (2012) 209 Cal.App.4<sup>th</sup> 624, 632-34.

1 communications of the type involved here is obviously a matter of great importance and, in fact,  
2 are not specifically dealt with in the the latest statute dealing with communications to a water  
3 board (Water Code § 13287). When this type of situation exists, mootness does not occur. See,  
4 e.g., Doe v. Wilson (1997) 57 Cal.App.4<sup>th</sup> 296, 304 (question of validity of emergency  
5 regulations and due process violations was not moot even though the State was promulgating  
6 replacement regulations on a non-emergency basis); Save Stanislaus Area Farm Economy v.  
7 Board of Supervisors (1993) 13 Cal.App.4<sup>th</sup> 141, 146 (public interest in the underlying question  
8 defeats mootness).

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

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

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

20 "As long-standing California Supreme Court precedent teaches: "Administrative  
21 tribunals which are required to make a determination after a hearing cannot act  
22 upon their own information, and nothing can be considered as evidence that was  
23 not introduced at a hearing of which the parties had notice or at which they were  
24 present. [Citations.] The fact that there may be substantial and properly  
25 introduced evidence which supports the board's ruling is immaterial." (*English v.*  
*City of Long Beach, supra*, 35 Cal.2d at pp. 158-159.) "A contrary conclusion  
would be tantamount to requiring a hearing in form but not in substance, for the  
right of a hearing before an administrative tribunal would be meaningless if the  
tribunal were permitted to base its determination upon information received

1 without the knowledge of the parties." [¶] In this case, based on the violation of  
2 statutory protections designed to ensure due process and a fair hearing, we  
3 conclude that "reversal of the Department's orders is required." (Internal citations  
4 omitted)

5 Reversal of the Regional Board's Ag Waiver is thus the only remedy available and  
6 sufficient to meet the Regional Board's violation of the law, rules, and precedent regarding ex  
7 parte communications. That the violation of those matters may have been the result of innocent  
8 earnestness on the part of the then-newly appointed member Mr. Johnston is of no moment to the  
9 existence of the violation since motive or intent is not an element when it comes to the use of ex  
10 parte communications. Indeed, even if the opposite were true Mr. Johnson's perhaps-innocent-  
11 earnestness is overcome by the actions of the other involved individuals – all of whom knew  
12 better – involved in the ex parte communications.

13 **B. The Ag Waiver Order Is Illegal And The Proposed Order Is Wrong**  
14 **Since The Regional Board Failed To Comply With The Requirements**  
15 **Of Water Code § 13241 By Its Pre-Adoption Failure To Consider,**  
16 **Among Other Things, Various Economic Considerations Relating To**  
17 **The Impact Of The Order**

18 In formulating and issuing the Ag Waiver, the Regional Board failed to comply with Cal.  
19 Water Code § 13241, a key provision of the Porter-Cologne Water Act, and thus acted in  
20 derogation of the limits on its authority. Resultantly, the Regional Board violated the due  
21 process rights of the entities and persons bound by the terms of the Ag Waiver. The Proposed  
22 Order, finding no evidence in the Administrative Record to the contrary, merely assumes a "so  
23 what – sure it did" attitude which, frankly, denigrates the statutory requirement and evidences an  
24 intent to validate the Ag Waiver come hell or high (but hopefully purified) water.

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

1 “Each regional board shall establish such water quality objectives in water quality  
2 control plans as in its judgment will ensure the reasonable protection of beneficial  
3 uses and the prevention of nuisance; however, it is recognized that it may be  
4 possible for the quality of water to be changed to some degree without  
unreasonably affecting beneficial uses. Factors to be considered by a regional  
board in establishing water quality objectives shall include, but not necessarily be  
limited to, all of the following: ...

5 **(d) Economic considerations.**

6 **(e) The need for developing housing within the region.**

7 **(f) The need to develop and use recycled water.”**

8 (Emphasis supplied). The import of this provision is obvious. When promulgating the terms of  
9 the Ag Waiver and deciding that agricultural, nursery, and viticulture growers are to be bound by  
10 various of its respective terms, Section 13241 mandates the Regional Board engage in a  
11 balancing process that necessarily factors in such things as “economic considerations” and  
12 “developing housing” when determining what conditions and restrictions are needed to serve  
13 those interests and, at the same time, not unreasonably impacting beneficial uses of water. Such  
14 a balancing is mandatory: i.e., pursuant to established rules of statutory interpretation and  
15 practice, the use of the word “shall” in the statute imposes an affirmative and mandatory duty on  
16 the Regional Board to consider and comply with the designated factors before and when  
17 adopting the Ag Waiver. See, e.g., Common Cause v. Board of Supervisors (1989) 49 Cal.3d  
18 432, 443 (“shall” is normally construed as a mandatory term in statutes); Morris v. City of Marin  
19 (1977) 18 Cal.3d 901, 904 (“shall” imposes a mandatory duty); Coalition for Clean Air v. City of  
20 Visalia (2012) 209 Cal.App.4<sup>th</sup> 408, 423 (“‘shall’ identifies a mandatory element which all  
21 public agencies are required to follow...”); In re Anthony T. (2012) 208 Cal.App.4<sup>th</sup> 1019 (“The  
22 term ‘shall’ is used to express a command. (Webster’s New Internation. Dict. (2002) p. 2085  
23 col. 1 [“‘shall’ is mandatory”]). “Shall” in this context is a mandatory and thus creates a  
24 mandatory duty with which the Regional Board must comply or else be found to have violated  
25

1 the requirements of the statute. The Regional Board did not comply with that mandatory duty  
2 and thus doomed that Waiver.

3 Indeed, a review of the Conditional Waiver and Order as well as its accompanying  
4 Record reveals that the Regional Board did not adequately – and, indeed, at all -- address these  
5 matters (other than, of course, the “need to develop and use recycled water” since such water is a  
6 key element and sine qua non of the Ag Waiver). This conclusion is borne out by the fact that  
7 the Record establishes that the Regional Board refused to even consider economic considerations  
8 and impact (as well as the impact and effect on developing housing) of the then-proposed waiver  
9 in any context (including that of the California Environmental Quality Act (CEQA) analysis in  
10 which it refused to consider “economic” factors due to its view that they were not relevant even  
11 when they may have a direct relationship to environmental effects). It is also borne out by the  
12 need for the Record to affirmatively contain even facially accurate evidence of what the specific  
13 factors/evidence considered are as well as that such considerations were actually considered.  
14 Neither Section 13241 nor precedent permit the Board to merely assume they do not exist or, for  
15 that matter, fail to identify them and elucidate what impact they have on the decision to issue and  
16 formulate the Ag Waiver. Further, even if it is assumed that members of the Regional Board  
17 have personal knowledge or beliefs concerning the economic factors involved arising from their  
18 life experience or prior dealings of the Regional Board (including consideration and adoption of  
19 the Ag Waiver), such knowledge does not provide a basis for statutory compliance in the present  
20 context.<sup>11</sup> The simple reason for that is that such knowledge is not identified and is not a part of  
21

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22  
23 <sup>11</sup> Indeed, it defies common sense that any consideration of economic factors that may have  
24 been made relative to adoption of the 2004 Conditional Waiver could or should or would be  
25 attributed to the 2012 Conditional Waiver. After all, economic conditions as they existed in  
2003-2004 are most certainly not the same or similar conditions to that which exist in 2011-2012  
due to the vast economic upheavals that have occurred during the intervening 8 years as well as  
the broad expansion of the conditional waiver in 2012. A review of the record here, however,

1 the record here and thus cannot be used to “fill in the blanks” of the Order and record  
2 themselves.

3 Since the record is bare of any evidence of the economic considerations that Section  
4 13241 mandates be made (with the possible exception of a nonsensical estimate that the 30-foot  
5 buffer would cause the loss of less than 100 acres of farmland out of the 400,000 plus acres  
6 under tillage in the Region forwarded by Ms. McCann of the Regional Board Staff) and which  
7 were made by the Regional Board prior to adoption of the Order, it must be assumed that such  
8 matters were not considered. Indeed, notably missing from the proposed order are  
9 Administrative Record citations establishing the requisite consideration. That failure in and of  
10 itself, and without more, renders the Order invalid and illegal. The result of this is a patent  
11 violation of the statutory basis for the Board taking any action at all concerning adoption of the  
12 Ag Waiver. That negatively impacts the legality of the Board’s actions as a whole since it  
13 renders its Order categorically arbitrary, unreasonable, and capricious. Resultantly, the adopted  
14 Ag Waiver (and with it any validation by this Board) violates the due process rights of all  
15 persons and entities made subject to its terms and conditions.  
16

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

- 20 1. The Board members themselves had some form of personal knowledge of such  
21 matters (including that such considerations did not militate against adoption of the  
22 Order) that informed their votes adopting the Ag Waiver;
- 23 2. Such knowledge and that they considered in it prior to (and as a part of the bases  
24 for passing the Waiver) does not need to be stated in the record; and,

25 does not even establish that such economic considerations and Section 13241’s mandate were  
considered, factored in to, or otherwise complied with in issuing the 2004 Conditional Waiver.

1 3. Consideration of economic matters – although unstated in the record or in the  
2 Waiver Order itself – may be presumed from the adoption of the Order itself since  
the Board would not knowingly violate its own operative/authorizing statutes.

3 None of these three (or, for that matter, similar considerations) are of any moment and do not  
4 save the Waiver Order from its illegality and accompanying violation of due process rights.  
5 Clearly, such matters are not in the Record and the Record is otherwise bereft of evidence to  
6 back up the Ag Waiver Code § 13241. If such matters did inform the Ag Waiver, then our due  
7 process rights were violated. See English v. City of Long Beach (1950) 35 Cal.2d 155, 158:

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

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

16 Additionally,

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

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

22 Since the burden and duty of introducing facts and evidence concerning, for instance, the  
23 existence or non-existence of economic considerations implicated by the Ag Waiver’s terms lay  
24 with the proposed order and it fails to establish such matters, we are under no duty to establish  
25

1 the existence of economic matters that must or should have been considered. Regardless of the  
2 absence of such a duty, however, various of the Petitioners (including the Grower Shipper  
3 Alliance, Ocean Mist Farms, the Farm Bureau, Jensen Farms and others) did produce ample  
4 evidence establishing the economic impact and considerations that should have been considered  
5 by the Regional Board but that were ignored by the Board, not made a part of the record as  
6 considerations considered by the Board, and thus played no part in the adoption of the Ag  
7 Waiver. Among these matters were:

- 8 1. The loss of agricultural production that would arise from setting aside land required  
9 by the 30-foot buffer zone (a matter that conflicts with the California Leafy Green  
10 Marketing Agreement (see [www.ccof.org/leafygreens](http://www.ccof.org/leafygreens)) and the "super metrics"  
11 adopted by the California food production industry to address food safety concerns);
- 12 2. Relatedly, the 30-foot buffer zone will cause literally thousands of acres of farmland  
13 now under cultivation to cease being under cultivation. The direct economic impact  
14 of that is obvious and non-speculative: fewer crops will be grown resulting in fewer  
15 crops being sold and otherwise being made available to the public which lowers  
16 profits and the funds available for use by the owner/operator to "grow" the Region's  
17 economy. All of these are a surefire means of affecting economic stagnation in an  
18 industry which is now just about the only California industry successfully working  
19 its way out of the current recession and economic downturn;
- 20 3. The economic market place reaction to lower profits for the farmer is, of course, an  
21 increase by the farmer in the sale price of his produce, a matter that directly  
22 translates into higher food costs to the public (which, like higher gasoline costs)  
23  
24  
25



1 further contributes to inflation and economic stagnation of the Region as well as  
2 California as a whole;

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

7 5. Just as a decrease in property taxes will result in further layoffs and furloughs of  
8 public employees, cutbacks in the number of laborers necessary to service the  
9 agricultural industry in the Region occasioned by having significantly fewer acres  
10 available for cultivation will occur. The results of that will obviously be a reduction  
11 in the monies being spent in the Region's economy, an increase in governmental  
12 benefits being paid to the unemployed, a movement of individuals out of the region,  
13 increased foreclosures of homes now being purchased by unemployed laborers, a  
14 decrease in housing being built or developed (due to a higher foreclosure-related  
15 inventory of housing being available in the market), and the resulting impact on the  
16 taxes that may be collected by the local and state governments. Indeed, a cascading  
17 detrimental economic effect and impact is likely to occur as a result of the Order.  
18

19 Of obvious great interest and impact is the 30-foot buffer zone which the Ag Waiver  
20 dictates is a required means of compliance with the Waiver. This in spite of the command of  
21 Water Code § 13360:

22 "No waste discharge requirement or other order of a regional board or the state  
23 board or decree of a court ... shall specify the design, location, type of  
24 construction, or particularly manner in which compliance may be had with the  
25 requirements ...."

1 The Regional Board in ducking both its economic analysis and its obligations to conduct the  
2 requisite CEQA analysis (rather than just determine a negative declaration was all that was  
3 needed) used this section as a shield but, at the same time, used it as a sword against agriculture  
4 in ignoring it relative to, for instance, the 30-foot barrier as a means of compliance. Thus,  
5 regardless that reverse osmosis machines or evaporation pools – both of which are big,  
6 expensive, take land out of production, and require infrastructure construction – are the only two  
7 available means of meeting purification standards, the Regional Board said it could not tell  
8 anyone which one to use and, hence, could perform no economic analysis since the  
9 considerations obtaining to both or either were different. But it could tell them to put a 30-foot  
10 buffer, the economic impact of which is obvious and, at a minimum, should have been  
11 considered prior to adoption of the Waiver.

12  
13 Taking the Salinas River as an example – but other rivers in the Region or other bodies of  
14 endangered waterbodies abound – the loss of agricultural land from imposition of the 30-foot  
15 barrier is staggering. The Salinas River is 170 miles in length, running from San Luis Obispo  
16 County through Monterey County and emptying into Monterey Bay. See Donald J. Funk, Upper  
17 Salinas River and Tributaries Watershed Fisheries Report, Upper Salinas Tablas Resource  
18 Conservation District (2002-2003). Discounting 50% of its length due to such things as  
19 housing/industrial developments abutting the river as well as things such as the River Road  
20 separating the river from adjacent farmland by more than 30 feet, that means that approximately  
21 6000 acres of farmland will be lost to the buffer zone. How it can be reasonably stated that such  
22 a loss would not have the above-noted economic impacts, at a minimum, is unknown and  
23 unknowable.

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

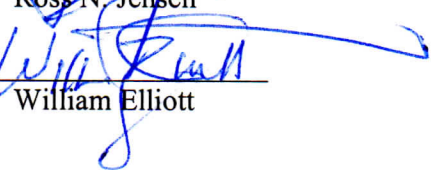
7 **III. Conclusion**

8 For the reasons stated above, in prior submission to this Board and to the Regional Board,  
9 and upon the Administrative Record as a whole, the Ag Waiver should be overruled by this  
10 Board and the Petitions of the agricultural parties granted.

11  
12  
13 Date: July 16, 2013

Respectfully submitted,

14  
15   
\_\_\_\_\_  
Ross N. Jensen

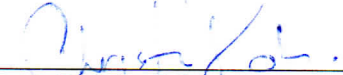
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William Elliott

**CERTIFICATE OF SERVICE**

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I hereby swear under penalty of perjury that I have served this COMMENTS OF JENSEN FAMILYU FARMS ET AL. by e-mail sent to each of the persons and entities at the addresses listed in Attachment A hereto on this 16<sup>TH</sup> Day of July , 2013 from San Luis Obispo, California 93445.

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

  
\_\_\_\_\_  
Christine Robertson

I

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