Public Comment Letters Received

By January 3, 2019

Reviewing

Draft General Waste Discharge Requirements

for Dairies in the North Coast Region

California Regional Water Quality Control Board

North Coast Region

5550 Skylane Blvd., Suite A

Santa Rosa, CA 95403

University of California
Agriculture and Natural Resources
Making a Difference for California

January 2, 2019

Ms. Cheri Blatt, Water Resources Control Engineer
Mr. Matthew St. John, Executive Officer North Coast Regional Water Quality Control Board

Dear Ms. Blatt and Mr. St. John,

Thank you for the opportunity to provide public input regarding Waste Discharge Requirements Order No R1-2019-0001 for dairies in the North Coast Region. We appreciate your many efforts to work with dairy producers, University of California Cooperative Extension Advisors and Specialist and other partners in the California Dairy Quality Assurance Program. We are grateful for the extended comment period providing sufficient time for us to provide detailed comments on this GWDR. We have worked closely with Regional Board staff during development and implementation of the existing Conditional Waiver.

Dairies under North Coast Regional Water Quality Control Board jurisdiction are predominantly organic, provide pasture for their cows and have challenges finding quality individuals familiar with pasture dairying needs to provide compliance assistance. Since the adoption of the conditional WDR in 2012, educational efforts focused on assisting producers to do their own compliance calculations and monitoring. A grant from CDFA provided funding for each dairy to work with their Resource Conservation District to develop and identify required components of aerial maps. All dairies in the region have evaluated manure and process water production, storm water generated runoff destined to the dairy lagoon and storage capacity. All dairies obtained 4 well samples to evaulate water quality (unless they had no wells). The existing Animal Resource Management Committee surface water monitoring was formalized for the representative monitoring program in the southern part of the region. Two new surface water monitoring programs were developed (Six Rivers and Smith River). Annual reports from these representative programs have been submitted. Many, although not all, producers have completed a Comprehensive Nutrient Management Plan (CNMP) with the Natural Resources Conservation Service. These are just a few of the changes that have occurred since the conditional waiver was adopted. Countless hours went into development of educational materials and delivering workshops and office hours to aid producers to achieve compliance.

University of California Cooperative Extension Advisors and Specialist are quite familiar with dairy producers in the North Coast through educational programs (workshop and office hour participation), on-farm visits, and the opportunity to accompany staff during some inspections. We provide these comments based on both an understanding of your regulatory goals and potential water quality concerns.

Page	Comment
WDR	
1	It would be helpful to have an appendix with a summary table identifying differences in water quality sampling (analytes for surface water; frequency of sampling for groundwater). It would be helpful to have a summary table identifying the revisions to the Water Quality Plan.
3 item 6 and page 14	Confusion in language exists on these pages. Page 3--This Order applies to all dairies. Smaller dairies milking less than 10 cows, 10 water buffalo….. and page 14 -- This Order applies to all dairies milking a minimum of 25 cows, 25 water buffalo… Please clarify which herd size is correct. Please also specify when herd sizes are identified for coverage under the Order, facility sizes (if any) that are exempt from completing all plans.
17 item g	Retention pond clean-out shall occur annually… Please modify to allow for site specific management practices. The objective is to have sufficient storage capacity. Liquids are used from ponds to provide both water and nutrients to pasture or crops. The removal of liquids is different than pond clean-out of more slurry based material. As long as adequate storage exists producers should be able to have pond clean-outs when needed and not have them required annually. Please focus on the objective and leave the site specific management decisions to the dairy operator.
18 4.f.	Stubble height reaches 4 inches…The objective is to have sufficient residual stubble height to protect soil from rain and runoff caused erosion and/or provide some filtering of organic matter. Please restate to indicate the objective of residual stubble height and not mandate a specific height.
18 4. Riparian areas	Thank you for including grazing when appropriate in riparian areas. This can be an essential management practice to reduce sufficient amounts of non-woody vegetation and maintain proper water flow during the rainy season.
19 6. Compost	Setback requirement of at least 100 feet from nearest surface water body and/or the nearest water supply well. Please identify the objectives to protect water quality. In other parts of the Order a 100 ft setback, a 35 ft when a vegetative buffer is present, or alternative practice are acceptable. It is possible to design a compost facility (concrete pad) with runoff collected and stored appropriately.
20 b	The CalRecycle section referenced provides guidance on the final deposition of compostable material and/or digestate. Including this section here as a general statement for all manure application appears to overstretch the intent. If other waste products are imported to the facility and used as co-compost then perhaps a reference to being sure composted materials are land applied appropriately is sufficient. CalRecycle information does identify their guidance is for local enforement agencies and othe interested parties. They do acknowledge Regional Water Quality Control Board authority. Please remove this section or streamline to indicate its importance for operators importing wastes to their facility.
20 7. Odors	In the winter rainy season, manure piles are required to be covered to protect air quality,…What is the objective? Covering of manure piles to reduce odor during the rainy season can be an effective management practice in a hot arid climate. Scraped manure in pasture dairies is closer to 70 or 80% moisture. Covering this material will create and maintain anaerobic conditions. These are the conditions one is trying to prevent to minimize formation of some odiferous compounds. Covering piles is costly (requires labor and proper plastic and weighting materials to hold plastic down). Plastic used ultimately ends up in smaller pieces and potentially blown beyond farm control. Please remove this requirement.

20 C. 2. And Page 27 item 3.	A requirement to update all existing plans is unrealistic. As mentioned during the November Board meeting, there is limited capacity throughout the region. There are few individuals currently knowledgeable of dairy systems and their operation, pasture grazing, and WDR needs. Additionally the funding is not readily available. Regional Board may consider that the first priority is to have everyone have plans. Following that, then update existing plans. Please modify existing plans may need to be modified or provide a sufficient window of time for all existing plans to be updated. Although the NRCS (Natural Resources Concervation Service) did do many plans around the time of the adoption of the Conditional Waiver they may not have the ability to modify plans as easily.
20 C. 2.	Reference to the schedule in Section H is confusing. Perhaps this is meant to be referencing Sections F and G?
23 E. 1 and Page 27 4. Annual Reporting	Much of the information in the NOI is included in the Annual Report. Is it possible to reduce paperwork and put a box on the Annual Report form to identify they are also submitting an NOI for this Order? An additional question or two could be used to augment needed information in the NOI that is not on the Annual Report form. Producers are accustomed to completing their Annual Report by November 30. If the intent is to not have producers submit an Annual Report in 2019 (Page 27 4. Annual Report starting in 2020) then having the NOI submitted in 90 days is reasonable. Please clarify on page 23 if there is no Annual Report in 2019.
23 F. 2.	Suggest rewording so producers would need to develop NMP and make available to staff for review upon request or during inspections.
28 surface water sampling, MRP page 5 a.	Test for pH, temperature, electrical conductivity and ammonia In the monitoring and reporting program section surface water analytes include electrical conductivity, total ammoniacal N and visual stream observations. Please make Order and MRP language consistent. Groundwater samples test for nitrate, tds and total coliform in the southern end of the region exceeds $100 per sample.
Notice of Intent	
2	Insert a question to identify if facility operator information and owner information are the same. If yes, skip to section III
3	Dairies covered under the Conditional Waiver have already submitted information on this page. The Regional Board has this information. Please be considerate when asking for information you already have. Consider removing this page. Dairies that are new have time to obtain this information so the questions may be quite confusing.
Monitoring and Reporting Program	
2 item 2. Retention pond	The objective is to ensure there is sufficient storage capacity to accommodate regular generation of process water and a 25-year 24-hr storm event. If producers have a marker in their pond they may determine sufficient capacity is present if the marker is visible. Actual measurement of freeboard may not need to occur. Please consider additional alternatives as acceptable to meet to intended objetive.
2 4. a.	The Discharger shall inspect any cropland and pasture on which process water or manure is applied…. Please substitute are for is.
4 B. 1.	Thank you for allowing surface water samples to be taken at 14 d intervals. Given recent years' storm line up it has not always been possible to achieve 3 sampling dates when situated 30 d apart.
5 a	NH_3 +NH_4^+ are ammoniacal Nitrogen (ammonia + ammonium)
6	Current language to require sampling groundwater at the nearest downgradient supply location or install a groundwater well quite costly. In situations where the nearest down gradient well is not on the dairy owner's property, sampling may not be an option. Even if the operator is granted access to sample the water there may not be information

	related to well construction characteristics. Consider removing. Installation and maintenance of groundwater monitoring wells is likely cost prohibitive. Simply, if required it will be a factor in dairies closing.
6 2 a	Groundwater sampling: Each sampling set is costly in both time and human resources to collect samples and deliver them to the appropriate analytical laboratory. Dairies have already submitted results from 4 sets of groundwater analyses. Please use this information to determine frequency of additional sampling and not make all operators sample three consecutive years.
7	For facilities with NO_3-N ≥ 5 mg/l the need to develop a work plan signed by a professional engineer or registered geologist is excessive. This trigger value is one-half of the drinking water standard. Staff from the Natural Resources Conservation Service, Resource Conservation Districts, dairy trade associations, University of California Cooperative Extension and other groups may be well qualified to identify management improvements. Condemning a facility to a detailed groundwater monitoring work plan when one-half of the drinking water NO_3-N concentration exists is expensive and may not yield any difference in water quality. Please allow local service providers to aid producers before requiring expensive groundwater monitoring.
9 b.	How does a producer demonstrate that wells chosen for groundwater sampling are representative when multiple wells exist?
9/10 c.	Submittal of groundwater results by geotracker may be beyond the technical capabilities for some. Internet connectivity remains challenging in rural areas. Also, infrequent use of geotracker will make for a new learning curve each time it is used.
10 f	Please delete reference to pH and temperature for field test instruments. These analytes have been removed from surface water sampling analytes.
11 5	Reference to noncompliance reporting should be page 13 (not page 11 as currently identified).
15	As indicated previously, insufficient resources (qualified staff and dollars) are available to write NMP for those who have no plan AND update existing plans by November 30, 2020. Please see comment above WDR page 20 C. 2. And Page 27 item 3. Funds through NRCS are not guaranteed in perpetuity. Costs associated with plan development given the sampling requirements will exceed $10,000.
Water Quality Plan	
	Please streamline water quality plan for existing dairies. Identify new information (not already submitted to the Regional Board as part of the last Water Quality Plan). Separate this information out to allow producers to supplement existing water quality plan. Kindly be sure that if information is required in an NOI that it is not also required in the water quality plan.
2 8. Table.	Move the information in parenthases (column 3) into a footnote.
4 23	Measurement of depth to water table requires special measuring capabilities and likely pulling each well pump. This will be an incurred expense for producers. In areas of the Region with tidal influence the depth to water table can fluctuate by AM/PM, by day, by month, by season, even by tidal cycles depending. A one-time measurement would not provide useful information and would give no details on recharge capabilities of groundwater aquifers. Kindly remove this requirement.
5	Please move the list protection at each groundwater wellhead and subsequent table to the area following groundwater well identification and before I. Manure ponds.
5 I	How would a producer determine the least annual groundwater separation below manure ponds? This process would require engaging an engineering consultant and be costly. Kindly consider removing this requirement.

5. I	Precisely determing pond berm height above sea level requires surveyor capabilities. Cell phone apps are not reliable in rural areas. Kindly consider removing this requirement
7 C	The last two sentences of the second paragraph are informational. They may or may not be correct over time. NRCS has practice standards it funds. RCDs have to apply for grants for their funding. Kindly remove these sentences as they are not a part of an actual Plan.
7 C.	These questions are quite confusing. Perhaps a table would suffice to indicate if rainfall drains away from manure (is kept clean), comes in contact with manure and is or is not collected and transferred to the dairy lagoon? The main question is does runoff from any buildings contact manure or feed and not get collected into the dairy lagoon? That's the runoff to be addressed. Are the other combinations needed?
10 1.	Application of nutrients to land should be done according to the NMP. If the facility's NMP indicates there may be applications beyond November 1 then it is challenging to answer this question. In dry winters, nutrient applications late into fall or early winter are justified. Consider rewording statement to allow for minor nutrient applications beyond November 1.
10 2.	Describe the measures taken to minimize to process wastewater….. remove second "to"
10. NMP	See previous comments regarding having all current NMP updated by November 30, 2020.
11 5	Annual manure and other organic by-product analyses will be costly and difficult to accomplish. It is unclear if any local laboratories within the North Coast will actually analyze manures. Previous samples collected for CNMP work were delivered to analytical laboratories in the Central Valley for analyses. This added physical challenge will increase costs associated with analytical analyses. Perhaps frequency of analyses would depend on potential risk to water quality. Organic based systems are notoriously short of nutrients for crop needs.
11	For facilities without a prepared NMP 2. In the interim (from now until the NMP is completed and nutrient management practiced) is manure….. replace is manure with are manure
13 D	Please remove the narrative paragraph specifically related to odors. This information is educational in nature and detracts from the required information under section D. Most dairies in the regions already scrape manure from animal housing areas to minimize storage needs.
16 J	The water conservation section appears with no relation to any other component of the Order. The narrative information here is not part of a water quality plan. The information identified under water conservation actually covers many practices and programs beyond water quality. Kindly remove this section. Including it in a Water Quality Plan is confusing.
18	Purpose. Duplicative phrase Alternative management measures that provide equal or better protection. Please delete.
19	Please see comments previously regarding 4 inch residual stubble height
20 H.	Are creek crossings are designed and constructed…. Delete second are.
18 RMP Purpose, Due Date, Definition, and I. Performance Measures	Replace references to submission of RMP to Regional Board office with "RMP is to be completed and filed on-site for review by Regional Board staff upon request."
18 Definition	Literature supports a width of approximately 30 feet to provide significant reductions in non-point source pollution constituents. Revise "…about 35 feet…" to read "… approximately 30 feet…"
19-20 Performance Measures and Worksheet Questions	The objectives for managing stream and riparian functions through establishment of protection of woody plant species are conflated with the water quality protection

	objectives through reduction of nonpoint source pollution constituent delivery to surface waters. The suggestion is to order and organize these questions and measures into these two groups and potentially removed the group related to woody species management. This last suggestion is made because as the measures and questions are currently presented, the implication is that the producer is responsible for the establishment and maintaince of woody plant species in the riparian area. This may or may not be possible for reasons beyond the producers control while at the sametime the management of livestock and NPS sources to improve and protect surface water quality is attainable.
19-20 II and III	Currently, it is not clear until both sections II and III are read that the RMP and the worksheet are the same thing. Upon first and second reads of section II, clarity was needed as to what was required if a dairy is meeting and in compliance with the performance measures. This can be resolved by editing the introduction in section II or switching the order of sections II and III.
Nutrient Management Plan	
1 A paragraph 2	Please reword credentials needed by individuals assisting dairy producers develop their NMP. One does not receive a degree in or certification from University of California Cooperative Extension. We are employed by University of California with responsibilities as Advisors, Specialists or Program Representatives. Also in this paragraph is the reference to needing all NMP to be updated. See previous comments.
2	The NMP shall be revised within 30 days when discharges from a land application area result in exceedance of water quality objectives. Kindly reword to allow consideration to management practices used. Perhaps a heavier than anticipated storm came through. If the NMP allowed for some application of manure before a light rain and a heavier rain arrived that doesn't make the NMP invalid. The NMP shall be revised within 90 days when any of the following occur: Please reconsider these requirements. Site-specific data information should be used along with the NMP to determine if modifications are needed. If site-specific data are similar to those values used when the NMP was developed it need not be modified. It is when site-specific data are markedly different than values used in development of the NMP that one should consider re-evalaution of the NMP. The first evaluation would be to identify if all sampling was representative and if samples were handled appropriately from collection to delivery to the laboratory. Requiring a revision to the NMP if acreage changes by 15% is not necessary if there were insufficient nutrients to begin with or if acreage increases. The trigger to revise the NMP should be a function of the difference the change in acreage would create related to suitable land for manure nutrient application.
3 4. Maps	The funding source that was available when the Conditional Waiver was adopted to pay Resource Conservation Districts to develop aerial maps is no longer available. This source of funding no longer exists as the milk stabilization unit at California Department of Food and Agriculture is no more.
4 7.	Describe the methods by which manure and process water is applied to land. Replace is with are.
5 8.	Please insert here or in F (page 9) a table with clear instructions for media and analytes sampled and frequency of sampling. Kindly identify that additional sampling of irrigation water is not necessary if irrigation water is from a well sampled for groundwater. Please allow use of microwave moisture content for solid manure. Moisture is often different from one source to another. If nitrogen is somewhat similar in the same source of

	manure less frequent sampling could be allowed. See comments previously related to challenges associated with laboratory availability to analyze these samples.
8	Flash grazing. Thank you for acknowledging this is an acceptable practice.
9 F	The current 590 Standard for forage plant tissue analysis requires excessive sampling of material. Based on published research from California a field composite from ten grab samples retrieved throughout the harvest of the field is sufficient to represent the field (Miller, C.M.F., Fadel, J.G., Heguy, J.M., Karle, B.M., Price, P.L., Meyer, D., 2018. Optimizing accuracy of protocols for measuring dry matter and nutrient yields of forage crops. Sci. Total Environ. 624, 180–188).
9 F	Moisture analysis on process water is not needed. Data are reported on an as-is basis and land applied on an as-is basis.
11 g	Duplicative process. Please delete one of these. Stormwater sampling is not a typical function of the NMP. Is this the most logical place to require record-keeping?
11 j	Will the Regional Board develop appropriate record-keeping tools for producers to use to maintain nutrient application information? The Central Valley tool has not been updated and does not serve pasture based systems.
Annual Report	
5 b c	Suggest moving F 1 b and F1c questions prior to F a and include instructions after F1c that if they are participating in a group monitoring program they should contine with 2 (no need to do current 1.a.)
6	See previous comments related to use of geotracker.
8 H	As listed producers need to identify Technical Service Provider/Approving Agency for development of their NMP. Please allow flexibility for dairy producers to complete their NMP with information obtained in educational workshop.
8 H	If so, do the results show that the is dairy applying nutrients. Transpose is and dairy to read that the dairy is applying….

Please don't hesitate to contact us should you need additional information.

Sincerely,

Deanne Meyer, Ph.D. Livestock Waste Management Specialist, UC Davis
David Lewis, Watershed Management Advisor, County Director
Randi Black, Dairy Advisor Sonoma, Marin and Mendocino Counties
Jeff Stackhouse, Livestock and Natural Resources Advisor, Humboldt-Del Norte Counties

Six Rivers Dairy Association

5601 S. Broadway
Eureka, CA 95503

December 19, 2018

Cherie Blatt
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403

Subject: Comments for Draft General Waste Discharge Requirements for Dairies in the North Coast Region, Order No. R1-2019-0001

Dear Cherie,

The Six Rivers Dairy Association was formed in 2012 to administer the Humboldt County Surface Water Group Monitoring Program, which conducts representative surface water sampling for its members for compliance under the current Regional Water Board dairy permit program. We offer the following comments on the draft GWDR related to surface water sampling, Attachment D Monitoring and Reporting Program, page 11, *Section B.5 Group Sampling.*

1. We request that the Regional Water Board keep the existing structure for the representative surface water sampling program, specifically allowing groups to keep the ability to report results using unique site identification numbers.

SRDA has worked very hard to make the group program work for producers and the Regional Water Board, and we believe it is an important way our dairy community can help protect water quality. The program as it exists now allows SRDA the ability to address water quality issues that arise in a producer-led manner, which is often more successful than regulatory means. SRDA has a proven track-record of this by adopting internal guidelines that guide decisions for membership and continued eligibility in SRDA, and ensuring dairies uphold membership requirements.

As a reminder from public comments heard in August 2017 on the proposed new permit, it was stated that "group sampling is best way to get baseline data, 99% no[t] causing probs." SRDA suggests along with keeping the group program and reporting as it currently stands, the Regional Water Board could add the option that they will request site-specific information when sampling results of total ammonia ≥3mg/l are found.

Sincerely,

Dave Renner
President, Six Rivers Dairy Association

CALIFORNIA COASTKEEPER ALLIANCE

January 3, 2019

Chair David Noren and Board Members
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403

Sent via electronic mail to: North.Coast@waterboards.ca.gov

RE: Comment Letter – Draft General Waste Discharge Requirements for Dairies in the North Coast Region, Order No. R1-2019-0001

Dear Chair Noren and Regional Board Members:

California Coastkeeper Alliance (CCKA) is a network of California Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state for the benefit of Californians and California ecosystems. On behalf of the California Waterkeepers, including Russian Riverkeeper, Humboldt Baykeeper, and Klamath Riverkeeper, we appreciate the opportunity to comment on the – Draft General Waste Discharge Requirements for Dairies in the North Coast Region, Order No. R1-2019-0001 (Draft Order). Water discharges from agricultural operations in California pose significant threat to water quality by transporting pollutants – ranging from toxic pesticides, sediment, nitrate, and salts – pathogens, and heavy metals from cultivated fields into surface and groundwater. Encroachment of streams and rivers throughout the state by intensive farming and grazing have also led to the destruction of natural riparian zones through increased erosion, nutrient and sediment pollution, higher water temperatures, and degraded aquatic habitats. Nutrient pollution and eutrophication are pressing challenges to water quality in California and agriculture is the largest source of nitrogen input into the environment in the state. The over- or improper application of fertilizers onto agricultural fields can cause excess nutrients to be lost to the environment through runoff, erosion, leaching, or volatilization, and impair beneficial uses of water throughout the state, including drinking water and recreation.

In the second half of the 20th century, rapid expansion and vertical integration of the meat production industry almost destroyed independent family farms and led to a shift from traditional meat production and grazing methods to the proliferation of Concentrated Animal Feeding Operations (CAFOs). CAFOs confine tens of thousands of animals and have the potential to contribute large pollutant loads into waterways. In fact, CAFOs can produce as much waste as a small city, but typically lack the basic waste treatment system to process it. Growers typically apply the large amounts of untreated animal sewage produced by their operations onto adjacent croplands. However, growers often apply waste in far excess of the amounts needed to fertilize these lands and as a result, much of that waste is mobilized via runoff into nearby waterways. The large amounts of animal waste produced by concentrated livestock has the potential to contribute nutrients, suspended solids, pathogens, and heavy metals to surface and groundwater supplies. In addition, the growth of contract farming that has resulted from this shift in production has also shifted liability for pollution from the multinational corporations that own the livestock and dictate meat production to the on-the-ground grower. As a result, the companies benefiting from the profit of industrial meat production can hide behind farmers and avoid liability. Beyond farming, CAFOs housing animals for recreational purposes present similar waste discharge concerns in suburban and urban areas and are often ignored by regulators.

Since CAFOs are often located near streams and waterways, they must be particularly well managed to minimize human health and aquatic ecosystem impacts. There are multiple best management practices that must be implemented to minimize the impacts of CAFOs and the resulting waste discharges. This includes various mechanisms for runoff control, solid and liquid waste storage and reuse, and nutrient management. The specific

practices individual operations should implement are dependent on the type of facility, the animal in the CAFO, any potential receiving water, and the specific area of the facility that is the problem.

CAFOs must also be required to provide specific information regarding their location and specific management practices to allow facilities to be more easily inspected, and the effectiveness of their practices more easily assessed. Generally, the California Water Boards should establish clear guidelines for facility siting in the permitting process for new facilities or expansions that require CAFOs to be located away from surface waters, areas with high potential for infiltration of contaminants into groundwater supplies, and generally away from critical or sensitive ecosystems. The state should impose a moratorium on construction for the expansion of CAFOs absent implementation of the best management practices. All regional boards should identify all CAFOs within their region and update the list annually. And lastly, in areas with high potential for groundwater infiltration, Salt and Nutrient Management Plans associated with agricultural activities should include a monitoring program that is transparently reported to the Water Boards and the general public.

As climate change persists, and our drought becomes the new normal, agricultural impacts will only be exacerbated in the North Coast. Heavily diverted rivers will see even less flows during summer months due to diminished snowpack. Harmful algae blooms largely caused by nutrient pollution will only continue to intensify as water temperatures rise and agricultural nutrients continue to be loaded into the system. And riparian encroachment will cause even more damage as intense flood events cause rivers to expand past their channelized banks, eroding the riparian zone and destroying valuable aquatic habitat. In the North Coast, 400,000 acres of irrigated agriculture in the Klamath Basin has largely depleted the flows of major rivers and their tributaries. The Humboldt region faces a growing threat of marijuana cultivation, causing illegal diversions and sediment runoff into extremely sensitive aquatic ecosystems. And the Russian River has been put into a strait jacket as winery growth has encroached into riparian areas, resulting in high sediment and nutrient runoff.

Specifically, the North Coast Regional Board fails to adhere to the Porter-Cologne Act, the Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program (Nonpoint Source Policy) and our Statement of Policy with Respect to Maintaining High Quality Waters, State Water Board Resolution No. 68-1626 (Antidegradation Policy). The current Draft Order is legally deficient, and we request the following changes be made to the Order before adoption:

(1) The Dairy Order violates the water code and the nonpoint source policy because it fails to require specific, enforceable standards against which to measure existing management practices.
(2) The Dairy Order violates the porter-cologne act and non-point source policy because it lacks sufficient feedback mechanisms to determine whether the program is achieving its stated purpose of achieving water quality objectives and protecting beneficial uses.
(3) The Dairy Order violates the antidegradation policy.
(4) The Dairy Order fails to adhere to the California constitution because all permittee data – including nutrient management plans – should be made publicly available.

I. THE DAIRY ORDER VIOLATES THE WATER CODE AND THE NONPOINT SOURCE POLICY BECAUSE IT FAILS TO REQUIRE SPECIFIC, ENFORCEABLE STANDARDS AGAINST WHICH TO MEASURE EXISTING MANAGEMENT PRACTICES.

A. The Draft Order fails to comply with the Porter-Cologne Act and the Nonpoint Source Policy Element 1 and 2, because the program does not achieve water quality objectives and protect beneficial uses.

Water Code §13269 requires a conditional Waiver of waste discharge requirements to include monitoring requirements "designed to support the development and implementation of the Waiver program, including, but not limited to, verifying the adequacy and effectiveness of the Waiver's conditions."[1] The Draft Order's compliance monitoring is inadequate.

The Draft Order fails to comply with the Nonpoint Source Policy. The Draft Order violates the Nonpoint Source Policy. In May 2004, the State Water Board adopted the Nonpoint Source Policy. The purpose of the Policy is to improve the state's ability to effectively manage nonpoint source pollution and conform to the requirements of the Federal Clean Water Act and the Federal Coastal Zone Act Reauthorization Amendments of 1990. The NPS Policy requires, among other key elements, an NPS control implementation program's ultimate purpose to be explicitly stated. It also requires implementation programs to, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

The key element of all nonpoint source control programs is verification measures to determine whether a program is meeting its stated purpose.38 The Nonpoint Source Policy requires an Agricultural Waiver or Order to address nonpoint source pollution "in a manner that achieves and maintains water quality objectives and beneficial uses."[2] This does not mean the Regional Board only set Water Quality Objectives, but it must also determine that there is a *high likelihood* the program will attain those objectives. The Draft Order fails to make this determination.

Nonpoint Source Policy Element 2 states that: "[a] nonpoint-source control **i**mplementation program must include a description of the [management practices (MPs)] and other program elements that are expected to be implemented to ensure attainment of the implementation program's stated purpose, the process to be used to select or develop management practices, and the process to be used to ensure and verify proper management practice implementation."[3] A Regional Water Board must be able to determine there is a "high likelihood that management practices will be successful."[4] "Management practices must be tailored to a specific site and circumstances and justification for the use of a particular category or type of management measure must show that The Draft Order violates Water Code §13263. Under the Porter-Cologne Act, anyone discharging or proposing to discharge waste that could affect water quality must either obtain Waste Discharge Requirements (WDR) or a Conditional Waiver of Waste Discharge Requirements (Waiver). A WDR must be consistent with any applicable state and regional water quality control plans and policies. However, the Regional Board's management-practice approach – without enforceable standards to protect beneficial uses – is not sufficient to achieve compliance with the Basin Plan's water quality objectives (WQOs) because it lacks specific, enforceable standards against which to measure existing management practices; lacks meaningful deadlines; and lacks adequate feedback mechanisms to determine if management practices are effective.

[1] California Water Code §13269(a)(2).
[2] State Water Resources Control Board, POLICY FOR IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM Cite to NPS Policy, pg. 12 (May 20, 2004).
[3] *Id*.
[4] *Id*.

B. The Draft Order fails to achieve the North Coast Basin Plan's Water Quality Objectives or to protect the Region's Beneficial Uses.

The Draft Order is inconsistent with the North Coast Basin Plan and relevant water quality objectives because it does not contain specific, enforceable standards to measure the effectiveness of management practices. The North Coast Basin Plan establishes water quality objectives to protect beneficial uses of water, establishes a program of implementation to achieve water quality objectives, and includes the requirements of the Nonpoint Source Policy.

- Biostimulatory Substances- Waters shall not contain biostimulatory substances in concentrations that promote aquatic growths to the extent that such growths cause nuisance or adversely affect beneficial uses.
- Sediment - The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.
- Turbidity - Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones of dilution within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.
- Bacteria Rec – 1 – In waters designated for contact recreation (REC-1), the median fecal coliform concentration based on a minimum of not less than five samples for any 30-day period shall not exceed 50/100 ml, nor shall more than ten percent of total samples during any 30-day period exceed 400/100 ml (State Department of Health Services).
- Bacteria Shellfish - At all areas where shellfish may be harvested for human consumption (SHELL), the fecal coliform concentration throughout the water column shall not exceed 43/100 ml for a 5-tube decimal dilution test or 49/100 ml when a three-tube decimal dilution test is used.
- Bacteria for Groundwater - In groundwaters used for domestic or municipal supply (MUN), the median of the most probable number of coliform organisms over any 7-day period shall be less than 1.1 MPN/100 ml, less than 1 colony/100 ml, or absent.

The Draft Order does not contain any specific, enforceable standards to measure compliance with these water quality objectives. The Regional Water Board's reliance on iterative management practices in lieu of enforceable standards is illegal due to the failure to take into consideration the beneficial uses and water quality objectives required to achieve beneficial uses.

The Regional Water Board's current reliance on management practices in lieu of enforceable standards is illegal under the Porter-Cologne Act and the state's Nonpoint Source Policy. Without performance standards linked to actual objectives, existing requirements, like nutrient management ratios, do not enable us to understand how water quality will be impacted by those practices or whether those practices are effective for meeting standards. Further still, relying on best management practices has proven insufficient for ensuring that water quality standards are being met.

The Regional Water Board must set enforceable water quality standards. Therefore, the State Water Board should require that following a water quality exceedance, water quality benchmarks become enforceable effluent limitations measured at the edge-of-field. Furthermore, the Draft Order lacks management practice implementation requirements further demonstrates the Order fails to require compliance with Basin Plan water quality objectives within a time certain. This is because the Draft Order entirely omit requirements to ensure that adoption of management practices at individual farms that are designed and engineered to attain Basin Plan water quality objectives.

The Central Coast Waiver at issue in *Monterey Coastkeeper* required only the largest polluting growers to conduct individual farm monitoring for effluent discharges. All other growers were allowed to participate in regional, representative monitoring. The Draft Order's flawed reliance on the iterative process is almost identical

to the management program held to be illegal in *Monterey Coastkeeper*. The *Monterey Coastkeeper* Waiver also relied upon the implementation of iterative management practices to achieve water quality standards. Just like the Draft Order, the *Monterey Coastkeeper* Waiver provided that for "the extent monitoring data shows implemented management practices have not been effective in preventing discharges from causing or contributing to exceedances, the Modified Waiver requires the discharger to implement 'improved' management practices."[5]

To assure management practices will meet water quality objectives by a certain timeframe, the Regional Water Board should require that management practices must be designed and engineered to attain Basin Plan water quality objectives, and that such design must be supported by an accompanying reasonable assurance analysis that demonstrates the management practices implemented are in fact designed to ensure compliance with Basin Plan water quality objectives.

II. THE DAIRY ORDER VIOLATES THE PORTER-COLOGNE ACT AND NON-POINT SOURCE POLICY BECAUSE IT LACKS SUFFICIENT FEEDBACK MECHANISMS TO DETERMINE WHETHER THE PROGRAM IS ACHIEVING ITS STATED PURPOSE OF ACHIEVING WATER QUALITY OBJECTIVES AND PROTECTING BENEFICIAL USES.

Water Code § 13269 requires a conditional waiver of waste discharge requirements to include monitoring requirements "designed to support the development and implementation of the Waiver program, including, but not limited to, verifying the adequacy and effectiveness of the Waiver's conditions."

California's agricultural program has a systematic management failure throughout the state due to a lack of verification monitoring to ensure compliance with water quality standards at the farm or operation level. Existing water quality monitoring requirements focus on stream sample collection at resolutions that are far too inadequate to determine compliance on a farm-by-farm or site-by-site level. This inadequacy significantly hampers enforcement efforts and also fails to assist farmers themselves in determining whether or not their management practices are effective. The Nonpoint Source Policy requires that that management practices are "tailored to a specific site and circumstance;" however, that criteria is impossible to verify solely with representative monitoring. As a result, the Regional Water Boards continue to have no evidence demonstrating that current management measures will effectively achieve water quality standards.

Without monitoring to determine whether individual growers' management measures are achieving water quality standards, it is impossible to hold growers accountable for their polluted runoff; and ultimately, impossible to protect our waterways from agriculture pollution.

The Draft Order fails because it allows individual permittees to self-form a representative monitoring group. On page 11, of the Draft Order Monitoring and Reporting Program, the Regional Board allows any permittees to "form a representative monitoring group" to develop and administer a local watershed-based surface water and/or groundwater monitoring program." The Regional Board goes on to allow permittees to "substitute data gathered from the representative monitoring program to substitute for some or ALL of the required monitoring of individual dairies…"

The Regional Board must issue an order with a monitoring and reporting program that must be able to determine whether dischargers are causing exceedances of water quality objectives and it must able to determine if the management practices and other requirements of the order are having an actual, measurable effect on those discharges and on water quality. This Draft Order fails to do so.

[5] *Monterey Coastkeeper et al. v. State Water Resources Control Bd.* (Super Ct. Sacramento County, 2015, No. 34-2012-80001324.

A. The Monterey Coastkeeper decision dictates that an iterative process with representative monitoring fails to ensure water quality standards will be achieved.

The Draft Order's monitoring program provides less feedback than the monitoring program overturned in *Monterey Coastkeeper et al. v. State Water Resources Control Bd,* which was upheld in the appellate court decision *Monterey Coastkeeper v. State Water Resources Control Board* (2018) 28 Cal.App.5th 342.[6] The *Monterey Coastkeeper* court found the Modified Waiver to be unenforceable because in practice, "this approach is highly unlikely to work because the receiving water monitoring data, submitted in most cases by a cooperative monitoring group, does not identify the individual discharges that are 'causing or contributing' to the exceedence."[7] The same conclusion can be drawn with the Draft Order.

The Draft Order does not provide enforceable standards because nobody can determine where receiving water violations are occurring. *Monterey Coastkeeper* held the Waiver's monitoring program did not ensure compliance with water quality standards because "neither the Board, nor the cooperative monitoring group, nor (in many cases) the grower, can identify where the pollution is coming from or whether the grower's management practices are effectively reducing pollution and degradation."[8] The Draft Order contains the same illegal flaw. There is no effective feedback mechanism to ensure each grower is complying with the Basin Plan's water quality objectives. As such, the Draft Order does not provide specific, enforceable standards to ensure compliance with water quality objectives.

The courts find minimal monitoring programs – with some individual monitoring – is inefficient to determine compliance with water quality standards. In *Monterey Coastkeeper*, the court held that "the Waiver's compliance/verification monitoring is inadequate."[9] The court's justification was that because "the Waiver relies on implementation of management practices to achieve water quality standards", the "monitoring must be sufficient to verify the effectiveness of the management practices that are implemented."[10] When receiving water exceedances occur, the court held that "limitations of the cooperative surface receiving water monitoring in identifying the source of exceedances" was the reason the "Waiver continues to be inadequate to identify and resolve exceedances for all but the small class of dischargers subject to individual surface discharge monitoring."[11] Even though the Central Coast Waiver had individual monitoring requirements for some growers, it was still not adequate to ensure all growers' management practices were sufficient to meet water quality objectives.

The current Draft Order requires no individual surface water monitoring. The Draft Order only requires representative monitoring – for all growers regardless of associated impacts. Even after an exceedence occurs, the Draft Order never explicitly requires individual farm monitoring to assess compliance with standards. The Draft Order does not even meet the level of rigor in the overturned monitoring program from *Monterey Coastkeeper* because zero growers are explicitly subject to individual monitoring to identify and resolve exceedances.

Representative monitoring – on its own – is not sufficient to determine compliance with water quality standards. We understand the law does not mandate individual field monitoring for all growers. However, there needs to be adequate monitoring to identify and resolve the source of exceedances. While the courts have not determined the precise monitoring program that will achieve this standard, the courts have ruled in *Monterey Coastkeeper* that the Draft Order's current reliance on representative monitoring is illegal and not sufficient to comply with the law.

[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id* at 41.
[10] *Id*.
[11] *Id*.

Management practices do not ensure that water quality standards are being met. The Draft Order's representative monitoring essentially guarantees that the Regional Board will not take enforcement action against a discharger as long as the discharger believes it is implementing iterative management practices, even if those iterative practices remain completely ineffective at controlling discharges of waste and meeting water quality objectives. As *Monterey Coastkeeper* explains, "Management practices are merely a means to achieve water quality standards. Adherence to management practices does not ensure that standards are being met."[12] However, the State Water Board continues to condone iterative management practices in-lieu of specific, enforceable standards. The State Water Board should heed the opinion in *Monterey Coastkeeper*: "It is unreasonable for the Board to keep doing the same things it has been doing and expect different results."[13]

B. The monitoring scheme suffers from the same illegal deficiencies overturned in the Agua decision.

The Draft Order's representative monitoring is as illegal as the overturned monitoring scheme recently rejected by the Court of Appeal in *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd (Agua)* 26. In *Agua*, the Central Valley Regional Water Board required monitoring for supply wells a significant distance from the source of pollution – the manure ponds. The *Agua* court determined that the WDRs' regional monitoring locations are "ineffective to accomplish the timely detection of a change in [water] quality."[14] Like the vacated dairy WDRs, the Draft Order does not require additional upstream monitoring unless the regional, *i.e.* distant, monitoring sites already show an adverse impact.

The Draft Order's monitoring scheme is not adequate to ensure the Order's directive that beneficial uses are to be protected. In *Aqua*, the court found that the "crucial question of fact in this case is whether the monitoring system prescribed in the Order is adequate to ensure the Order's directive that no further degradation of groundwater shall occur."[15] The court went on to hold that there were "no facts from which any court could determine the monitoring system is adequate to detect and prevent further groundwater degradation."[16] Water Code §13263 and the Draft Order require growers to not degrade beneficial uses by achieving water quality objectives. However, like the Regional Board in *Agua*, the State Water Board cannot point to any fact in the record that ensures the proposed surface water monitoring scheme will detect and prevent further beneficial use degradation.

The fact that follow-up management plans may be triggered does not obviate the fact that the prescribed monitoring locations will not monitor localized areas that feel the full brunt of one or more irrigated land dischargers' pollution. Like the dairy WDRs, follow-up management plans by the growers are only triggered after multiple violations of water quality objectives far downstream are detected. That triggering event already establishes that instead of beneficial uses being protected from further degradation, water quality objectives are being violated and beneficial uses unreasonably affected.[17]

Agua was explicit that general warnings that Coalition members not discharge pollutants at levels that exceed applicable water quality objectives do not cure the absence of meaningful monitoring to ensure that dischargers are actually complying with water quality standards. The *Agua* Court of Appeals stated:

[12] *Id* at 34.
[13] *Id* at 35.

[14] *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal. App. 4th 1255, 1260.
[15] *Id* at 1267.
[16] *Id*.
[17] *Id* at 1267-77.

> The Order protects the beneficial uses of groundwater by declaring that degrading groundwater is prohibited. However, as previously shown, the mechanism for ensuring the groundwater will not be degraded, the monitoring program, is insufficient for the task.[18]

The point applies equally to the Draft Order. Although the Order includes general requirements to protect beneficial uses, comply with standards and not degrade surface waters, those general requirements do not cure the absence of any meaningful monitoring to determine whether receiving waters are degraded by individual discharges. Indeed, the Court of Appeals said:

> The wish is not father to the action. The Order finds that the beneficial domestic, agricultural, and other uses of the groundwater underlying the dairies will be protected by the Order, but the finding wholly depends upon the Order's prohibition of the further degrading of groundwater without requiring the means (monitoring wells) by which that could be determined. Because the monitoring plan upon which the Order relies to enforce its no degradation directive is inadequate, there is not substantial evidence to support the findings.[19]

In the absence of water quality monitoring that is able to detect degradation beyond a small percentage of Central Valley waters, the WDRs suffer from the same inadequacy. Until the Draft Order requires surface water monitoring that will detect degradation, there is no substantial evidence to support the Order's mandate that beneficial uses be protected.

As explained above, the monitoring system currently in place cannot detect violations of water quality standards or evaluate the effectiveness of management measures to prevent violations in waters well upstream of the regional or representative monitoring locations. Nor is there any evidence in the record upon which the Regional Board could determine that implemented management measures are "highly likely" to be successful in attaining standards in those upstream waters.

III. THE DRAFT ORDER VIOLATES THE ANTIDEGRADATION POLICY.

The Draft Order does not comply with the State Antidegradation Policy. Antidegradation law requires that, in high-quality waters, baseline water quality must be maintained unless it is demonstrated that any change in quality will (1) be consistent with the maximum benefit to the people of the state ("maximum benefit"); (2) not unreasonably affect present or probable future beneficial uses; and (3) not result in water quality less than that prescribed by state policies. Furthermore, any activity that produces or may produce waste, and that discharges into high-quality waters,[20] must result in best practicable treatment control ("BPTC") to ensure that (a) pollution or nuisance will not occur, and (b) the highest water quality consistent with maximum benefit will be maintained.

[18] *Id* at 1280.
[19] *Id* at 1260-1261.
[20] The court in *AGUA* found that an actual showing of degredation is not required; instead the policy applies when there "is a determination that the receiving water is high quality water and that an activity will discharge waste into the receiving water." *Associacion De Gente Unida Por El Agua (Agua) v Central Valley Regional Water Board*, (2012) 210 Cal.App.4th 1255, 1272. The policy presumes from these two facts that the quality of the receiving water will be degraded by the discharge of waste. *Id.*

The Regional Board has failed to conduct a proper antidegradation analysis. Instead, the Draft Order simply overstates

> *This Waiver is consistent with Resolution No. 68-16 because it does not authorize degradation. Implementation of covered conservation practices will result in a net benefit to water quality, and adherence to mitigation measures designed to avoid or minimize impacts to water quality. The activities permitted under this Order have been determined to have a low potential impact to water quality when conducted pursuant to the terms of the Order, resulting in compliance with applicable water quality control plans, including water quality objectives, and protection of beneficial uses. Additionally, this Order requires monitoring of and reporting on the implementation of covered activities to ensure full implementation and effectiveness of BMPs and mitigation measures.*

The Draft Order fail to meet the requirements of Antidegradation Policy by failing to (1) establish a water-quality baseline to determine authorized alterations in water quality and their impacts on beneficial uses, (2) conduct an adequate maximum-benefit analysis, and (3) establish BPTC to ensure that nuisance and pollution will not occur and that the highest water quality consistent with maximum benefit will be maintained.

1. *The Order fails to meet the requirements of the Antidegradation Policy because there is no establishment of a water quality baseline*.

By merely stating that the Antidegradation Policy has been satisfied, the Water Board fails to make the required findings that would allow high quality waters to be degraded. When there "is a determination that the receiving water is high quality and that an activity will discharge waste into the receiving water" degradation is assumed[21] and an Antidegradation Policy analysis is required. Therefore to allow degradation, the Draft Order must "set forth findings that bridge the analytical gap between the raw evidence and ultimate decision."[22] The State Board's findings must provide "the analytic route [it] traveled from evidence to action" to satisfy this requirement, so as to allow the reviewing court to satisfy its duty to "compare the evidence and ultimate decision to 'the findings.'"[23] Mere recitation of legal requirements – as done here - is not sufficient.

The Draft Order authorizes continued noncompliance with the State Antidegradation Policy. First, the draft order does not require the establishment of a water-quality baseline. In *Monterey Coastkeeper v. SWRCB* the Court contemplated whether an Agricultural Waiver for the Central Coast was required to apply the Antidegradation Policy as laid out in *Agua*.[24] In that case the State Water Board did not make any of the necessary findings to allow a degradation to occur and instead stated the Waiver was consistent with the policy "because it will 'improve' water quality."[25] The Court found this analysis unacceptable and remanded and directed the Board "to consider whether the Waiver is consistent with the Antidegradation Policy, as interpreted by the Court in [*Agua*]."[26]

The findings to allow degradation must be made using the EPA's Economic Guidance for Water Quality Standards Workbook[27] ("EPA Workbook") which establishes a test to determine if there might be interference with important social and economic development. The EPA Workbook outlines three steps involved in

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[21] *Agua*, at 1272. Degredation is assumed when waste is being discharged into high quality waters.
[22] *See Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d, 506, 514-516.
[23] *Id.* at 515.
[24] *Monterey Coastkeeper v. SWRCB*, (2015) No. 34-2012-80001324.
[25] *Id.* at 39.
[26] *Id.*
[27] U.S. Environmental Protection Agency, *Interim Economic Guidance for Water Quality Standards Workbook* (March 1995), available at http://water.epa.gov/scitech/swguidance/standards/economics/chaptr5.cfm.

performing an economic impact analysis as part of an antidegradation review: (1) verify the project's costs and calculate annual costs of the pollution control project; (2) determine if maintaining high quality waters will interfere with development; and (3) determine if development is economically and socially important.[28] The EPA Workbook provides several worksheets for addressing these factors.[29] Yet the State Board and the Regional Board have not addressed these basic factors or completed the EPA worksheets – or provided any evidence even remotely resembling such an analysis – in reaching their conclusion. The Draft Order does not meet the requirements of law and is therefore an abuse of discretion.

2. *The Order fails to meet the requirements of the Antidegradation Policy because it allows for an inadequate maximum-benefit analysis*.

Second, the Draft Order more generally sanctions an inadequate maximum-benefit analysis. The Order states that "The activities permitted under this Order have been determined to have a low potential impact to water quality when conducted pursuant to the terms of the Order, resulting in compliance with applicable water quality control plans, including water quality objectives, and protection of beneficial uses.."[30] This statement is purely conclusory, as there is no identified cost-benefit analysis supporting such a finding. This type of conclusory reasoning is precisely what *Agua* determined to be not sufficient as a proper antidegradation analysis.[31]

In *Monterey Coastkeeper* the Superior Court found a draft agricultural Waiver to be in violation of the Antidegradation Policy because it made conclusory statements without any findings of evidence.[32] In that case, the Board did not provide any findings and just stated they complied with the Antidegradation Policy because the Waiver would "'improve' water quality."[33] The Court remanded the draft order and directed the Board to apply the Antidegradation Policy as laid out in *Agua*.[34] This draft order suffers from the same faults as the one in *Monterey Coastkeeper*. The Board makes the statement that "societal benefits outweigh the costs" but does not provide any findings to justify that conclusion.[35] Conclusory statements like those in the draft order at issue here were specifically rejected as insufficient in the context of agricultural Waivers by the Superior Court in *Monterey Coastkeeper*.[36] By not providing findings of evidence to justify the maximum-benefit analysis, this Draft Order does not meet the requirements of the law.

An adequate maximum-benefit analysis would compare the economic, health, and environmental costs and benefits of the authorized degradation. The serious health risks posed by nitrate-contaminated water increase costs not only to individuals but to the healthcare system as a whole. Financial costs, moreover, include not only those to farmers, but also those to individuals and communities that must spend a greater share of their incomes and resources to obtain potable water, such as through bottled water, water treatment, or the drilling of new or deeper wells. Contaminated water also has regional economic impacts, both because of the opportunity costs involved with diverting resources to alternative water sources, as well as because contaminated water can reduce property

[28] *Id.* at 5-2.
[29] *Id.* at Worksheets AA, AB, and O-Y.
[30] Draft order, at 61.
[31] *Agua*, 210 Cal. App. 4th at 1280. "While the findings need not be extensive or detailed, mere conclusory findings without reference to the record are inadequate. . . . Here, the crucial findings that would have allowed the Regional Board to authorize a discharge that would degrade the groundwater, i.e., that the discharge will be consistent with the maximum benefit to the people of the state, that it will not unreasonably affect beneficial uses, and that it will not violate water quality objectives, were all based upon the finding that the Order would not further degrade groundwater quality. That finding is not supported by the evidence in the record. . . ." *AGUA*, 210 Cal. App. 4th at 1281 (internal citations omitted).
[32] *Monterey Coastkeeper*, No. 34-2012-80001324 at 39.
[33] *Id.*
[34] *Id.*
[35] Supra note 15, at 61.
[36] *Monterey Coastkeeper*, No. 34-2012-80001324 at 39. "On remand, the Board is directed to consider whether the Waiver is consistent with the Antidegration Policy, as interpreted by the Court in *AGUA*." *Id.*

values, increase loan costs, and in general limit community development. Without including these and other costs associated with allowed degradation, it is impossible to conclude that authorized changes in water quality are consistent with maximum benefit.

The State Water Board laid out how a proper maximum-benefit analysis should be conducted in State Water Board Order 86-17.[37] A maximum-benefit determination "is made on a case-by-case basis and is based on considerations of reasonableness under the circumstances at the site" and must consider the following factors:[38] "past, present, and probable beneficial uses of the water" as specified in the Water Quality Control Plans; "economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits,[39] environmental aspects of the proposed discharge; and the implementation of feasible alternative treatment or control methods."[40] The Draft Order did not conduct this required analysis and therefore does not comply with the law and is an abuse of discretion.

3. The Order fails to meet the requirements of the Antidegradation Policy because it does not require Best Practicable Treatment or Control.

Third, the Draft Order does not require Best Practicable Treatment or Control (BPTC). Without an enforceable standard tied to water quality objectives, it is impossible to know whether authorized management practices will lead to cessation of pollution and nuisance within a reasonable timeframe. In *San Joaquin County Resource Conservation District* the Court found "the program is geared towards identifying exceedances, rather than degradation . . . .render[ing] the Renewed Waiver inconsistent with the Antidegradation Policy.[41]

The Court in *San Joaquin County Resource Conservation District* goes on to explain why only identifying exceedances does not comply with the Antidegradation Policy: "it is not clear that the Board has an adequate means of identifying and taking actions against dischargers who are violating water quality objectives, or of ensuring BPTC is being implemented."[42] The Draft Order suffers from the same fatal flaws as the Renewed Waiver in *San Joaquin County Resource Conservation District*, it specifically prevents the Board from having the ability to take action against dischargers or ensure BPTCs are fully implemented.

Furthermore, it is impossible to determine whether authorized discharge activities will ensure maintenance of the highest quality water consistent with maximum benefit, since (1) the amount of authorized degradation is unknown, (2) the maximum-benefit analysis is insufficient, and (3) there are no enforceable standards. This again, by definition, does not constitute BPTC. "If the Board is going to rely on watershed-scale monitoring to ensure agricultural dischargers are implementing BPTC, the Board still must ensure that any activity that will result in a discharge of waste to high quality waters will comply with water quality standards and meet BPTC."[43] The General WDRs in the Draft Order do not meet this requirement.

We have serious concerns about both the effectiveness of the measures required by the Order and the ability of the Regional Board and the public to detect problematic discharges. The conclusory statements in the Order are not sufficient, either to assuage our concerns or to comply with the law. We urge the Regional Board to perform a thorough antidegradation analysis to ensure that this Order complies.

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[37] State Water Resources Control Board Order No. 86-17, at 22, n. 10; *AGUA*, at 1279.
[38] *AGUA.* at 1279.
[39] With reference to economic costs, costs to both the discharger and the affected public must be considered. *Id.*
[40] *Id.*
[41] *San Joaquin County Resource Conservation District v. Central Valley Regional Water Quality Control Board,* (2013) No. 34-2012-80001186, at *20.
[42] *Id.*
[43] *Id.*

IV. THE DAIRY ORDER FAILS TO ADHERE TO THE CALIFORNIA CONSTITUTION BECAUSE ALL PERMITTEE DATA – INCLUDING NUTRIENT MANAGEMENT PLANS – SHOULD BE MADE PUBLICLY AVAILABLE.

The people have a right to know who is polluting their water. Surface and ground waters belong to the people.[44] And the people have a constitutional right of access to information about the regulation of their property.[45] Without reporting, neither the public nor the Regional Board can hold growers accountable, conduct proper oversight of the Third Party, understand if and how best management practices are leading to water quality improvement, or create the "correlated data set" that the State deemed vital to understanding and addressing nitrate pollution throughout the state.

> "The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give *their public servants the right to decide what is good for the people to know and what is not good for them to know*. The people insist on remaining informed so that they may retain control over the instruments they have created." – The Brown Act.

The public has a right to all growers' individual data. Under both State and Federal law, disclosure of water quality data to the public is of great importance. Anything less than individual grower data violates the Clean Water Act, the Porter-Cologne Act, and the Nonpoint Source Policy. The right of the public to water quality data is only tempered by the need to protect methods and processes that amount to trade secrets. As the acts make clear, methods and processes does not include monitoring data needed to ensure compliance with water quality standards.

The Clean Water Act and the Porter-Cologne Act demand that data be made available to the public. Water Code §13269 requires a Waiver to include monitoring requirements "designed to support the development and implementation of the Waiver program, including, but not limited to, verifying the adequacy and effectiveness of the Waiver conditions."[46] Additionally, "monitoring results must be made available to the public."[47]

The Clean Water Act clearly states that parameter data, such as nitrogen levels, are always required to be disclosed. The growers try to argue that some of their field level data amounts to protected trade secrets. This argument misinterprets the law. The Federal Clean Water Act deliberately excludes effluent data from amounting to a protected trade secret:

> Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (*other than effluent data*), to which the Administrator has access under this section, if made public would divulge *methods or processes* entitled to protection as trade secrets.[48]

The only types of information that can ever be considered trade secrets are methods and processes.[49] Any interpretation of trade secrets that includes contamination levels, their locations, and the owner of those locations, violates the mandate of the Act to make available to the public information related to water quality. The data the growers' seek to protect, parameter data from wells and the owner of those wells, are not methods or processes and therefore must be disclosed.

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[44] Cal Const., art. X, § 5; Wat. Code §§ 102, 104.
[45] Cal. Const., art. I, § 3, subd. (b)(1).
[46] Cal. Water Code §13269(a)(2).
[47] *Id*.
[48] 33 U.S.C. § 1318(b) (2012) (emphasis added).
[49] *Id.*

In addition to violating the Act on its face, allowing the growers to protect any of the field level data would undermine the intention of Congress to have the public actively involved in monitoring and enforcement.[50] Without field level data tied to particular growers, the public will not be able to identify which growers are in violation. If the public cannot determine who is in violation they will not be able to utilize their rights to bring citizen suits. Therefore, growers are not entitled to protect this data from disclosure.

The Nonpoint Source Policy also requires all data to be made available to the public. The Policy requires that regardless of the monitoring required, "all monitoring programs should be reproducible, provide a permanent/documented record and be available to the public."[51] This requirement is to ensure that Key Element 4 can be achieved. Key Element 4 states "[a]n NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s) . . . ."[52] The public cannot do their duty under the Nonpoint Source Policy to ensure the program is achieving its purpose if data cannot be tied to particular BMPs. By not providing all field data, including its location and owner, the public will not be able to determine which farms are bad actors and/or which BMPs are not being effective. If the public cannot determine which measures are effective and which are not, then the Waiver lacks the feedback mechanisms required by the Nonpoint Source Policy.

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Transparency and accountability must become a cornerstone of California's agricultural management. It is time the California's Water Boards take meaningful action to address the persistent pollution problems caused by California agricultural practices. We look forward to working with you to reform agricultural pollution management.

Sincerely,

Sean Bothwell
Executive Director
California Coastkeeper Alliance

[50] *See* 33 U.S.C. § 1365 (2012).
[51] NPS page14.
[52] NPS page 13 (emphasis added).

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December 31, 2018

Cherie Blatt
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403

Dear Cherie,

Thank you for the opportunity to provide public input regarding the draft General Waste Discharge Requirements Order No R1-2019-0001 for dairies in the North Coast Region. We appreciate the cooperative approach you take in your work with dairy producers and partners.

The Humboldt County Resource Conservation District Dairy Program staff has worked closely with producers, partners, and you and other Regional Board staff during implementation of the existing Conditional Waiver permit for dairies. The majority of Region 1 dairies are currently enrolled under the Conditional Waiver, which is appropriate as they are deemed low risk to water quality. We understand the Regional Board is working to adopt a GWDR for all dairies because Waivers expire after 5 years. Although GWDRs were first adopted in 2012 for dairies that posed higher risks to water quality, we would like to point out that overall the risks our dairies pose to water quality have not increased with the proposed adoption of the new GWDR. Most dairies are doing a very good job of protecting surface and groundwater quality. This is supported by Resolution No. R1-2013-0026 "In Appreciation of the North Coast Dairy Community and Interested Parties for their Contributions to the North Coast Dairy Program in the Protection of Water Quality," unanimously adopted by the Regional Water Board on May 2, 2013 to recognize dairies in the North Coast region. Therefore, the following comments are offered as a way to provide balance of protecting water quality while not placing potentially cost-prohibitive, additional regulatory burdens on dairy operators.

Thank you for your consideration of our comments.
Sincerely,

Jill Demers
Executive Director

General Order – R1-2019-0001

Page No., Item	Comment
	Please consider adding an appendix with a summary table showing differences in water quality sampling (analytes for surface water, frequency for groundwater sampling).
3, 6. 14	There is conflicting information about minimum herd sizes. Please clarify for consistency. Please also specify when herd sizes are identified for coverage under the Order (if any) that are exempt from completing all plans.
17, g.	Retention pond clean-out shall occur annually… A dairy's waste management system may be designed such that it does not require annual clean-out. As long as adequate storage exists producers should be able to have ponds cleaned out when needed and not be required to have to do this annually. Please modify language to allow for site specific management practices.
18, 4.f	Stubble height…The 4-inch height requirement is too prescriptive. Please modify language to indicate the objective of residual stubble height and not mandate a specific height.
19, 6.	Compost. Setback requirement of at least 100 feet is too prescriptive and does not allow for individual dairy design footprints. Instead, please consider modifying language to identify the objectives to protect water quality and remove specific feet/length. In other parts of the Order a 100 ft setback, a 35 ft setback when a vegetative buffer is present or alternative practice are acceptable. It is possible to design a compost facility (concrete pad) with runoff collected and stored appropriately.
20, b.	When reading the CalRecycle information, they defer to RWB authority in GWDR, leading to confusion of this section. The CalRecycle section referenced provides guidance on the final deposition of compostable material and/or digestate, and CalRecycle identifies their guidance is for local enforcement agencies and other interested parties. If other waste products are imported to the facility and used as co-compost then perhaps a reference to being sure composted materials are land applied appropriately is sufficient. Please consider removing this section or clarify language to indicate its importance for operators importing wastes to their facility.
20, 7.	Odors. Requiring manure piles to be covered in the rainy season will be overly burdensome and cost-prohibitive on producers, and it is unclear what the ultimate objective is. Covering manure piles to reduce odors during the rainy season can be an effective management practice in a hot arid climate. Scraped manure in pasture dairies is closer to 70 or 80% moisture; covering this material will create and maintain anaerobic conditions, which would potentially increase odors. Please consider removing this requirement.
20, C.2.	All existing plans must be updated is an unrealistic requirement, and for many dairies, likely unnecessary, and in the case of NRCS provided cost-share, an inefficient use of tax dollars. There are limitations to capacity to perform this as well as funding limitations. Please consider rewording to *may need to be updated*.
20, C.2.	Reference to the schedule in Section H is unclear as Section H refers to Permit Reopening, Revision, Revocation, Termination, and Re-Issuance

23, E.1; 27, 4.	Much of the information in the NOI is included in the Annual Report. Is it possible to reduce paperwork and put a box on the Annual Report form to identify they are also submitting an NOI for this Order? An additional question or two could be used to augment needed information in the NOI that is not on the Annual Report form. Producers are accustomed to completing their Annual Report by November 30. If the intent is to not have producers submit an Annual Report in 2019 (Page 27, 4. Annual Report starting in 2020) then having the NOI submitted in 90 days is reasonable. Please clarify on page 23 if there is no Annual Report in 2019.
23, F.2.	Please consider rewording so producers would need to develop WQP and NMP and make available to staff for review upon request or during inspections. The requirement to submit WQP and NMP to the RWB is a risk to the dairy, and other dairies do not have to submit these plans.
28	Stated as surface water must be tested for pH, temperature, electrical conductivity and ammonia, but in the MRP program section (page 5, Table 1) surface water analytes include electrical conductivity, total ammoniacal N and visual stream observations. Please make Order and MRP language consistent.

Attachment A – Notice of Intent

Page No.	Comment
2	Please consider inserting a question to identify if facility operator information and owner information are the same. If the answer is yes, allow skipping to section III.
3	Reporting of containment structure information on the NOI does not provide any context of the dairy operation. Additionally, new dairies have up to 2 years to complete NMP, up to 1 year of enrollment for WQP. They may not know total storage volumes when they file NOI. Additionally, dairies covered under the Conditional Waiver have already submitted information on this page. Please be considerate when asking for information the RWB already has, and consider removing this page.

Attachment D – Monitoring and Reporting Program

Page No.	Comment
6, 2.	Requiring groundwater sampling at nearest downgradient well may not be feasible, and installing and maintaining a monitoring well will be cost-prohibitive. The nearest downgradient well may not be under the dairy operators control, there may not be access, there may not be knowledge of depth or construction type. Please consider removing this requirement.
6, 2.a.	Each groundwater sampling set is costly in both time and human resources to collect samples and deliver them to the appropriate analytical laboratory. RWB already has baseline data from previous groundwater sampling required with previous dairy permits. Please use this information to determine frequency of additional sampling and not make all operators sample three consecutive years.
7	NO_3-N ≥ 5 mg/l. What is the scientific basis that supports the decision to use the threshold of 5 mg/l? What if a well's baseline has been above 5mg/l? Would the requirement for the dairy to complete a Work Plan be imposed? Staff from the Natural Resources Conservation Service, Resource Conservation Districts, dairy trade associations, University of California Cooperative Extension

	and other groups may be well qualified to identify management improvements. Requiring a facility to undertake a detailed groundwater monitoring work plan when one-half of the drinking water NO_3-N concentration exists is expensive and may not yield any difference in water quality. Please allow local service providers to aid producers before requiring expensive groundwater monitoring.
9, b.	How does the dairy operator demonstrate that well(s) chosen for sampling are representative when multiple wells exist?
9, c.	Submittal of groundwater results into GeoTracker may be beyond the technical capabilities for some, and internet connectivity remains challenging in rural areas. This would be another reporting burden on producers. If they have to find someone to help with this task it may mean they have to pay another fee. Please consider using Regional Board staff to complete this step.
11, 5.	Typo. Noncompliance Reporting correct page number is 13.
15, III. C.	Please see comment above under General Order, page 20, C. 2.

Appendix 1 – Water Quality Plan

Page No.	Comment
	Please streamline water quality plan for existing dairies. Identify new information (not already submitted to the Regional Board as part of the last WQP). Separate this information out to allow producers to supplement existing WQP. Kindly be sure that if information is required in an NOI that it is not also required in the WQP.
2, 8., Column 3	Include note within parenthesis that not exceeding 2012 NOI max. population is relevant only for existing dairies, and consider moving this information into a footnote.
4, 23.	Measurement of depth to water table requires special measuring capabilities and likely pulling each well pump, particularly for irrigation wells. This will be an incurred expense for producers. Additionally, depth to water table can fluctuate by AM/PM, by day, by month, by season, even by tidal cycles depending on location. A one-time measurement would not provide useful information and would give no details on recharge capabilities of groundwater aquifers. Please remove this requirement.
5, I.	Requiring the groundwater separation below the manure pond would be very difficult and expensive to determine. Please consider removing this requirement.
5, I.	Determining pond berm height may require a 3rd party to survey the height which could be expensive and burdensome to producer. Please consider removing this requirement. As an alternative, include wording that will allow the use of Google Earth measurement as an acceptable option.
7, C.	Please remove RCDs from sentence. Many RCDs do not have this type of funding. Also, please remove 3 questions about Production Area building roofs and drainage, these are duplicative and will be answered with maps.
10, 1.	North Coast pastures can have year-round growth, so nutrient applications may occur year-round, weather dependent. Please consider rewording this statement to *Majority of* [n]utrient application…".
10, NMPs.	Please see comment above under General Order, page 20, C. 2.
11, 5.	Annual requirements for manure sampling would be burdensome on producer. It is unclear if any local laboratories within the North Coast will actually analyze

	manures. Previous samples collected for CNMP work were delivered to analytical laboratories in the Central Valley for analyses. This added physical challenge will increase costs associated with analytical analyses. Please modify language to state that a dairy *may* need to perform annual manure sampling, which could be dependent on potential risks to water quality posed from specific dairy site(s).
13, Odors.	Please remove the narrative paragraph specifically related to odors. This information is educational in nature and detracts from the required information under section D. Most dairies in the region already scrape manure from animal housing areas to minimize storage needs, and maximize pasture grazing time.
18, Purpose.	Typo in paragraph, remove sentence fragment.
19, F.	Please see comment above under General Order, page 18, 4.f.
20, F.	Please see comment above under General Order, page 18, 4.f.
20, H.	Typo in question.

Appendix 2 – Nutrient Management Plan

Page No.	Comment
1	Please see comment above under General Order, page 20, C. 2.
5, c.	Please remove requirement for "general schedule for periods of time when manure ponds are reaching maximum capacity and rainstorms are eminent." The North Coast receives the majority of annual precipitation between October and April each year (with exceptions). This is common knowledge and is therefore unnecessary to include.

Appendix 3 – Annual Report

Page No.	Comment
6	Please see comment above under MRP, page 9, c.
7, 5.	North Coast pastures can have year-round growth, so this question could cause confusion. Suggest rewording this question to "By what date this year is the *majority of nutrient applications* to pastures and cropland complete?"

Blatt, Cherie@Waterboards

From: Kimberly Burr <kimlarry2@comcast.net>
Sent: Thursday, January 03, 2019 3:53 PM
To: North.Coast@waterboards.ca.gov; Blatt, Cherie@Waterboards
Subject: Diaries. Draft. GWDR COMMENTS. R1-2019-0001

Dear Board and Staff:

Thank you for your work on the above entitled General Waste Discharge Requirements for Dairies. " There are many ways that agricultural operations can reduce nutrient pollution." US EPA site

It is my understanding that, runoff of nutrients above the natural amount result in adverse impacts to beneficial uses. This is increasingly so now that climate change is here. Because these nutrient sources are controllable, they can and should be more strictly regulated than ever. Their release into the environment is having a bigger impact than ever and should be avoided.

"Fertilized soils and livestock can be significant sources of gaseous, nitrogen-based compounds like ammonia and nitrogen oxides. Ammonia can be harmful to aquatic life if large amounts are deposited to surface waters. Nitrous oxide is a potent greenhouse gas." US EPA site

As a creek advocate, it is clear that agricultural activities still do, but must no longer, impact beneficial uses. The waterways are suffering the impacts of enormous sedimentation, and agriculture including dairies occupy many acres in North Coast watersheds.

Green Valley Creek - critical habitat.

SUMMARY

I would like to emphasize the need for generous setbacks of irrigation (especially with waste pond sludge) and setbacks for the dairy cows from creeks, that requirements be established that water troughs be provided away from creeks and drainages, that generous riparian buffers and vegetation be protected and restored, that runoff especially manure and urine laden runoff be strictly forbidden at all times. As we all know, grazing has historically lead to trampled and broken down swales, drainages, and creek banks to the detriment of critically important aquatic habitats. Setback requirements must be based on science such as geology, soil types, and modern water temperature recovery efforts. Further, any operations that are allowed to prolong or contribute to poor, impaired, or harmful water quality conditions or negatively impact beneficial uses including prolonging impaired conditions, must not be permitted to continue.

The pollution generated including runoff of sediment and sediment laden with chemicals and cow manure and and other bodily fluids must be kept safely on sight or completely treated before placed on the soil. Employing the best available science requires numeric limits to any discharges, frequent monitoring, and inspections.

BACKGROUND

"Farming operations can contribute to nutrient pollution when not properly managed. Fertilizers and animal manure, which are both rich in nitrogen and phosphorus, are the primary sources of nutrient pollution from agricultural sources. Excess nutrients can impact water quality when it rains or when water and soil containing nitrogen and phosphorus wash into nearby waters or leach into ground waters." US EPA

The runoff harms both fresh and saltwater environments and can even contribute to toxic algal blooms. "Thus, the combination of warm ocean water and expected future increases in coastal loading from runoff (Globally [Seitzinger et al., 2010; Lee et al., 2016] and locally [Bergamaschi et al., 2012]) could potentially lead to yet larger toxic events." AGU Geophysical Research Letters.

Green Valley Creek. flowing brown.

Also see, Harmful algal blooms and eutrophication: Nutrient sources, composition, and consequences *Estuaries and Coasts* August 2002“"Eutrophication is one of several mechanisms by which harmful algae appear to be increasing in extent and duration in many locations. Although important, it is not the only explanation for blooms or toxic outbreaks. Nutrient enrichment has been strongly linked to stimulation of some harmful species, but for others it has not been an apparent contributing factor. The overall effect of nutrient over-enrichment on harmful algal species is clearly species specific.”"

Green Valley Creek - adverse impacts.

And, "A certain level of nutrients is necessary for biological production and is therefore vital for ecosystem functioning. Excessive nutrients, however, can cause too much production and lead to other adverse impacts." Conceptual Model for Nutrients in the Central Valley and Sacramento - San Joaquin Delta 9/20/06. *Prepared by* Katherine Heidel, Sujoy Roy, Clayton Creager, Chih-fang Chung, Tom Grieb,Tetra Tech, Inc.

Thank you again for updating and including all requirements that fully protect the beneficial uses of our shared water resources including migration, spawning, rearing, feeding, and sheltering of species by protecting cold freshwater habitat.

Kimberly Burr
Forestville, Sonoma County
Green Valley Creek/Russian River

> “Balance - When we are urged to weigh the environmental impacts against the interests of developers, consider this...."We've lost nearly two-thirds of the world's wildlife since the first Earth Day 48 years ago."
>
> —The Nature Conservancy

DEL NORTE RESOURCE CONSERVATION DISTRICT

241 W First St, Suite B, Smith River, CA 95567
707.487.7630 | DelNorteRCD@yahoo.com

January 3, 2019

Cherie Blatt
North Coast Regional Water Quality Control Board
5550 Skylane Blvd
Santa Rosa, CA 95403

RE: Draft Order No. R1-2019-0001

Thank you for the opportunity to comment on the 2019 draft general waste discharge requirement for dairies. Our concerns are:

- Retention pond clean out- Please include language such as- as long as adequate storage capacity is not compromised and approved by the Executive Officer pond clean out is not required. There may be times when annual and bi-annual is not necessary.
- Riparian Areas- Livestock removed at 4 inches-grazing in corridors is important to reduce canary weed grass in Del Norte. Please remove so we are not limited to a specific height for all properties.
- Compost storage does not need a 100 ft. setback when there are vegetative buffers. Please modify to incorporate NRCS practices on buffers.
- Odors-Do not require us to cover manure piles. Odors are not an issue in Del Norte and the material is cost prohibitive.
- MRP Requirements-Groundwater Sampling Parameters-When nitrate-nitrogen levels are above 5 mg/1 and below 10 mg/1 there should be no work plan and no professional engineer or registered geologist for assessments when dairies are not exceeding the EPA standards. The work plan and engineer/geologist should be set at above 10 mg/1. Also, GeoTracker could be difficult for some producers.
- Water Quality Plan Report-Please remove minimum depth to water table, depth of well and date of measurement. Some well pumps would have to be removed for measurement. This is not feasible or useful information for a one time reporting.
- Nutrient Management Plan-Please remove the annual manure testing and other organic by product analyses. This would be costly. Testing can be requested at time of inspection if there is a site specific concern by the Executive Officer.

Linda Crockett

Sincerely,
Linda Crockett, Manager

December 28, 2018

North Coast Regional Water Quality Control Board
C/O Cherie Blatt
5550 Skylane BLVD, Suite A
Santa Rosa, CA 95403

Alexandre FAMILY FARM

NCRWQCB

JAN 3 2019

EO ☐ WMgmt ☐ Admin
AEO ☐ Timber ☐ Legal
NPS ☐ Cleanups ☐
Date

Re: Order R1-2019-0001 Draft General Waste Discharge Requirements

Dear Mrs. Blatt,

This letter is to comment and request consideration on Order Number R1-2019-0001 Draft General Waste Discharge Requirements for Northern California Dairies for possible modification. Alexandre Dairy has four Dairies in Northern California currently operating under Order R1-2012-0003 and Order R1-2016-0045 Conditional Waiver of Discharge Requirements for Existing Dairy's.

Overall, Alexandre Dairy (the "Dairy") is very supportive of the North Coast Regional Water Quality Control Boards ("NCRWQCB") draft Order for General Waste Discharge Requirements as it insures longevity and continuity in the permitting process, allows for new dairies to be constructed in the North Coast, allows dairies to increase livestock numbers if necessary while providing consistency through CEQA EIS analysis the protection of beneficial uses of water and dairy best management practices that support aquatic health and water quality. The majority of the current draft order utilizes process that are currently in place to insure proper reporting of data through annual reporting requirements. The Dairy believes that surface and ground water monitoring requirements, nutrient management planning and waste discharge specification reporting are necessary components of implementation of the Dairy's Water Quality Plan.

To that end, there are a few comments that we would like to make specific to Riparian Management Plan development, Ground Water Monitoring, and Tribal Cultural Resource Reporting.

The Riparian Management Plan proposes a process by which the Dairy can continue practices within riparian areas that allow for grazing and protection of water quality while improving dramatically fish passage and riparian woody vegetation protection. As outlined in the draft order, management of the riparian area that allows for the natural growth and establishment of "native" vegetation is key. As with most north coast streams, non-native vegetation like Canary Reed Grass and Bearded Iris some of these areas. By distinguishing native vs non-native vegetation for management is key for land stewards and managers on Dairy Farms for to help insure the State's water quality and fish passage remains clean and open. We would however recommend, as there is limited entry into riparian areas by grazing cattle that grass height be set 2 - 3 inches before livestock are pulled to insure effective flash grazing of the zones.

Water Quality Monitoring through the testing of surface and ground waters is a key performance indicator for dairies. We support the continuance of ground water and surface water monitoring as currently accepted through group reporting. It is the Dairy's belief that after a certain period of time, ground water quality monitoring should be discontinued or conducted every 4 or 5 years based on establishing the first three (3) year baseline with new data. It is also important to recognize that the recommendation to increase the Nitrate-Nitrogen threshold for detection above current EPA drinking

water standards (.5mg/l) is not necessary and could mis-inform the public on permitted federally acceptable levels. We are hopefully NCRWQCB staff can review this recommendation and revise to Federal EPA limits.

The Tribal Cultural Resource Mitigation Program is fairly benign unless a Dairy is doing a new development, which would also trigger AB52 tribal consultation through a County, if acting as lead agency. As written, the Program would allow a Dairyman to oversee construction and/or grading of land for any new development and report suspect artifacts to local Tribes. Of course, Tribes will have already had the opportunity through the lead agencies CEQA permitting process to investigate any location within the development area if the tribe(s) believe it is necessary to concur.

We believe there may be some hardship for north coast dairies that currently do not operate under a CNMP or NMP to obtain a Nutrient Management Plan under the proposed timeline. There should be a process to insure a waiver of time in case there is not enough Consulting labor to complete these NMP's. It is also important the NCRWQCB recognize all CNMP and NMP developed in the last 10 years as meeting technical standards as specified in Attachment D – Appendix 2. It would be ineffective and cost prohibitive to have all current CNMP and NMP holders to revisit the plans.

Thank you for the opportunity to comment on the new draft Order R1-2019-0001.

Sincerely,

Chris Howard
Alexandre Family Farm
707-487-1000

WESTERN**UNITED**DAIRYMEN

December 21, 2018

Cherie Blatt
California Regional Water Quality Control Board
North Coast Region
5550 Skylane Blvd., Ste, A
Santa Rosa, CA 95403

Dear Ms. Blatt,

Western United Dairymen (WUD), California's largest dairy trade association, appreciates the opportunity to provide comments on R1-2019-0001, the draft General Waste Discharge Requirement (GWDR) for Dairies in the North Coast Region.

We first wish to recognize the time and diligence that the water board staff has committed to administering an effective and successful dairy program over the past 7 years. The current waiver/GWDR program has arguably created one of the most successful water quality partnerships in the State of California, with emphasis on water quality and producer investment in infrastructure improvements, rather than a bureaucratic, paperwork driven process. The program has identified where issues need to be addressed through surface and groundwater monitoring and inspections allowing water board staff to focus on those areas with progressive enforcement aimed at achieving improvements rather than a sudden move to punitive enforcement. Our hope is that the new GWDR builds on these successes and continues to focus on water quality.

Noting our appreciation for the success of the current dairy program and with appreciation for the efforts to keep the draft GWDR consistent with many of the principals of the waiver, several thoughtful discussions with our dairy producer members have resulted in four issues for your consideration below:

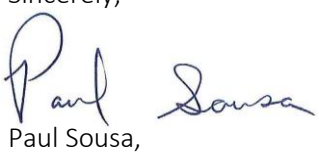
1. Burden on good producers: A good program should identify dischargers that have issues that need to be addressed to Regional Board staff and minimize the regulatory burden on those are in compliance and protecting water quality. This then allows staff to focus its time on those individuals that need to make improvements. This provides the best path for water quality and the use of staff time. Some of the changes in the draft GWDR seem to counter this approach such as the requirements for groundwater monitoring addressed below.
2. Groundwater Monitoring: The current GWDR draft asks that producers sample representative wells during years 1, 2 & 3 of the program, and every 2 years thereafter, adding a requirement to test for total dissolved solids. These new requirements will cost an average dairy producer nearly $1,000 during the first five years of the program; because dairy producers cannot pass on these types of costs this may result in a financial burden that many small farmers cannot endure during down-cycles in the milk market, without providing much additional useful information to the water board. We respectfully ask that you change the MRP to require samples during years 1 & 2 of the program and every 5 years thereafter, unless a well has shown repeated test results at or

above 7mg/l. This reduces the regulatory burden on those dairies that do not have an issue with their wells and focuses on those were improvement might be needed. Because changes to groundwater quality happen relatively slowly in most production wells this still allows the Regional Board to identify those wells that are approaching the drinking water standard.

3. Surface Water Sampling: Surface water sampling under the existing waiver has been very successful and the GWDR should continue that success. Again as mentioned above, this monitoring identifies issues that need to be addressed and the dischargers in the area are immediately notified of the issue. The Regional Board is then presented with the results and is able to track whether water quality is improving over time or not. The current results point to the fact that the program has worked to identify and correct issues. Changes in how the results are reported to the Regional Board are not needed.
4. Nutrient Management Plans: Nutrient Management Plans (NMP) are a good tool to help dairy producers manage manure nutrients and prevent water quality impacts. In a testament to the commitment of dairy families to water quality, many dairies in the region already have an NMP. However, for those that do not it will be a challenge to get them all completed in the very short timeline allowed under the draft GWDR. The North Coast has limited qualified professionals available for this task. Many producers will choose to work with NRCS to complete a Comprehensive Nutrient Management Plan (CNMP) which is more comprehensive and time intensive to complete further making the current deadline a challenge. For those dairies that do have an existing NMP they should be reviewed to determine if updates are needed, and if so, the focus should be on the changes that are needed and not reinventing what has already be created as expressed by various board members during the public workshop on the GWDR. The deadline to review and update existing plans should be extended to November 30, 2022 to allow the focusing of resources to those facilities that have not yet completed a plan.

In closing, we would like to reiterate our appreciation for your staff, their hard work, and the many hours and long discussions with stakeholders on how to continue to make this program successful. Our members are committed to continuing a strong, positive relationship with the North Coast Water Board with the interest of improving both water quality and the success of dairies in our region. Please do not hesitate to reach out to our local field Representative, Melissa Lema at (mlema@westernuniteddairymen.com) or myself should you feel the need.

Sincerely,



Paul Sousa,
Director of Environmental and Regulatory Affairs
Western United Dairymen
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December 21, 2018

Cherie Blatt, Water Resource Control Engineer
Nonpoint Source & Surface Water Protection Division
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403

Subject: General Waste Discharge Requirements for Dairies within the North Coast Region

Dear Ms. Blatt,

Thank you for the opportunity to provide comments on the draft General Waste Discharge Requirements (GWDR) for dairies in the North Coast Region (Draft Order No. R1-2019-0001), which encompasses the coastal zones of the Counties of Sonoma, Mendocino, Humboldt, and Del Norte. The California Coastal Commission (Commission), in partnership with coastal cities and counties, regulates land use planning and development, including agricultural-related development, in the coastal zone to protect coastal resources, including the biological productivity and quality of coastal waters, streams, wetlands, estuaries and lakes. As such, we find that the GWDR for North Coast dairies addresses many water quality issues that are important to the Commission.

We understand that it is challenging to address all conditions and situations within a single set of General Permit requirements. Because it is a general permit that will apply to a host of situations, the GWDR includes few explicit Best Management Practices (BMPs), instead requiring that each operation must demonstrate, by preparing various documents and plans, how BMPs will be used to protect water quality in each situation. Each operation will require an additional level of review to determine whether the various protections described in the required plans will ultimately serve to protect water quality. However, key areas we believe could be improved and/or clarified in the draft Order involve riparian corridor protection and the thresholds proposed to require different operations to perform various tasks and documentation. Additionally, we note that the GWDR lacks minimum water quality requirements for dairies that are imposed by coastal counties in the North Coast region through Local Coastal Programs (LCPs), which are locally adopted coastal land use plans and implementing ordinances that have been certified by the Commission as legally adequate to implement the requirements of the Coastal Act within these counties. While we recognize that specific coastal zone policies may not be applicable to the entire North Coast Region, we feel that it is important to coordinate these efforts to the greatest extent possible.

We offer the following comments for your consideration. Please note that the following comments are from Commission staff; the Commission itself has not reviewed the draft Order.

A. Flow Chart Representing Dairy Requirements

We recommend the inclusion of a decision flow chart to provide clarity about the GWDR for dairies of different sizes. For example, on page 3 of the draft Order, item 6 states that the Order applies to all dairies, but dairies with less than 10 cows, etc. must only follow Part A of the requirements. Then, on page 14, it is stated that the Order applies to all dairies with 25 cows, etc., but that smaller dairies must meet Part A requirements. Further, within Part A, item 4 states that smaller dairies must comply with the Monitoring and Reporting Program (MRP), Water Quality Plan (WQP), and Nutrient Management Plan (NMP), and at the same time notes that these plans are not required of small dairies. We believe the language would be more easily understood using a visual tool, such as a flow chart.

B. Riparian Corridors

Riparian corridor protection is a focus of the Coastal Act. Section 30231 of the Coastal Act states that water quality shall be protected by "minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams." In order to protect water quality, LCPs generally include policies that identify and protect riparian corridors as environmentally sensitive habitat. Most LCPs restrict new development within riparian corridors, allow only certain resource-dependent uses (e.g., nature study, restoration, timber harvest, etc.) within riparian areas, and require minimum no-development buffer widths to protect riparian areas. The draft Order would allow grazing within riparian corridors under certain circumstances, and would require a Riparian Management Plan for dairies that exceed a specified number of animals.

Overall, we recommend stricter limits on riparian disturbance to protect the biological productivity and quality of coastal waters, thereby ensuring that this Order is in conformance with the statutory standards of the Coastal Act. Cattle crossings of riparian corridors should use the same footprint as road crossings, when possible. It would be ideal to bring greater emphasis to road management and sediment discharge related to construction and maintenance of roads by combining the cattle crossing with the road crossing design; this might enable us to afford a measure of control as to how the road crossings are constructed and maintained.

We recommend excluding riparian corridors from the areas made available for dairy access where possible, including grazing, for all the reasons identified in the Riparian Management Plan (RMP) document. This suggested exclusion would help protect riparian corridors for all dairies, regardless of size. At a minimum, we recommend requiring all dairies, including those below the head-count threshold, to submit a satisfactory RMP prior to allowing access to riparian corridors.

C. Setbacks

We recommend clarifying and strengthening the setback requirements of the draft Order. Again, Section 30231 of the Coastal Act requires that natural vegetation buffer areas be maintained to protect riparian habitats. It is unclear whether the requirements of the Order will ensure adequate protection of riparian areas. For example, it is unclear whether a 35-foot setback (with vegetation) would effectively control the drift of spray applications, or whether intermittent and uneven emergent groundwater around wetlands would be adequately insulated. We also

recommend clarifying what vegetation density or type would trigger the possible reduction of a 100-foot buffer to a 35-foot buffer. Further, please clarify whether this a horizontal buffer or a sloping buffer along the ground surface. Finally, please consider whether it may be appropriate to factor in the concentration of potential pollutants in manure or nutrient application to the determination of appropriate buffer width.

D. Animal Unit Thresholds

We appreciate that this order applies to all dairies and that larger dairies must meet more stringent requirements as the number of animals present can quickly exceed the land's ability to recover from disturbance. However, we recommend developing a more robust approach that ensures that water quality standards are met regardless of dairy size, so as to be consistent with the water quality requirements of the Coastal Act. The thresholds set forth in this Order do not adequately account for the varying levels of water quality impacts that may result from dairies of different sizes. For example, it is concerning that a dairy with 25 1,000-pound-plus dairy cows, or 99 goats or sheep could be operated without the reporting requirement or oversight enrollment that the GWDR offers, because even minimal numbers of animals can impact a sensitive resource. Similarly, it seems like a 300-animal dairy should be given more lenient requirements than a 1,300-animal dairy, and should have less lenient requirements than a 25-animal dairy. Perhaps density should also be considered in terms of animals per area-grazed, or for the land area available for manure application.

E. CEQA Hydrology and Water Quality Requirements

For the CEQA checklist IX j, it may be relevant to acknowledge that dairy land in the Eel River Basin/Humboldt Bay and Smith River coastal plain are subject to tsunami inundation, in addition to flooding during severe storm events.

F. Best Management Practices

The GDWR states that BMPs for waste containment, nutrient application to land at agronomic rates, and grazing management measures should be employed to prevent discharges to surface water and groundwater. Additionally, page 7, item 29 states that "the MRP is necessary to ensure compliance with this Order's terms and provisions to prevent or reduce uncontrolled waste discharges and to protect water quality…" In addition, riparian management measures to meet specific performance requirements may also be required.

Overall, a number of requirements are detailed throughout the Order, but there are relatively few specified BMPs described that could be employed to meet water quality standards. On one hand, this provides flexibility and allows the dairies to determine the appropriate management schemes given the relevant local conditions. On the other hand, this Order would be more useful, and easier to implement, if it included (or at least referenced) a standardized list of water quality BMPs for dairy operators to selectively adopt.

G. Water Quality Requirements for Dairies located within the Coastal Zone

As mentioned above, Local Coastal Programs (LCPs) are the local government's guide to land use planning and development in the coastal zone, developed in partnership with the Commission. The counties of Del Norte, Humboldt, Mendocino, and Sonoma all have Commission-certified LCPs that further detail water quality requirements for development located in their respective LCP jurisdictions. In areas with certified LCPs, such as the four North Coast counties, the Commission has delegated development permitting authority to the local governments to implement consistent with the applicable certified LCPs. Any landowner proposing to undertake development in the coastal zone in a certified area must obtain a coastal development permit (CDP) from the local government, and for the development to be approved, it must be consistent with the policies and standards of the certified LCP. In addition, in some areas, such as much of the grazing and dairy land around the lower Eel River Delta and the Arcata Bottom, the Commission retains review authority for development projects, and the water quality requirements of the Coastal Act are the standard of review for CDPs within these areas.

In some respects, the GWDRs are more lenient (less restrictive) than the water quality protection requirements of the certified LCPs in the North Coast. For example, the Sonoma County LCP includes the following water quality protection policies related to agriculture and grazing:

> Environment Section, Policy 20: *Prohibit grazing or other agricultural uses in designated coastal wetlands. On watershed lands, a fence should be constructed on the outer edge of the wetland.*
>
> Environment Section, Policy 23: *Encourage the fencing of springs, seeps, and pond areas surrounded by lands used for grazing. Water for livestock should be piped outside of the wetland for use by livestock.*
>
> Environment Section, Policy 25: *Prohibit construction of agricultural, commercial, industrial and residential structures within 100 feet of wetlands.*
>
> Environment Section, Policy 26*: Between 100 and 300 feet of wetlands, prohibit construction of agricultural, commercial, industrial and residential structures unless an environment assessment finds the wetland would not be affected by such construction.*

Mendocino County allows existing agricultural activities within coastal wetlands to continue, but with limitations:

> Policy 3.2-7: *Current agricultural use of seasonal wetlands shall be recognized and allowed to continue. In instances where existing agricultural practices have a detrimental effect upon wetland areas, every attempt shall be made by the concerned property owner and responsible public agencies to mitigate the impact. Expansions of existing agricultural operations involving cultivation or construction of drainage systems into wetlands shall not be permitted*.

In addition, the Humboldt County LCP[1] includes the following water quality protection policy that applies to all new development within the coastal zone, including agricultural-related

[1] The Humboldt County LCP includes six different certified land use plans (LUP) by region: North Coast Area Plan, Trinidad Area Plan, McKinleyville Area Plan, Humboldt Bay Area Plan, Eel River Area Plan, and South Coast Area

development. This same policy also is codified in Section 30231 of the Coastal Act (PRC § 30231):

> *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

The Humboldt County LCP also requires that any permit approval for development in "Transitional Agricultural Lands," which generally includes agricultural lands on diked former tidelands, such as the many thousands of acres of farmed wetlands surrounding Humboldt Bay and the Eel River Estuary, may only be approved if the project represents the least environmentally damaging feasible alternative, if the best mitigation measures feasible are included, and provided that the functional capacity of the agricultural wetlands will be maintained (Coastal Zoning Regulations section 312-39.12).

Del Norte County also includes policies that allow for continued agriculture use in farmed wetlands while maintaining protections for wetland function and for adjacent sensitive habitat areas. Marine & Water Resources Chapter, Section VII-D (Wetlands), Policy 4 requires in part:

> …
>
> c. *In order to provide that the maximum amount of agricultural production in existing farmed wetlands and cultivated lands…, maintenance and repairs shall be permitted for existing dikes, levees, drainage ditches and other similar agricultural drainage systems and will be subject to any and all applicable policies within the certified land use plan.*
>
> d. *Performance standards shall be developed and implemented which will guide development in and adjacent to wetlands, both natural and man-made, so as to allow utilization of land areas compatible with other policies while providing adequate protection of the subject wetland.*
>
> …
>
> f. *Development in areas adjacent to environmentally sensitive habitat areas shall be sited and designed to prevent impacts which could significantly degrade such areas, and shall be compatible with the continuance of such habitat areas. The primary tool to reduce the above impacts around wetlands between the development and the edge of the wetland shall be a buffer of one-hundred feet in width. A buffer of less than one-hundred feet may be utilized where it can be determined that there is no adverse impact on the wetland…*

Plan. Each include the above-cited policy. The six LUPs are implemented by coastal zoning regulations certified by the Commission in 1986.

All of the North Coast LCPs maintain relatively stringent protections for riparian corridors. For example, Mendocino County requires the following with respect to riparian corridor protection:

> Policy 3.1-7: *A buffer area shall be established adjacent to all environmentally sensitive habitat areas. The purpose of this buffer area shall be to provide for a sufficient area to protect the environmentally sensitive habitat from significant degradation resulting from future developments. The width of the buffer area shall be a minimum of 100 feet, unless an applicant can demonstrate, after consultation and agreement with the California Department of Fish and Game, and County Planning Staff, that 100 feet is not necessary to protect the resources of that particular habitat area and the adjacent upland transitional habitat function of the buffer from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the environmentally sensitive habitat areas and shall not be less than 50 feet in width. New land division shall not be allowed which will create new parcels entirely within a buffer area. Developments permitted within a buffer area shall generally be the same as those uses permitted in the adjacent environmentally sensitive habitat area and must comply at a minimum with each of the following standards:*
>
> > *1. It shall be sited and designed to prevent impacts which would significantly degrade such areas;*
> >
> > *2. It shall be compatible with the continuance of such habitat areas by maintaining their functional capacity and their ability to be self-sustaining and to maintain natural species diversity; and*
> >
> > *3. Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel. Mitigation measures, such as planting riparian vegetation, shall be required to replace the protective values of the buffer area on the parcel, at a minimum ratio of 1:1, which are lost as a result of development under this solution.*
>
> …
>
> Policy 3.1-10: *Areas where riparian vegetation exists, such as riparian corridors, are environmentally sensitive habitat areas and development within such areas shall be limited to only those uses which are dependent on the riparian resources. All such areas shall be protected against any significant disruption of habitat values by requiring mitigation for those uses which are permitted. No structure or development, including dredging, filling, vegetation removal and grading, which could degrade the riparian area or diminish its value as a natural resource shall be permitted in the Riparian Corridor except for:*
>
> - *Channelizations, dams, or other substantial alterations of rivers and streams as permitted in Policy 3.1-9;*
> - *pipelines, utility lines and road crossings, when no less environmentally damaging alternative route is feasible;*
> - *existing agricultural operations;*

- *removal of trees for disease control, public safety purposes, or for firewood for the personal use of the property owner at his or her residence. Such activities shall be subject to restrictions to protect the habitat values.*

Del Norte County (Marine & Water Resources Chapter, Section VII-D (Riparian Vegetation), Policy 4a) requires that "*Riparian vegetation shall be maintained along streams, creeks and sloughs and other water courses within the Coastal Zone for their qualities as wildlife habitat, stream buffer zones, and bank stabilization*."

And Sonoma County requires the following in regard to riparian corridor protection:

> Environment Chapter, Policy 9: *Prohibit construction of permanent structures within riparian areas as defined, or 100 feet from the lowest line of riparian vegetation, whichever is greater, except development dependent on the resources in the riparian habitat, including public recreation facilities related to the resources. Any development shall be allowed only if it can be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of the riparian habitat. The riparian area or 100 foot wide buffer zone should generally be maintained in a natural, undisturbed state…*
>
> Environment Chapter, Policy 10: *Require erosion-control measures for projects affecting the riparian corridor.*
>
> Environment Chapter, Policy 14: *Encourage special range management practices which protect riparian areas.*
>
> Environment Chapter, Policy 15: *Encourage development of livestock watering areas away from the riparian corridor.*

The above cited policies represent a sample of the various policies included in the LCPs to protect water quality, wetlands, riparian habitat, and other resources in the coastal zone from development impacts, including on potential development impacts on coastal agricultural lands that are the subject of the draft Order.

The GWDR is not necessarily inconsistent with the above-cited LCP policies, but we would like to ensure that there is adequate coordination between the GWDR and relevant local jurisdictions and that the WDRs are strengthened to be more protective of coastal water quality. Please consider adding requirements to ensure consistency with the applicable local laws and the Coastal Act. Further, development in the coastal zone is broadly defined,[2] and new development

[2] PRC § 30106: *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which*

associated with dairies in Region 1 may require separate CDP authorization from the applicable local government and/or the Coastal Commission, unless the activity is exempt or categorically excluded, in addition to Regional Board authorization. We therefore recommend including language in the GWDR clarifying that the regulations described in the Order shall not replace or supersede local water quality requirements for dairies described in relevant LCPs or coastal permits required by the Commission or local governments. We also recommend that the Order include language directing permittees to refer to the local county LCP and/or to the Commission's North Coast District office (for Del Norte, Humboldt and Mendocino counties) or North Central Coast District office (for Sonoma County) for further information regarding coastal development permit and coastal water quality requirements that may pertain to new development on coastal agricultural lands.

Thank you for your attention to these comments. Once again, we appreciate the opportunity to provide input on the GWDR for dairies in the North Coast Region and look forward to receiving future updates regarding its development. Please feel free to reach out with any questions you may have about our comments.

Sincerely,

Jeannine Manna
North Central Coast District Manager
California Coastal Commission

cc: Michael Sandecki, Environmental Scientist, California Coastal Commission
Sophia Kirschenman, North Central Coast District, California Coastal Commission
Melissa Kraemer, North Coast District, California Coastal Commission
Vanessa Metz, Water Quality Unit, California Coastal Commission

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are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Habitat Conservation Planning Branch
P.O. Box 944209
Sacramento, CA 94244-2090
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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

November 30, 2018

Ms. Cherie Blatt
Water Resource Control Engineer
California Regional Water Quality Control Board
North Coast Region
5550 Skylane Blvd. Suite A
Santa Rosa, CA 95403

Dear ~~Ms. Blatt~~ Cherie,

DRAFT GENERAL WASTE DISCHARGE REQUIREMENTS FOR DAIRIES (PROJECT)
ORDER NO. R1-2019-0001
INITIAL STUDY AND MITIGATED NEGATIVE DECLARATION
SCH# 2018112016

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration (MND) from the North Coast Regional Water Quality Control Board (NC-RWQCB) for the Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.[1]

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources, and holds those resources in trust by statute for all the people of the State. (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a).) CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. (*Id.*, § 1802.) Similarly for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

CDFW is also submitting comments as a **Responsible Agency** under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381.) CDFW expects that it may need

[1] CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority. (Fish & G. Code, § 1600 et seq.) Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), the project proponent may seek related take authorization as provided by the Fish and Game Code..

PROJECT DESCRIPTION SUMMARY

Proponent: NC-RWQCB

Objective: The objective of the Project is to issue a general waste discharge requirements for discharges of waste from dairy facilities. The order covers the management of process water, manure, and other organic materials at dairies and includes the application of those materials to land.

Location: The order will cover dairies in Del Norte, Humboldt, Marin, Mendocino, Siskiyou, Sonoma, and Trinity counties.

Timeframe: The order will supersede five current waste discharge orders associated with dairy operations. The order does not expire and will be replaced when NC-RWQCB deems it necessary.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the NC-RWQCB in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

Within the NC-RWQCB jurisdiction are eight medium and high priority groundwater basins/subbasins subject to the Sustainable Groundwater Management Act (SGMA)[2], and four groundwater basins/subbasins that may be subject to SGMA pending finalization of DWR's Draft 2018 Basin Prioritization (DWR 2018)[3]. To manage these groundwater basins, six exclusive Groundwater Sustainability Agencies (GSAs) have formed[4]. These GSAs are responsible for development of Groundwater Sustainability Plans (GSPs) by

[2] Groundwater basins and subbasins subject to SGMA within the North Coast RWQCB boundary: Santa Rosa Valley – Santa Rosa Plain, Ukiah Valley, Eel River Valley, Smith River Plain, Scott River valley, Shasta Valley, Butte Valley, Klamath River Valley

[3] Groundwater basins and subbasins potentially subject SGMA pending Draft 2018 Basin Prioritization finalization within the North Coast RWQCB boundary: Wilson Grove Formation Highlands, Santa Rosa Valley – Healdsburg Area, Alexander Valley – Alexander Area, Mad River Valley – Mad River Lowland

[4] Groundwater Sustainability Agencies formed within the North Coast RWQCB boundary: Siskiyou County Flood Control and Water Conservation District, Tulelake Irrigation District, City of Tulelake, Modoc County, County of Del Norte, Ukiah Valley Basin Groundwater Sustainability Agency, Santa Rosa Plain Groundwater Sustainability Agency

January 2022, which is less than two years after the first dairy discharge annual report is required.

SGMA includes specific environmental considerations and protections and requires groundwater basins to avoid 'significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies' to achieve sustainability (Water Code §10721, subd. (x)(4)). GSP regulations require a number of water quality components including descriptions of groundwater quality issues that may affect beneficial uses of groundwater and identification of known contamination sites/plumes (Cal. Code Regs., tit. 23, §354.16, subd. (d)); development of a minimum threshold for degraded water quality (Cal. Code Regs., tit. 23, §354.28, subd. (c)(4)); and creation of a monitoring system sufficient in spatial and temporal data to determine groundwater quality trends and to address known issues (Cal. Code Regs., tit. 23, §354.34, subd. (c)(4)).

I. General Waste Discharge Requirements (GWDR) for Dairies within the North Coast Region

COMMENT 1:
Section #:33 Regulatory Framework
Page #: 8

Issue: The GWDR identifies an understanding of subsurface conditions as a prerequisite to effective groundwater protection. While the GWDR concludes that facility-specific data are necessary to assess compliance, the solution to require annual groundwater sampling as specified in the Monitoring and Reporting Program for the GWDR is insufficient to accurately characterize potential groundwater impacts.

Specific impact: The groundwater sampling requirements in Monitoring and Reporting Program are not temporally robust to characterize, with certainty, impacts to groundwater and interconnected surface waters (see comment on Monitoring and Reporting Program for the GWDR below), leaving room for unaccounted impacts to groundwater such as nitrogen contamination.

Why impact would occur: Absent monitoring design based on an understanding of subsurface aquifer dynamics, and/or absent sufficient groundwater collection data through different seasons, there is no way of guaranteeing the prevention of adverse impacts to groundwater quality.

Evidence impact would be significant: The monitoring requirements as they stand would apply to all dairy operations in the NC-RWQCB region. Shortcomings in monitoring standards may allow for unaccounted groundwater contamination in any or all dairy facilities, which could adversely impact interconnected groundwater dependent ecosystems and surface waters.

Mitigation Actions for Consideration: The NC-RWQCB should recommend the use of basin hydrogeologic conceptual models and other aquifers descriptions required in GSPs (when and where are adopted) when designing monitoring approaches to

increase the validity of groundwater sampling results. (See comment on Monitoring and Reporting Program for the GWDR below).

COMMENT 2:
Section #:46 California Environmental Quality Act
Page #: 12-13

Issue: The Notice of Intent (NOI) Section IV. Implementation of Order Provisions requires that "e. the development of the dairy is in compliance with any applicable county regulations and ordinances, including grading, construction, and building ordinances". Groundwater regulations/ordinances are not explicitly included in this list.

Specific impact: In the absence of county groundwater regulations and ordinances, the NOI compliance requirement list may cause applicants to overlook local groundwater management requirements. Groundwater regulations and ordinances may be developed or updated due to recent case-law from the Scott Valley River basin concluding that adverse impacts of groundwater extraction on navigable surface waters are subject to the Public Trust Doctrine (ELF v SWRCB, 2018).

Why impact would occur: Not including groundwater regulations specifically in the NOI checklist risks dairies not complying with or failing to cross-reference local groundwater regulations in the development of their dairy management plans. This failure to reference local requirements then leaves local groundwater systems at risk of contamination that may have been preventable with consideration of local regulations that account for site-specific hydrogeology.

Evidence impact would be significant: With the advent of SGMA and new groundwater case law, it is expected that local groundwater regulations and ordinances will be evolving. By omitting compliance to groundwater regulations and ordinances, it is less likely that dairies will continue to be cognizant of the evolving effort to comprehensively manage groundwater across the state, which could leave groundwater dependent ecosystems vulnerable to water quality impacts.

Recommendation: Include 'groundwater' in the list of specifically identified county regulations and ordinances.

COMMENT 3a:
Section #:46 California Environmental Quality Act
Page #: 12-13

Issue: The NOI Section IV. Implementation of Order Provisions requires that "b. A Section 1602 Streambed Alteration has been procured, if necessary". The Fish and Game Code section is cited incorrectly.

Recommendation: Revise he subsection to indicate: "All dischargers must comply with Fish and Game Code Section 1600 et seq. Lake and Streambed Alteration requirements."

COMMENT 3b:

Section #:46 California Environmental Quality Act
Page #: 12-13

Issue: The NOI Section IV. Implementation of Order Provisions requires that "f. All impacts to special status species must be fully mitigated". This requirement is vague which could lead to dischargers violating the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.).

Recommendation: Revise the subsection: "All dischargers must obtain an Incidental Take Permit (ITP) pursuant to Fish and Game Code Section 2081(b), if required". Obtaining an ITP will ensure that impacts to CESA listed species will be fully mitigated.

COMMENT 4:

Section #: A.3. Discharge Prohibitions
Page #: 14

Issue: Discharge Prohibition #3 states: "The discharge of waste from a dairy that causes or contributes to an exceedance of any applicable water quality objective in the Basin Plan, or any applicable state or federal water quality criteria, or a violation of any applicable state or federal policies or regulations, is prohibited." This list excludes water quality objectives (i.e., minimum thresholds) included in GSPs. Further, the exclusion of the term 'local' from the list of applicable policies or regulations may contribute to dischargers overlooking any local policies or regulations.

Specific impact: Under this list, dairies may not be accountable for meeting GSP water quality minimum thresholds or measurable objectives.

Why impact would occur: Absence of language on GSPs and local water quality regulations leaves ambiguity as to whether dairies are accountable to GSPs and GSAs. This ambiguity may risk a failure of dairies to comply with local regulations (once they are established under GSPs), thereby risking groundwater quality degradation.

Evidence impact would be significant: With the advent of SGMA, it is expected that local groundwater quality regulations will evolve to more comprehensively manage groundwater resources for beneficial uses. A failure to comply with the newest regulations that are required to reflect the best available information on groundwater systems will leave groundwater and interconnected surface waters vulnerable to contamination by point and non-point dairy contaminants.

Mitigation Actions for Consideration: Revise this clause to read: "The discharge of waste from a dairy that causes or contributes to an exceedance of any applicable water quality objective in the Basin Plan or the Groundwater Sustainability Plan (if applicable), or any applicable local, state or federal water quality criteria, or a violation of any applicable state or federal policies or regulations, is prohibited".

COMMENT 5
Section #: B 4, Riparian Areas
Page #: 18

Issue: This section allows for livestock grazing in riparian areas. The GWDR does not require the use of exclusionary fencing to keep livestock from degrading riparian habitat and does not provide a specific buffer to protect the stream and streambank from certain livestock processing activities.

Specific impact: Riparian areas are important habitat for many species and provide important ecological function. Livestock grazing near the stream edge or entering the stream can degrade the streambank, pollute the stream with animal waste, and increase sediment that can negatively impact fish within the area as well as downstream. Dairy and livestock waste processing activities can degrade riparian habitat.

Evidence impact would be significant: By not requiring exclusionary fencing, dischargers may opt for less effective ways of protecting riparian areas from over grazing, trampling of streambanks, and disturbing sediment discharge sites. Furthermore, by not discussing the importance of maintaining a buffer around the stream and riparian area to protect it from dairy and livestock waste processing facilities, dischargers may place such facilities too close to streams and riparian habitat. Approximately 95% of riparian habitat has been lost in California. It is imperative that the remaining riparian habitat is protected and preserved.

Mitigation Actions for Consideration: Additional conditions to provide a buffer zone to protect riparian area, stream, and streambanks. Dairy and livestock waste processing should be located at least 150 feet from streams or edge of riparian habitat, whichever is greater. Livestock should be fenced outside of streams and, depending on the grazing regime, outside of riparian habitat.

II. Monitoring and Reporting Program for the GWDR (Attachment D)

COMMENT 5:
Section # 1B.2: Groundwater Well Sampling
Page #: 6- 8

Issue: The monitoring and reporting program defines groundwater monitoring requirements for the Groundwater Well Sampling. The requirement for preliminary monitoring is one sample per year from a representative well.

Specific impact: Annual sampling will fail to capture any seasonal variability in groundwater movement and contaminant concentration and dilution. One sample per year is insufficient to represent potential impacts to groundwater quality across seasons. Additionally, sampling results from each participating dairy may not be directly comparable; depending on the hydrologic/seasonal condition each sample was taken. This inability to compare the results from different locations compromises the NC-RWQCB's ability to assess cumulative impacts.

Why impact would occur: Absent thorough groundwater sampling across seasons, potential groundwater contamination may occur without NC-RWQCB awareness or ability to intervene.

Evidence impact would be significant: Since the requirement for one annual groundwater sample is insufficient to capture all potential groundwater quality impacts and all dairies would be held accountable to this standard, there would be a significant absence of data to understand the GWDR and dairy management plans efficacy in protecting groundwater from contamination. This may leave groundwater dependent ecosystems vulnerable to contamination.

Mitigation Actions for Consideration: The Department of Water Resource's *Best Management Practices for the Sustainable Management of Groundwater* recommends that groundwater quality data represent conditions that inform the appropriate basin management (DWR 2016). GSP regulations require that a monitoring network be sufficient to demonstrate seasonal trends and particularly to represent seasonal low and high groundwater elevations (Cal. Code of Regs., tit. 23, §354.34). Because groundwater quality is apt to vary across operation seasons (Bexfield and Jurgens 2014), the NC-RWQCB should consider increasing groundwater monitoring requirements to better promote the collection of data of sufficient frequency to characterize dairy groundwater quality impacts.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations. (Pub. Resources Code, § 21003, subd. (e).) Accordingly, please report any special status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDB). The CNNDB field survey form can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDB_FieldSurveyForm.pdf. The completed form can be mailed electronically to CNDDB at the following email address: CNDDB@wildlife.ca.gov. The types of information reported to CNDDB can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089.)

CONCLUSION

CDFW appreciates the opportunity to comment on the IS/MND and the GWDR to assist the NC-RWQCB in identifying and mitigating Project impacts that may affect California fish and wildlife. We also appreciate the opportunity to inform all interested parties on those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

Questions regarding this letter or further coordination should be directed to Karen Carpio, Senior Environmental Scientist at (916) 653-3864 or Karen.Carpio@wildlife.ca.gov.

Sincerely,

Richard Macedo
Branch Chief
Habitat Conservation Planning Branch

cc: Office of Planning and Research, State Clearinghouse, Sacramento

ec: California Department of Fish and Wildlife

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January 03, 2019

Mrs. Cherie Blatt, Southern Nonpoint Source and Forestry
North Coast Regional Water Quality Control Board
5550 Skylane Boulevard, Suite A,
Santa Rosa, CA 95403

RE: Comment Letter-Draft General Waste Discharge Requirements Order No. R1-2019-0001 for Dairies in the North Coast Region.

Dear Cherie,

Russian Riverkeeper ("RRK") and Humboldt Baykeeper (HBK) are two of twelve Waterkeeper organizations within the California Coastkeeper Alliance ("CCKA") network. We both work tirelessly to protect and our Watershed and Bay for the benefit of its inhabitants, its visitors and our ecosystems. Environmental Law Foundation ("ELF") is a California nonprofit organization founded on Earth Day in 1991 that has a longstanding interest in reducing pollution to waters of the state and in promoting access to data about water pollution. On behalf of RRK, HBK and ELF, we appreciate the opportunity to provide comments on the North Coast Regional Water Quality Control Board's ("NCRWQCB") *Draft General Waste Discharge Requirements Order No. R1-2019-0001 for Dairies within the North Coast Region***.**

A well-regulated dairy industry is important to our region and is a critical part of protecting and enhancing regional water quality. Without a strong dairy GWDR Order, dairy pollution threatens the quality of our waters. RRK and ELF strongly urge the NCRWQCB to adopt a revised dairy order that reflects the importance of our natural resources and protects and enhances clean water.

The revised order must reflect the lessons learned by this Regional Board, and other Regional Boards and states, when choosing how best to update this Order's terms and requirements. Of critical importance is 1) a requirement that dairies electronically submit ALL reports and ALL data associated with this permit; 2). a requirement that any and all group monitoring be completely transparent and not secretive; ; 3). a requirement that dairies monitor surface water and storm water runoff for the same pollutants Region 2 requires and in addition monitor for Total Phosphorus and E. Coli; 4) the Order, as currently written, is not

consistent with the Basin Plan; and 5) the Order, as currently written, fails to comply with the Nonpoint Source Policy and the Antidegradation Policy. In all areas, the Regional Board should consider a broader national trend where regulators seek to improve permit transparency and allow the public to more easily understand the sources of pollution to their waterways and what is being done to protect them.

These recommendations stem from a comprehensive review of California dairy CAFO permits and permits from other top dairy-producing states. The following are our principle comments in order to improve the General Waste Discharge Requirements for Dairies followed by more specific comments related to individual Sections of the Draft Order, the MRP, the WQP, the NMP and the Noncompliance Reporting sections.

We will first address the issue of secrecy. The discussion below is directed at two issues within the permit

I. The Revised Dairy Permit Must Require Dairies to Electronically Submit All Reports and Data Associated with this Order.

And

II. Any and All Group Monitoring Must Be Completely Transparent and All Results Must Be Submitted Electronically and Available For Public Review.

The Draft Permit Unlawfully Permits Secret Data

The people have a right to know who is polluting their water. Surface and ground waters belong to the people. (Cal Const., art. X, § 5; Wat. Code §§ 102, 104.) And the people have a constitutional right of access to information about the regulation of their property. (Cal. Const., art. I, § 3, subd. (b)(1).)

i. Legal Background

The California Constitution, statutory law, case law, and the State Board's policies protect the people's right to access to public information about water pollution. These authorities lead to two interrelated conclusions: 1) the public must have sufficient information to verify that the Regional Boards are

successfully implementing a regulatory program that controls water pollution and 2) that information must be public.

a. Constitution and General Principles

The California Constitution provides that the "people have the right of access to information concerning the conduct of the people's business" and that a "statute, court rule, or other authority… shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(1)-(2).) Further, when adopting a new rule "that limits the right of access", the Regional Board shall only do so with "findings demonstrating the interest protected by the limitation and the need for protecting that interest." (*Id.*, subd. (b)(2).)

Regulating water quality is clearly the "people's business." Under the Constitution, the "use of all water… is hereby declared to be a public use, and subject to the regulation and control of the State…." (*Id.* art. X, § 5.) The Water Code further confirms the public's interest in and ultimate control over the state's water, stating that all "water within the State is the property of the people of the State." (Wat. Code § 102.) If there were any doubt, the Water Code goes on to provide that "the people of the State have a paramount interest in the use of all the water of the State…." (Wat. Code § 104.) Based on these authorities, it is clear that the public has a clear, direct right to information about water pollution.

Perhaps the most direct summation of the public's right to information, as well as this Board's duty to provide it, is in the preamble to the Bagley-Keene Open Meeting Act, which requires that Regional Board meetings be open and available to the public:

> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

(Gov. Code § 11120.) The public has the right to know how the government is regulating their water.

b. The Nonpoint Source Policy

The State Board's policies, which govern this permit, confirm the public's right of access to data about water quality impacts from dairies. In 2004, the State Board adopted the Nonpoint Source Policy. Regional Board and State Board actions, including this GWDR, must comply with state water policy. (Wat. Code §§ 13146, 13240, 13247.) The Court of Appeal recently held that a Regional Board may not "delay, diminish, or dilute a requirement that is part of the policy." (*Monterey Coastkeeper v. State Water Resources Control Board* (2018) 28 Cal.App.5th 342, 370.) Thus the provisions of the Nonpoint Source Policy are mandatory and have the force of law.

The Nonpoint Source Policy contains five mandatory Key Elements.[1] Key Element 4 requires:

> A [nonpoint source] control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.[2]

Further, "all monitoring programs should be reproducible, provide a permanent/ documented record and be *available to the public*."[3]

The Nonpoint Source Policy could not be clearer. Not only must this GWDR contain sufficient monitoring and reporting to ensure that the public and the Board can tell if the program is working towards achievement of water quality objectives, these mechanisms must be available to the public.

The Regional Board must issue an order that accomplishes two goals. First, the monitoring and reporting program must be effective. That is, it must be able to determine whether dischargers are causing exceedances of water quality objectives and it must be able to determine if the management practices and

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[1] Nonpoint Source Policy at 11.

[2] *Id.* at 13.

[3] *Id.* at 14 (emphasis added) We note that despite the requirement for a "permanent" record, the Order allows dairies to destroy records after 5 years. (MRP at p. 14.) Given that this Order does not expire, this short record retention requirement is both unlawful and illogical.

other requirements of the order are having an actual, measurable effect on those discharges and on water quality. Second, the monitoring and reporting program must be public. The Board may not establish a system where crucial data is secret.[4]

c. Recent Cases

Moreover, recent court decisions weighing on the need both for effective monitoring and for transparency concluded that agricultural orders that did not include effective and public monitoring programs are unlawful.

One case addressed the Central Valley Regional Board's WDRs for dairy operations. In *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1273 ("*AGUA*"), the court held that the monitoring program for that order was insufficient to detect groundwater degradation. The court held that the groundwater monitoring was insufficiently detailed to trace exceedances of groundwater objectives back to specific dairies and that the order did not require testing for all constituents of concern. (*Id.* at 1275-77.) The dairy order provided for monitoring from irrigation supply wells, which are screened across multiple depths and therefore allow for mixing of waters in the sample. This made it impossible to tell whether pollution in the groundwater was from newer (shallower) discharges or older (deeper) discharges. (*Id.* at 1275-76.) Second, the monitoring did not test for all constituents of concern. The information sheet for the dairy order listed the primary constituents of concern as "ammonia, nitrates, phosphorus, chloride, boron, salts, pathogens, and organic matter." (*Id.* at 1276.) But the monitoring program required testing only for "nitrate, electrical conductivity (which measures salts) and phosphorous." (*Id.*) In addition, the court also found that the fact that the Regional Board's executive officer had the authority to order more monitoring did not save the order. Discretionary monitoring, without "mandatory standards," "does not ensure that no further degradation" will occur. (*Id*. at 1277.) Thus, if monitoring is a key part of a regulatory scheme, it must contain mandatory features that are capable of achieving its stated purposes.

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[4] There are exceptions for trade secret information. (E.g. Wat. Code § 13267(b)(2).) This Order, however, does not assert that the data it allows the dairies to keep secret is trade secret.

A case in the Central Coast found that it is unlawful to allow third parties to maintain water pollution data secret. (*Zamora v. Central Coast Regional Water Quality Control Board* (Oct. 28, 2016) San Luis Obispo Sup. Ct. No. 15CV-0247, attached as Zamora Order). The court ruled that the Central Coast Regional Board's procedure for notifying residents that their wells were contaminated with nitrate did not comply with Water Code section 13269 or the Public Records Act. A work plan adopted pursuant to the Central Coast order allowed a third-party coalition to conduct the well testing and send a notification to the grower requiring the grower to in turn notify the well users. The grower was then required to send a confirmation to the coalition when it had notified the well user. The coalition was allowed to keep both of these records secret, allowing the Regional Board the ability only to inspect, but not copy, the records at quarterly meetings. The court ruled that this procedure, designed only to protect growers' secrecy, was improper: "Two pillars of the Water Quality Act are to protect the quality of community water supplies and to promote public access…The public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public's water supplies." (*Id.* at 2-3.) The court was clear that secrecy in water pollution data was not permissible:

> The Coalition generates three technical documents that intentionally make it difficult for all but the most sophisticated user to figure out the owners and locations of polluted well water. There is no justification for such obfuscation: the strong interest in public accountability cannot be overcome by vague notions of privacy or unsupported allegations of terrorist threats to polluted groundwater supplies.

(*Id.*at 3.)[5] Importantly, the court also held that the Coalition records were public records for the purposes of the PRA even though they were held off of the Regional Board's premises. (*Id* at 19-20.) The fact that the Regional Board's staff had reviewed the documents at compliance meetings constituted "use" of the

[5] The Central Coast Groundwater Coalition had justified the need for secrecy, in part, by suggesting that privacy was needed to avoid terrorist threats to drinking water wells. The Court pointed out that the Coalition had submitted no evidence of such threat. (*Zamora*, *supra*, at 15: see also *American Civil Liberties Union of Southern California v. Superior Ct.* (2017) 3 Cal.5th 1032, 1046 ("[V]ague safety concerns" cannot "foreclose the public's right of access" (quotation marks omitted).)

documents under the PRA.[6] Because the Regional Board used the documents, they were subject to disclosure.

Lastly, two cases in the Central Coast held that important nitrogen application reporting data is not trade secret. (*Rava Ranches v. California Water Quality Board,* Central Coast Region (Nov. 17, 2016); *Triangle Farms v. California Regional Water Quality Board, Central Coast Region* (Dec. 29, 2016) (Mont. Sup. Ct Nos. 16CV000255 and 16CV000257, attached as "Rava Order After Hearing of 81916" and "Triangle Order") Both cases concerned ELF's Public Records Act requests for Total Nitrogen Applied data, which certain growers are required to report to the Central Coast Board. The data includes types of crops, acreage, annual aggregate totals of nitrate levels, location information, and average nitrate concentrations. (*Rava Ranches*, *supra*, at 13.) Two growers challenged ELF's PRA requests, arguing that the data constituted a trade secret. But the court held that the data was not secret and was required to be disclosed. Applying the balancing test contained in the Public Records act, the court determined that public disclosure of the nitrogen applied data was in the public interest.

ii. Secrecy and Insufficient Reporting in the Draft GWDR

The Draft GWDR contains two aspects that violate the foregoing legal principles: it allows important data to remain secret while failing to require sufficient reporting to ensure that the program is working.

First, the MRP allows dairies to keep crucial data secret. While dairies are required to prepare Nutrient Management Plans (NMP), these plans are not public. (Draft GWDR at p. 27, MRP at p. 15, Attachment D, App. 2.) Instead, dairies are permitted to keep the NMP on the dairy. The NMP will be available for inspection by the Regional Board's staff and submitted to the Regional Board upon request. But there is no set schedule for such inspections and no requirement that the Regional Board ever actually request the NMPs. And the public may not request the NMPs from the dairies. Moreover, the GWDR does not provide for any reporting on whether the dairies complied with the provisions of their plans. This is insufficient under the Nonpoint Source Policy.

The information in the NMPs is necessary for the Regional Board to understand

[6] The PRA declares that documents "containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency" are public records. (Gov. Code § 6252, subd. (e).)

whether the GWDR is working to control discharges. The plans contain crucial information about the dairies' management practices, their nutrient budgets, and compliance with those budgets. The Order's effectiveness in reducing nutrient discharge from dairies depends on dairies' properly planning their use and application of manure. It also depends on the dairies' actually implementing their plans. The Order provides procedures in the event that dairies fail to comply with their plans by, for instance, exceeding their nutrient budget or by applying manure to fields in a way that threatens surface waters (See Attachment D, App. 2 at p. 6-8.). But as currently constructed, these procedures play out in secret. The Regional Board will not know the contents of the NMP, will not know that the plan has been violated, and will not know what remedial measures, if any, the dairies have taken.

The Nonpoint Source Policy requires more than what this Order provides. It requires a "feedback mechanism" sufficient for the Regional Board *and* the public to know whether the program is working. Further, it requires that monitoring programs be reproducible and available to the public.[7] As currently set up, the Regional Board cannot know the contents of the NMPs unless it acts affirmatively to request them. And the public has no recourse at all because it lacks access to the NMPs unless the Regional Board acts. And neither the Regional Board nor the public will know whether dairies actually complied with their secret plans or whether they took any of the required remedial action. This system is not sufficient for the Regional Board to know whether the program is working or for the public to reproduce those results. It is therefore unlawful.

The Regional Board should also be aware that the system as established in the GWDR may not survive a Public Records Act request. The PRA covers any document "containing information relating to the conduct of the public's business prepared, owned, *used*, or retained by any state or local agency." (Gov. Code § 6252, subd. (e) (emphasis added).) The *Zamora* court, as discussed above, found that review of records kept at a discharger coalition's offices constituted "use" for the purposes of the PRA and rendered those documents subject to disclosure.

And the Supreme Court has also recently confirmed that public records are not limited to those physically on the premises of the public agency. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.) In *City of San Jose,* the Supreme Court

[7] Nonpoint Source Policy at 14.

found that public officials' emails were public records subject to disclosure even if those emails were sent from personal email accounts and never existed on the public agency's servers. (*Id.* at 629.) The Court pointed out that the physical location of the documents does not dispose of the question of whether they are public documents: "An agency has constructive possession of records if it has the right to control the records, either directly or through another person." (*Id.* at 623.) "[A] document's status as public… does not turn on the arbitrary circumstances of where the document is located." (*Id.* at 624.) The court frowned on an interpretation of the PRA that allowed a public agency to "shield information from public disclosure simply by placing it in a certain type of file." (*Ibid.*) "Such an expedient would gut the public's presumptive right of access and the constitutional imperative to broadly construe this right." (*Ibid.* (internal citations omitted).)

In order to comply with the Nonpoint Source Policy and the Public Records Act, the Regional Board should revise the GWDR in the following ways:

- Require dairies to submit copies of their NMPs to the Regional Board;
- Require reporting of compliance with NMPs, including a description of management practices implemented, and reports of manure applied and crop yield to establish whether agronomic rates were complied with;
- Require dairies to submit manifests of manure sold to other entities so that the Regional Board and the public can track manure that was transferred to other sites and applied there;
- Ensure that monitoring is performed at sites close enough to fields and operations such that monitoring will reveal whether dairies are causing or contributing to water quality exceedances.

III. The New Dairy Permit Must Increase the Requirements for Surface Water Monitoring to Ensure Overall Compliance and Effectiveness of the Permit.

"Waste from dairy facilities can contain significant amounts of pathogens, oxygen-depleting organic matter, sediment, nitrogen compounds, and other suspended and dissolved solids that can impact both groundwater and surface water" add to this the adverse aquatic habitat impacts nutrient enrichment resulting in algal blooms, organic waste loading resulting in lowered oxygen

levels, pathogen loading that can cause threats to public health, siltation of aquatic habitat, high levels of ammonia that are toxic to fish and aquatic invertebrates. Currently, the Draft Order is extremely limited with its requirements of pollutants to be monitored (Total Ammonium Nitrogen & Specific Conductance). It does not require dairies to monitor for specific pollutants that are deleterious to and causing impairments to local waterways.

Require dairies to monitor surface water and stormwater runoff for Total Phosphorus, E. Coli, specific conductance, total ammonium nitrogen, unionized ammonia, pH, and temperature. (Region 2 requires 5 of the 7 mentioned). This provides the Regional Board and the public with a more complete picture of each dairy's impact on local waters particularly in light of impairments such as Pathogens and Nutrients in 303(d) listed waterways. This data will assist the Regional Board with identifying and addressing problem dairies. A robust monitoring program will also provide R1 staff with better data as to the impact of this industry, and particular facilities impact upon regional water quality. This will not cause a burden on the dairies as they are already monitoring for these pollutants in other areas of their plans (with the exception of pH and Temperature which can be done using a simple pocket tester probe).

IV. The Order, As Currently Written, Is Not Consistent With The Basin Plan.

The Draft Order is not consistent with the Basin Plan because it lacks sufficiently specific, enforceable measures and feedback mechanisms needed to meet the Basin Plan's water quality objectives. Additionally, there is little to support a conclusion that the Order will lead to quantifiable improvements in water quality or even arrest the continued degradation of the North Coast Region's waters.

The draft Order's iterative approach of requiring improved management practices until discharges no longer cause or contribute to exceedances of water quality standards is unlikely to work because the waivers provisions are not enough to identify the true impact individual dischargers are having or how they may be contributing to exceedances. Consider the two constituents, Specific Conductivity, and Total Ammonia Nitrogen. The benchmark for Specific Conductivity states the WQ sample must be below 2000 uS/cm while the Basin Plan WQO does not rise above 350 us/cm (this is an average of all Waterbody's on the North Coast-the Russian River upstream has a 90% upper limit of 320 uS/cm and a 50% Upper limit of 250 uS/cm). You cannot evaluate the true

impacts dischargers are having when you allow for a benchmark that is almost 10 times what the WQO is for that specific waterbody. Change the benchmark to reflect the Specific Conductance WQO for the dairy operations location to better understand how the discharger is contributing to exceedances. Have the violators file noncompliance reports when they exceed this Basin Plan WQO. To set a standard that violates your own Basin Plan in effect is arbitrary and capricious.

Sampling of Total Ammonia Nitrogen by itself is not enough of an indicator unless it is paired with Un-ionized Ammonia, pH and Temperature (See Regional Board #2 Dairy sampling requirements).We implore staff to direct the Dairy Order to be more consistent with the Basin Plan. Require the dischargers to monitor for pollutants that have numeric WQO's (pH, E.Coli) add additional sampling in order to better evaluate actual compliance with WQOs and be more in line with other Orders (Region 2) Finally, consider the Biostimulatory Substances narrative WQO in the Basin Plan and add Total Phosphorus to the sampling requirements.

V. The Order, As Currently Written, Fails To Comply With The Nonpoint Source Policy and The Antidegradation Policy.

The Draft Order does not comply with the NPS Policy because it lacks adequate monitoring and reporting to verify compliance with requirements and measure progress over time; specific time schedules designed to measure progress toward reaching quantifiable milestones; and a description of the action(s) to be taken if verification/feedback mechanisms indicate or demonstrate management practices are failing to achieve the stated objectives. Additionally, it fails to comply with the Antidegradation Policy by failing to provide for effective monitoring to adequately and effectively detect degradation. Below is our legal argument on how the Current Draft GWDR Order fails to comply with the Antidegradation Policy.

The Antidegradation Policy requires the Regional Board to take certain steps regarding water quality.[8] Among other things, it must set a baseline level of water quality and determine whether water quality will be degraded by proposed action. If the water is high quality and it will be degraded, the State

[8] See Statement of Policy with Respect to Maintaining High Quality Waters in California (Resolution 68-16 or Antidegradation Policy). See also *AGUA*, *supra*, 210 Cal.App.4th 1255.

Board must determine whether such degradation is (1) consistent with maximum benefit to people of the State, (2) will not unreasonably affect present and anticipated beneficial uses, and (3) will not result in water quality less than that in Basin Plan and other policies. And the State Board must require any discharge of waste into high quality waters to implement "best practicable treatment and control" ("BPTC") necessary to assure that pollution or nuisance will not occur and that the highest water quality consistent with maximum benefit to the people of the State will be maintained.[9]

In *AGUA*, the Court of Appeal carefully examined a WDR for dairies in the Central Valley and found that the order violated the Antidegradation Policy. This order falls into several of the same traps that the Central Valley order did. This Regional Board should carefully study the *AGUA* decision and ensure that this Order complies with the Antidegradation Policy.

The Draft GWDR's discussion of the Antidegradation Policy is troubling. (Draft GWDR at p. 10-12.) First, the discussion states that the Order will "ensure that the existing beneficial uses and quality of waters… will be maintained and protected." (GWDR at 11.) It goes on to state that discharges will "not degrade existing water quality." These statements do not comply with the Policy.

The text of the Antidegradation Policy and the *AGUA* court's ruling are both explicit that the baseline for any antidegradation analysis is the best water quality that has existed since 1968. It is not sufficient to only address impacts to present water quality, especially where present-day water has already been degraded. The Policy states that it applies whenever "existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained…." The *AGUA* court confirmed that a Regional Board must

> compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives. If the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved. In that case the antidegradation policy is not triggered. However, if the baseline water quality is better than the water quality objectives, the

[9] Antidegradation Policy, (Ex. C) at 1.

> baseline water quality must be maintained in the absence of findings required by the antidegradation policy.

(*AGUA*, *supra*, 210 Cal.App.4th at 1270.) Here, the Regional Board is comparing the effects of the Order not to the best quality that has existed since 1968, but to existing water quality. The undersigned organizations have submitted evidence that dairy discharges have degraded waters of the state already. It would reward past bad behavior to only analyze impacts of future discharges to existing water quality. The Regional Board must determine whether high quality waters exist and, if they do, implement the Antidegradation Policy.

Second, as discussed above, the Order simply assumes that it will be effective in controlling discharges from dairies in the North Coast. But as the *AGUA* court held, "the wish is not father to the action." (*Id.* at 1260.) We have serious concerns about both the effectiveness of the measures required by the Order and the ability of the Regional Board and the public to detect problematic discharges. The conclusory statements in the Order are not sufficient, either to assuage our concerns or to comply with the law. We urge the Regional Board to perform a thorough antidegradation analysis to ensure that this Order complies.

Following are our general comments on the General Order and the various plans within the order.

Attachment D

Monitoring and Reporting Program

The Goal of MRP is to assess compliance AND progress towards water quality standards and must be structured to clearly respond to those goals.

Specific Issues:

The opening statement reads *to evaluate compliance with the terms and conditions of the Order, this MRP requires that regular monitoring, sampling, and record-keeping be conducted by dairy owners and operators (hereinafter "Discharger") and that the records be made available to Regional Water Board staff.* In *Zamora*, (see attached) the court found that all documents related to the Order "are subject to production under the Public Records Act because these documents relate to the conduct of the public's business and are "used" by the Regional Board in assuring compliance

with on—farm best management practices", monitoring and sampling. According to *Zamora*, "the State Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program ("NPS Policy") (§13369; AR 3:000062) emphasizes that monitoring programs must include sufficient feedback mechanism so that the [Regional Board], dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different [management practices] or other actions are required." Additionally, it must be plainly stated that the monitoring (NMPs, WQP, RMP) and reporting data of individual farms (Annual Reports, Noncompliance, WQ Monitoring) participating in the waiver are readily available to the public. Members of the public need only ask, and the monitoring results are required to be provided by the Regional Board as a matter of course.

As written, the Draft Order requires that groundwater monitoring results are to be uploaded to Geotracker, however, stormwater/surface water monitoring results are only required to be submitted in a yearly annual report and there is no requirement in the Order that requires these to be submitted electronically.

Please change this language to reflect this recent court decision. We suggest "and that all records pertaining to the Order must be submitted electronically to Regional Board Staff in order to assure they are publically available"

Section I.A.
"*Visual inspections shall be done when conditions are safe to do so*." This is far too vague and could be used to dodge performing inspections, and sampling, when pollutants are mobilized and entering RW from a Dairy. In our edge of field sampling we conducted from 2002 to 2005 we found that pollutant concentrations peaked shortly after the peak of the storm hydrograph. This means pollution is leaving farms and entering local streams in the middle of storm events. Placing such a vague limitation on when permittees are required to sample allows them to inspect or sample when pollutants have left the dairy property thus providing no assurance of permit compliance. Dairy personnel work outside all year long and often in bad weather conditions so this significant limitation ("when safe to do so") on conducting inspections is questionable. Any limit on the timing of inspections or sample collection must be more clearly defined to allow the public to evaluate if the MRP is adequate to assess compliance with the permit or water quality standards. It should also be defined who performs the inspections and sampling and that they have the proper training to conduct compliance inspections or water quality monitoring.

All adverse conditions, including discharges that are a threat to human health or the environment, shall be reported to the Regional Water Board within 24 hours.

"Adverse conditions" should be clearly defined in this section especially what constitutes "threat to human health or environment" and some training should be provided so that more defined requirements are clear to all Dairy and inspections and monitoring personnel.

How are "adverse conditions" and "discharges that are a threat to human health or environment" to be reported? Please specify what those enrolled under the order are to do upon discovering this condition/threat. Staff needs to consider the difference between three sets of language that address the same condition requiring reporting. In the MRP section 1A it reads "*adverse conditions, including discharges that are a threat to human health or the environment shall be reported...within 24 hours*". In the MRP (Sect II Reporting (B)) the language under "Noncompliance Reporting" reads *any spill, discharge, or other type of noncompliance that violates the conditions of this Order and/or endangers human health or the environment within 24 hours…* In the Draft Order (Section J (5)) there is a section on **Noncompliance Reports** that reads "*any noncompliance that endangers human health or the environment*" RRK advocates for combining all three sets of language. Consider this…any adverse condition including spills, discharges or any other noncompliance that violates the conditions of this order and/or poses a threat to human health or the environment shall be reported within 24 hours. For clarity and direction, please add the Cal OES phone number in addition to the Regional Boards phone number and mention they must report to BOTH. Then direct them to the additional reporting requirements (i.e. refer to the MRP (Sect II. Reporting (B) for additional reporting requirements).

Corrective actions shall be implemented to stop the discharge of sediment and waste to surface water waters of the state and groundwater as soon as possible.

This statement is in direct contradiction to the discharge prohibitions set forth in Section A of the Draft Order No. R1-2019-0001. Please add additional language here so that the discharger is aware that these "adverse conditions" and/or "discharges" may result in enforcement (direct them to Section I Enforcement in the Order). Also, add that the discharger is required to report (In the Annual Report) what corrective actions were taken, what the results were, and a list of preventative measures going forward (direct them to MRP (Sect II. Reporting (B))

I.A.1
If confined livestock areas and production areas are to be inspected **daily**, how is the documentation of non-stormwater discharges supposed to happen? Simple

notes, photo documentation or what? Are these non-stormwater discharges required to be reported? How and when? Why aren't Dairies required to sample non-stormwater discharges to ensure they do not violate WQS? As this is a Monitoring and Reporting Program, be specific as to what is to be reported and how it is to be reported and where it is to be reported.

I.A.2
"Noncompliance shall be reported to the Regional Board Staff" How? When? As mentioned above, please direct those not in compliance to MRP, Sect II. Reporting (B). Also could you please clarify what a "*25 year, 24 hour storm"* is in terms of rainfall amount? When we receive a weather report its not reported in terms of what year or how many hour storm it is. After you mention *25 year, 24 hour storm* please give a description (example-approximately 4.5 inches to 6.0 inches in a 24-hour period)

I.A.3.
"Any discharges shall be reported to the Regional Water Board as explained in Section II. B." This statement should read *Any discharges shall be reported to Cal OES and the Regional Water Board as explained in Section II. B.* Please correct this. To leave it as is infers that only R1 is to be contacted and that is not how the Noncompliance Section reads.

I.A.4 a.
Why isn't "erosion, conditions or field saturation, runoff from cropland containing waste, or violation of set-back requirements," considered a permit violation and listed in prohibitions? Case law states that any violation of the NMP is a permit violation and you must list the consequences of the violation and more clearly define the "remedies" the discharger must take.

I.A.4 b.
It should be clearly stated that any violation or deviation from the NMP is a violation of the Order and consequences (enforcement/fines) should be defined in this section or direct the discharger to another section of the Order.

I.A.4 c.
Dates, occurrences, location, and estimated amounts of unauthorized releases from the cropland or pastures, either off-property or to surface water drainage courses, shall be documented and reported to the Regional Water Board as noncompliance (see section II.B. below). This statement should read *shall be documented and reported to Cal OES*

and the Regional Water Board as explained in Section II. B. Please correct this. To leave it as is infers that only R1 is to be contacted and that is not how the "Noncompliance" Section reads.

I.A.4 d.

"The Discharger shall visually inspect croplands and pastures and the closest receiving water" Please specify how often. NOTE-in the beginning of this section you highlighted in bold how often the visual inspection was to occur (i.e. **daily**, **weekly**) please continue this throughout the Visual Inspections Section for clarity. This section lists a number of changes in water quality downstream as a result of operations, such as, "turbidity, color, animal waste or dairy related debris". These are all violations of the NMP and WQP and thus types of noncompliance that violate the conditions of this Order. Please include language that specifically calls this out and how to report them.

I.A.4 e.

The timing of inspections of fields or crops where manure is applied is arbitrary in the Draft Order "twice during dry season" and MUST occur during and after manure application to ensure that the NMP is not resulting in noncompliance or over-application of manure above agronomic rates. How can you assess compliance with issues listed in section I.A.4.d if you conduct a visual inspection days after application when discharged waste is well beyond sight and might even have entered the ocean miles away? You must clearly state that visual inspections must occur during and after manure application.

I.A.4 f.

In our 4 years of sampling edge of field runoff from a Dairy, we detected major water quality violations with phosphate levels orders of magnitude over USEPA Ecoregion III Total Phosphorus criteria (See Excel Sheet "Bishops Ranch VWIN attached for your review). In order to adequately assess compliance with land application of manure, the first runoff from those fields must be sampled to ensure that the NMP is protecting water quality or at least resulting in progress towards meeting water quality standards. Without that monitoring how can the public be assured that water quality in neighbor's wells, public health and the environment are protected?

I.A.4 f.

Post-storm inspections are to evaluate whether management practices have functioned adequately and whether additional measures or maintenance work is needed. In I.A.4e. above Staff states *Inspections shall occur…at least monthly during the rainy season, preferably pre- and post- 1-inch (or greater) rain storm in 24-hours.* Please clarify. RRK advocates for inspections BEFORE and AFTER storms. Currently, there is no requirement for reporting anything related to these inspections in 4e and 4f. Please insert that if, as a result of the inspections, there is a noncompliance issue that it will need to be reported and direct them to "see Section II. B."

I.A.4 g.
"The Discharger shall maintain records of any response action taken" Where? In the WQP? In the Annual Report? Please specify when, where and how these records are to be kept and recorded. If a water quality problem is found how will simply recording the response provide assurance that the response actions were effective? If a water quality problem is found, it should be required that dischargers conduct water quality monitoring to ensure the actions were effective in eliminating the problem.

I.A.5. *The following inspections shall be conducted prior to, during, and after anticipated 1-inch (or greater) storm event in 24-hours.* Please add "Any adverse conditions, including discharges that are a threat to human health or the environment, must be reported within 24 hours. Then direct them to see Section II. B. It is extremely important that the reader knows that if a noncompliance condition is discovered prior to, during or after an anticipated rain event that the discharger reports it within 24 hours and that they submit a follow up report within 14 days.

I.B
If water quality sampling/reporting is required to allow the Regional Water Board to assess compliance and to assess the effectiveness of BMPs in the Dairy's WQP and NMP, the public, by legal precedent, should have access to ALL pertinent plans and sampling results so as to verify that your agency is effectively keeping the dischargers in compliance.

Consider this scenario: RRK embarks on sampling dairy runoff. Upon receiving the sampling results for Total Ammonium, Un-ionized Ammonia, Total Phosphorus, E. Coli, Specific Conductivity, pH and Temperature we find that several Basin Plan WQO's are exceeded. With this information our next course of action would be to review the NMP, the WQP, the Annual Report and any Noncompliance documents to see where the discharger may have exceeded

agronomic rates or be out of compliance with other areas of the plans. There should not be a disconnect between sampling/reporting and the NMP. It's imperative that ALL sampling results and all "plans" (NMP's, WQP's, Riparian Management Plans and Noncompliance reports) be made public so we may ascertain the overall effectiveness of the GWDR.

I.B.1
In the previous iterations of Waivers, water quality monitoring reports have NOT been adequate to assess compliance with permit terms and water quality standards for the following reasons:

1. Sampling locations were distant from the edge of the dairy property allowing dilution of discharges that would not provide an accurate result in order to asses permit compliance.

2. (a) Sampling times in previous monitoring reports occurred a minimum of 24 hours after the peak of the runoff hydrograph, which ensures that any pollutants discharged from the dairy were well downstream before sampling occurred. The absence of a requirement to sample within a closer proximity of pollution leaving a dairy property ensures that results will never be an effective tool for assessing compliance with the Order which is a violation of the Clean Water Act and California's Policy for Implementation and Enforcement of the Non-Point Source Pollution Control Program. (NPS Program).
(b) One person was responsible for conducting the sampling in both Sonoma and Marin Counties. There are 20 dairies in Sonoma County alone. This calls into question the validity of any of the samples as this one person had to cover 2 counties in an incredibly small window of time.
(c) All samples were collected under a group monitoring plan where the dischargers identity was kept hidden. Not knowing whether the sample was downstream of a 50 milking cow dairy or a 200 milking cow dairy is extremely relative to the sampling results. If Total Ammonia is higher next to a 50 head dairy and lower next to a 200 head dairy that is important information as it can direct management/monitoring decisions.

3. The Benchmark Values in Table 1 do not contain Phosphorus which is the limiting nutrient in freshwater systems and since all dairies in the Laguna de Santa Rosa drain into a phosphorus impaired waterway this should be a requirement to ensure the permit is effective at complying with WQS. Furthermore, Phosphorus is the nutrient that contributes to Harmful Algal Blooms which are a threat to human health and result in severe economic losses

for river related businesses. Currently, the NMP [Page 5, C(8) Sampling and Analysis Plan] directs the dischargers to this link https://anlab.ucdavis.edu/media/pdf/uc_analytical_methods.pdf In this document in Appendix 1. Sampling Requirements from the General Order under **Table 2. NUTRIENT MONITORING.** ***Process Wastewater*** It states that "for each application: Record the volume (gallons or acre-inches) and date of process wastewater application to each land application area" It then goes on to require that **"**Quarterly during one application event" the following constituents are to be tested for (1) Field measurement of electrical conductivity and (2) Laboratory analyses for nitrate-nitrogen (only when retention pond is aerated), ammonium nitrogen, total Kjeldahl nitrogen, total phosphorus, and potassium.

Sampling for Total Phosphorus is not new to those who own or operate dairies. They are also required to sample soils at each field type for a host of other constituents including Total Phosphorus. At a minimum, require testing of Total Phosphorus to those that are located near and especially those who are adjacent to a 303(d) listed waterway.

Additionally Nitrate, TSS and/or Turbidity sampling is not required but most waterways are impaired for sediment. Nitrate is both a potential human health issue and contributes to hypoxia and harmful algal blooms in marine waters where all discharges ultimately flow into.

4. Currently, in the San Francisco Bay Region (Region 2) the Regional Board requires those enrolled under the Dairy GWDR to monitor for Total Ammonium Nitrogen (NH3 + NH4), Un-ionized Ammonia (NH3), Electrical Conductivity, pH and Temperature. This level of monitoring provides the Regional Board and the public with a more complete picture of each dairy's impact upon local waterways. Currently, the only requirement for surface water monitoring is Total Ammonia Nitrogen (NH3 + NH4) and Electrical Conductivity. The discharge of pollutants from dairies poses serious public health and environmental harm. Measuring for only two constituents will not adequately provide R1 Staff or the public with enough information to substantiate whether WQS are being protected or being violated. At a minimum, adopt the monitoring program currently in use in Region 2. RRK recommends that those under the waiver should monitor for both Total P and E. Coli and all the constituents that Region 2's Dairy GWDR requires. This will provide regulators with more robust data in order to truly assess the impact of this industry and individual dairy operator's impact upon regional water quality.

RUSSIAN RIVERKEEPER

Here is the Scientific Rational behind testing for temperature and pH. Ammonia exists in two species: un-ionized ammonia (NH3) and ionized ammonium (NH4+), the amount of each type are dependent on the pH and temperature of the water. At a lower pH, the excess hydroniums (H+) in the water tend to drive the balance toward ammonium. At a higher pH, the lack of hydroniums tends to produce un-ionized ammonia. Temperature also has an effect with the amount of un-ionized ammonia increasing with increasing temperature at any given pH. **The un-ionized form is of greatest concern because of its high level of toxicity.**

It is critical that the total ammonia (ionized and un-ionized combined) is measured as you have currently required in the Draft Order. However, as Region 2 is fully aware, by measuring Total Ammonia one can make a simple calculation to determine the amount of un-ionized ammonia present in the sample (see MRP No. R2-2015-0031). NOTE: Our experience in sampling rain events throughout the watershed is that pH levels are consistently near 8. When we sample, we use an Oakton pocket measuring probe ($80). This simple, easy to use probe measures pH, Specific Conductivity and Temperature. And is easy to store and calibrate

The footnote R1 staff directs those under the Order (page 5 B.1(a) MRP) reads *The toxicity level of unionized ammonia is directly affected by pH and temperature. The higher the pH and temperature of the water, the higher the proportion of total ammonia that exists in toxic form.*

The R1 Basin Plan has a Water Quality Objective for pH. It also has a Temperature Plan (in lieu of Temperature TMDLs) as most all blue line streams and tributaries are impaired for temperature. R1 Staff makes the claim (page 5 B.1(a) MRP) that *pH and temperature are not required to be tested because past dairy program surface water samples on the North Coast showed no toxicity*. THIS PROGRAM IS IN ITS INFANCY!!! Neither Staff nor the dischargers have collected enough samples to make this claim. If you are going to make such a statement please make all the sampling data available to the public IMMEDIATLY via a link and circulate it so we can view this data before the Board convenes to approve this order.

If your objective is to regulate the discharge of wastes that could affect the quality of the waters of the State in order to ensure protection of the beneficial uses of surface water…and the prevention of nuisances, then require monitoring

that will provide you with the information to do so! To require a discharger to monitor for Specific Conductivity and Total Ammonium and not have them calculate un-ionized ammonia nor measure for pH and Temperature (As Region 2 currently requires) is not in the public's best interest.

MRP B. (5) Group Sampling

In the last iteration of the permit, group monitoring was conducted whereupon the discharger's identification was unknown and the actual sampling location was unknown. Additionally, it was discovered that one person was conducting monitoring for the group which extended through two counties. This meant that one person was sampling over 45 dairies during a single storm event. Most of the samples were taken outside of the sampling window because of the sheer number coupled with the expanse of the two county monitoring area.

If you are to conduct group monitoring, make certain that these third party monitoring programs are not designed to obscure accountability. In order for sampling to have any validity it must be done by trained, efficient, sampling staff who can not only verify the location through GPS Coordinates but effectively complete the sampling within the window allotted (during a runoff event not hours or days after). As previously mentioned, ALL sampling results, monitoring results and ANY data collection associated with the Order whether its on a farm or submitted via a hard copy MUST be available digitally or through a PRA review. The public has a right to all information generated as a result of this program.

Appendix 1
Water Quality Plan

The purpose of the WQP is to ensure that the Facility is designed, constructed, operated, and maintained so that dairy wastes are managed in compliance with the Order for the protection of surface water and groundwater. Changes to the dairy operation must be updated in this WQP.

The General Order should require dairies to periodically update and revise both WQPs (and RMPs) and NMPs. Currently, the only language that exists on the subject with *Changes to the dairy operation must be updated in this WQP.*

Recommendation Please interject the word ANY before "Changes" and then add that the updated WQP will need to be resubmitted when ANY changes have been made to dairy operations or the WQP (and/or RMP).

Suggested wording: "Any changes to the dairy operation must be updated in the WQP and/or RMP). Once updated, the revised WQP must be resubmitted electronically to the Regional Board"

I. Manure Ponds, Contingency Plan
If pond storage does not meet minimum capacity standards (Section 22562(a), then the dairy facility must have a Contingency Plan. Manure ponds that do not meet standards should have contingency plans, however, as a dairy may significantly pollute local waters if any of its infrastructure fails, the General Waiver should require all dairies to prepare and implement an Emergency Response Plan. Other states, like Washington and Wisconsin, require dairies to prepare and implement these plans. These plans should be approved by the Regional Board and be electronically available to the public.

Section II. B (pg 6, WQP) Please define what a 25 year, 24 hour storm event is. We know this is a moving target depending upon where in the watershed the operation is located, however, give some information as to a ballpark figure of what this is and how you arrived at this (approximately 4.5 inches to 6.0 inches in a 24-hour period is a 25 year 24 hour storm in the Laguna de Santa Rosa Watershed) Add a web link of where the discharger can get this information.

Section II. D (pg 8, WQP) Please direct the dischargers to where they can find information on what the 20 year peak stream flow is for the stream channels near them. To be null on this gives the impression that R1 Staff is unaware of when this condition exists.

Section II. G (pg 9, WQP) ***Waste Discharge*****:** *The discharge of manure, process wastewater or storm water containing manure or process wastewater to surface waters or*

groundwater is prohibited under the GWDR. At some point there will be a discharge, then what? Clearly state in this section what the discharger's responsibility is when a discharge happens AND the possible enforcement that could result if not reported or corrected. (or at least direct them to what section Noncompliance reporting and Enforcement are located).

Section II. J (pg 11, WQP) *4. Soil samples for Phosphorus (P) are required at least every five (5) years under the NMP requirements. AND 5. At least annually, manure and other organic by-product analyses must include total nitrogen (N), ammonium, total phosphorus (P) or P2O5, total potassium (K) or K2O, and percent moisture.* If this level of sampling is required, it is ludicrous for Staff not to have Total Phosphorus tested for in water quality samples.

Riparian Management Plan.

Purpose -Begin this plan by stating the number of dairies this applies to "as of Jan 1, 2019 there are x amount of dairies in the North Coast Region that will be required to submit an RPM.

Definition- "*Several references mention a riparian protection width of about 35 feet as measured from the stream bank; however, the width of the riparian area may be less for flatter slopes with dense vegetation.* Why would staff advocate for anything less than 35ft? Certain Blue Line Streams within Sonoma County require 100 ft. buffers. Please remove ANY discussion related to riparian areas that are acceptable at less than 35 feet.

I. **Performance Measures of Riparian Management Areas**
(H.) *Creek crossings shall be designed and constructed in a manner that prevents, minimizes and controls animal waste from entering the waterway;* Please add "and sediment" to this statement.

(J.) *Grazing in riparian areas shall be conducted in a manner that prevents, minimizes, and controls the discharge of waste to surface waters.* Please add "and sediment" to this statement.

III. The RMP includes:

C. Progress Reports

Please list all things that must be submitted every year. Once the WQPs and RMPs are submitted, there is nothing to submit except for the Annual Report? There should be a revision requirement written into the order for all the plans. At a minimum, that if any operational changes occur at the dairies that these documents must be revised and resubmitted. Also, what is it exactly the dischargers are measuring progress toward? Please be specific about what this is.

Appendix 2
Nutrient Management Plan

NMP Purpose and Implementation.

The purpose of the NMP is to identify the management practices used at the dairy to minimize adverse impacts to surface water and groundwater from runoff and leaching from land application areas...Implementation of the NMP is closely linked to each facility's waste management system, monitoring program, and environmental conditions. The NMP must be updated in response to changing conditions and the results of monitoring.

Given the above, it is critical that NMP be made available to the public.

Dischargers shall obtain assistance from specialists in completing the nutrient budget calculations. The most current version of the NMP must be kept at the facility and must be made available for review by Regional Water Board staff during inspections.

If R1 staff is reviewing NMPs at the facilities under this Order and are using this information in compliance decisions (whether WQ is improving or WQO are being violated) then the NMP is required by law to be made public.

The Regional Water Board may approve an alternative schedule for submittal of MRP reports, including for the NMP, to dairies implementing an approved nutrient offset project.

The Regional Board has an obligation to make ALL documents available to the public. **Especially, when considering a nutrient offset program.**

Dairies that meet the definition of a large CAFO…meet the conditions of the GWDR, and want to enroll under this Order must be implementing an NMP upon enrollment if they will discharge stormwater from cropland where manure, litter, or process wastewater has been applied.

Again the information you are using in the NMP to ascertain whether the dairy operator is in compliance with the Order- as they will be discharging stormwater where manure, litter or process water has been applied- is critical information and must be publically available

Current federal law requires electronic reporting. National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule, 80 Fed. Reg. 64064, Oct. 22, 2015 ("Electronic Reporting Rule"). The federal law required dairies to electronically submit monitoring reports beginning December 21, 2016. 40 C.F.R. § 122.41(l)(4)(i). The law also requires dairies to electronically submit bypass reports and Annual Reports starting December 21, 2020. 40 C.F.R. §§ 122.41(e)(4), 122.41(l)(6)(i), 122.41(l)(7), 122.41(m)(3).

According to the CA State Water Quality Act, section 13269, subd.(a)(2): Monitoring results shall be made available to the public… a recent court case construed NMPs as "monitoring reports" as they help R1 staff verify "the adequacy and effectiveness of the waiver's conditions". Additionally, NMPs are documents that relate to the conduct of the public's business as they are used by the NCRWQCB in assuring compliance with dairy farms best management practices (See Zamora & ELF vs. Central Coast Regional Water Board).

The revised Dairy Order must require dairies to submit *ALL* reports electronically, including non-compliance reports, twenty-four hour reports, WQPs and NMPs. Dairies should submit these reports to a searchable and publicly accessible database. This will improve data accuracy and compliance, promote transparency, and better protect the watershed.

The NMP shall be revised within 30 days when discharges from a land application area result in exceedance of water and quality objectives. **This is a violation of the Order and should be viewed as Noncompliance with possible enforcement. Please include language here that brings attention to this.**

"The NMP shall be revised within 90 days when any of the following occur:"

"2. Changes in operating practices result in the production of nutrients that are not addressed by the NMP;" Give some examples. Production of nutrients not addressed? We implore staff to list those nutrients that are of highest priority along with benchmarks and have those enrolled under the order test for specific nutrients. Currently, there are no apparent benchmarks to define how much improvement an operator must show to improve WQ or halt degradation.

5. The NMP is not effective in preventing periodic discharges of manure or process water to Waters of the United States (U.S.). PERIODIC?? This is written as if you expect periodic discharges to happen.

The Discharger shall review the NMP annually and revise it if changes in conditions or practices at the dairy require changes in the NMP. The review/revision date must be noted in the NMP. Records on the timing and amounts of manure and process water applied to land and information developed through a Monitoring and Reporting Program (MRP) associated with the GWDR for the dairy must be considered when making decisions related to nutrient management.

This is why all documents must be available to the public. All of the documents within the Waiver are interrelated. Nothing should be "stand alone" and everything should be available to the public.

B. Management of Dairy Manure and Process Water

Compliance with the following management measures is required once the Discharger begins implementation of the NMP. Best Management Practices (BMPs) must be in place to prevent discharges to surface waters at all times:

1. *The collection, treatment, storage, or application of manure or process water shall not result in:*

a. Degradation of surface water or groundwater except as allowed by the Order;

Where in the order does it say that degradation of surface water/groundwater is acceptable? This is in direct contradiction to the Anti-Deg analysis

3. *The discharge of process water to surface water is prohibited.* What if this occurs, then what? Spell out what the consequences will be if and when a discharge occurs.

4. *The discharge of stormwater to surface water from land where manure or process water has been applied is prohibited unless all applications to land are in accordance with an NMP.* Again, it is unlawful to hold back documents from the public that bear on whether WQO are protected or are violated. The public has a right to be made aware of what these applications to land consist of and whether they are in accordance with the NMP. The public cannot make this determination unless the NMP is public.

Draft Order No. R1-2019-0001

Scope of Coverage

*6. This order applies to all dairies…Smaller dairies must meet the Discharge Prohibitions in Section A of this Order…*Thank you for including this. All dairies have the potential for exceeding Water Quality Objectives and degrading Beneficial Uses.

The Regional Water Board Executive Officer may require these smaller dairies to enroll at any time if it is determined that there is a potential for discharge of waste to surface water or groundwater. RRK advocates for a data base that shows all dairies under the Order at any given time. Delineate those enrolled by county. Make it easy for the public to have access to this information and link the name of the dairy in the data base to all important documents submitted and available for public review.

7. *Dairies must certify that their facility is structurally and operationally in compliance with the prohibitions and waste discharge specifications in this Order.* ***Certification is done through a series of plans required including a WQP, RMP, NMP, Annual Reporting and water quality monitoring.***

Please include a discussion on what the enforcement consequences are if the certification is found to be false or in error (i.e. what if the information that is submitted is false?) Additionally, we must make the case that through this certification you are requiring that the dairies complete a ***WQP, RMP, NMP, Annual Reporting and water quality monitoring.*** Again we are making the claim

that these documents by law must be available to the public and should be submitted electronically to R1 staff.

11. Dairies defined as large CAFOs that discharge stormwater from cropland where manure, litter, or process wastewater has been applied must be implementing an NMP… Such discharges can qualify as "agricultural stormwater discharges,"… if manure and wastewater are applied to the land in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater.

Large CAFOs that discharge such stormwater without an NMP are in violation of the federal Clean Water Act (CWA) and may be fined for the discharge and/or required to enroll under an NPDES permit. This is the first of MANY instances where through a certain activity there is a clear violation not only of the Federal CWA but the State Porter-Cologne Act, Basin Plan, etc. yet this is the only instance where you state the result of that activity "may be fined". We implore you to state that enforcement and associated fines may be levied on any and all violators and include this language any time a violation is mentioned.

16. The Discharger may be liable for penalties if the Discharger violates this Order, discharges waste, or causes waste to be deposited where it is discharged into the waters of the state and creates a condition of pollution or nuisance.
Why "may be liable". If I drive down the freeway at 80 miles an hour in a 65 mile an hour zone and I get pulled over, it isn't a question of may or may not. It's the deterrent effect (I am exceeding the speed limit, I am going to get a ticket) that keeps me from speeding in the first place. Change this to read Dischargers WILL BE LIABLE!!!!

Water Quality Concerns

19. The majority of animal waste is produced by cow dairies in the North Coast Region. There are currently approximately 120 cow dairies operating within the Region…and averaging 300 milking head. With 20 cow dairies in the Russian River Watershed x 300 head x 110 pounds of manure a day per animal, this equals over 650,000 pounds of manure a DAY or close to 20 Million pounds a month. This is 200 million pounds of manure a year in our watershed alone. For the entire region this manure amount goes to 118 Million pounds a month. The message is clear. This is several orders of magnitude more than human waste in our watershed.

Humans defecate an average of just under one pound per day. Human waste has some level of treatment. Dairy manure is held in ponds, sprayed around etc. but NEVER treated. Hence the dairy operators MUST sample phosphorus/ bacteria. It should be easy to see that untreated dairy manure is magnitudes worse of a health/environmental problem than that of failing septic systems.

20. *Waste from such facilities can contain significant amounts of* ***pathogens, oxygen-depleting organic matter, sediment, nitrogen compounds, and other suspended and dissolved solids that can impact both groundwater and surface water****.* You have correctly identified the pollutants that need to be monitored for in any surface water monitoring and reporting program associated with this order. We implore you to monitor storm water samples/dry weather runoff samples and surface water samples for those that are having the most deleterious effects upon our waterways E. Coli, Total Phosphorus, Total Ammonium, Un-ionized Ammonia, pH, Specific Conductivity, Temperature and Turbidity.

*21. Adverse aquatic habitat impacts associated with improper waste management and application may include: nutrient enrichment resulting in algal blooms, organic waste loading resulting in lowered oxygen levels, pathogen loading that can cause threats to public health, siltation of aquatic habitat, high levels of ammonia that are toxic to fish and aquatic invertebrates…*RRK has done enough sampling throughout the watershed to know that impacts to aquatic habitat associated with improper waste application include (NOT may include), they do include what you have listed above. For this reason we must advocate for a more robust sampling regime E. Coli, Total Phosphorus, Total Ammonium, Un-ionized Ammonia, pH, Specific Conductivity, Temperature and Turbidity.

Background

24. *Issuance of this Order provides an opportunity to include implementation plan requirements identified in Chapter 3-Water Quality Objectives and Chapter 4-Implementation Plans including Total Maximum Daily Loads of the Water Quality Control Plan for the North Coast Basin (Basin Plan).*

If TMDL's are being implemented through permits, then where is the data/ analysis on load allocations and how Best Management Practices achieve those load allocation? If this is TMDL implementation then why aren't you mandating

that Phosphorus and E. Coli are sampled for in the MRP so we can demonstrate BMPs are actually achieving load allocations???

25.*The Basin Plan specifies implementation measures for each categorical pollutant source identified as contributing to the water quality impairment in specific watersheds…dairies, are identified as categorical pollutant sources…facilities are required to implement site-specific management measures to control and reduce animal waste and sediment runoff.* ***This Order implements the Basin Plan by requiring management measures for pollutant sources that will improve water quality in impaired watersheds***. RRK has presented legal arguments in this and other documents submitted on the Draft Order. We believe that this order DOES NOT implement the Basin Plan. It is impossible to determine whether WQ will improve because you have no baseline. Minimal amounts of monitoring data have been complied on dairies. If anything, the language in this section supports having a more robust MRP. Currently, staff is only monitoring for two constituents. Monitor for impairments to surface water (Total Phosphorus, Total Ammonium Nitrogen, Un-ionized Ammonia, E. Coli, Turbidity, Spec. Cond. pH and Temperature link BMP requirements to Water Quality Monitoring, in this way you increase your chances of actually being able to answer the question as to whether management measures are improving WQ in impaired watersheds.

Water Quality Control Plan for the North Coast Basin

36.*Numerous North Coast water bodies are listed as impaired for various pollutants including sediment, temperature, nutrients, and indicator bacteria pursuant to CWA Section 303(d)….Compliance with this Order is a key component for addressing impairments and meeting Basin Plan water quality standards.* How can you measure whether compliance is occurring if you are not even requiring that key indicators are being measured for in the MRP? Monitor for impairments to surface water (Total Phosphorus, Total Ammonium Nitrogen, Un-ionized Ammonia, E. Coli, Turbidity, Spec. Cond. pH and Temperature.

38. *Species of anadromous salmonids listed as threatened or endangered under both the federal Endangered Species Act or the California Endangered Species Act have declined significantly…in the majority of water bodies in the North Coast Region.* ***Degradation of freshwater habitat by land use activities is an important contributing factor to the decline in populations.*** Specifically list how dairy operations affect the

degradation of freshwater habitat and what measurable goals within the Order will be in place to reverse this trend.

Anti-Degradation

43…*The attached MRP requires water quality sampling. Results above benchmark values may result in additional sampling, work plan submittal, best management plan implementation, and could result in enforcement actions.* The benchmark for Specific Conductivity in the MRP states the WQ sample must be below 2000 uS/cm while the Basin Plan WQO does not rise above 350 us/cm (this is an average of all Waterbody's on the North Coast-the Russian River upstream has a 90% upper limit of 320 uS/cm and a 50% Upper limit of 250 uS/cm). You cannot evaluate the true impacts dischargers are having when you allow for a benchmark that is almost 10 times what the WQO is for that specific waterbody. To set a benchmark in the Order that violates your own Basin Plan WQO in effect is arbitrary and capricious.

C. Provisions

13. The Discharger shall maintain a copy of this Order, the dairy's WQP, NMP, and RMP at the site so as to be available at all times to site-operating personnel. The Discharger shall ensure that all site-operating personnel are familiar with the content of this Order and each management plan. ***The WQP, NMP, and RMP must be available to Regional Water Board staff*** *during inspections and must be submitted to the Regional Water Board staff upon request.* It is extremely difficult to ascertain from the Order and various plans and reports how and when documents need to be submitted. We heard the Executive Officer say that monitoring results would be available digitally but all we have seen is that Ground Water results were required to be submitted electronically through Geotracker. Please clarify exactly what needs to be submitted electronically and what needs to be submitted through hard copy and again ALL documents associated with this Order must be available through a PRA request.

16. The Regional Water Board staff may specifically designate, as appropriate, management practices that staff considers to be above-and-beyond the minimum requirements of this Order. Such practices may be eligible for generating credits as allowed under an approved nutrient offset program, water quality credit trading program, or other similar TMDL implementation program. Any new TMDL's adopted for watersheds after the adoption of this Order may result in additional monitoring

requirements in the MRP. RRK would like to flag the inclusion of the trading program here. We are aware of it and are prepared to litigate against any trading involving manure.

J. Required Reports and Notices

5. Noncompliance Reports

b. The Discharger shall submit a written report to the Regional Water Board within fifteen (15) business days of becoming aware of the incident

Compare this language to the language in the Monitoring and Reporting Program below

MRP

B. Noncompliance Reporting *A written report shall be submitted to the Regional Water Board office within fifteen (14) business days of the Discharger becoming aware of the incident.*

Please resolve this issue.

Also, how will these reports be submitted? And then how does the public access these reports? We recommend having a file "Noncompliance reports" where the public can go and review.

On this issue, will the submittal of Noncompliance reports trigger R1 Staff inspections of the dischargers? What will trigger an R1 staff inspection?

Comments Submitted on behalf of Humboldt Baykeeper

How will the SHELL and REC-1 beneficial uses of Humboldt Bay be protected without sampling surface waters for pathogenic bacteria? Dairies are one of the primary land uses adjacent to Humboldt Bay, particularly in North Bay where commercial oyster beds are located. These oyster farms are frequently closed to harvest after significant rain events due to high bacteria levels in surface runoff.

According to the California Department of Public Health (CDPH) Twelve-Year Sanitary Survey Report Shellfish Growing Area Classification For Humboldt Bay,[10]

> Humboldt Bay is potentially impacted by both point and non-point sources that may result in elevated concentrations of fecal coliform bacteria in the certified growing areas…During significant rainfall events, fecal coliform pollution is washed into the various creeks and storm drains that discharge to the bay. Rainfall thresholds have been established that close the growing areas to harvesting when specific amounts of rainfall have occurred.

Some oyster beds are closed to harvest for weeks or even months in particularly wet winters. In the Arcata Bottoms area nearest the oyster growing areas and Mad River Slough, there is no fencing separating the cattle from the streams in the Arcata Bottoms area.[11] Without requiring riparian fencing outside of confinement areas or sampling for pathogenic bacteria to detect the need for better management practices, it is unclear how the Order will lead to improvements in water quality.

Pathogenic bacteria pollution has impacted Humboldt Bay and its commercial shellfish operations for many years – but only after significant precipitation. CDPH recently recommended that increased sampling of fecal coliform concentrations and flow measurements be carried out to generate loading estimates for the tributaries of North Bay (Lanphere Slough, Liscom Slough, a tide gate located 100 yards south of the Mad River Slough Bridge, McDaniel Slough, Butcher Slough, Gannon Slough, Jacoby Creek, Eureka Slough, and Elk River). It is important to note that dairies are a dominant land use in most of these watersheds, particularly in the lower reaches.

Due to the closure requirements imposed to protect public health and safety from eating commercial oysters, a recent study found that water quality is one of the top four concerns for Humboldt Bay shellfish growers, along with

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[10] California Department of Public Health. Jan. 2019. Twelve-Year Sanitary Survey Report Shellfish Growing Area Classification For Humboldt Bay. Technical Report # 18-20.

[11] CDPH, 2019.

permitting, regulatory changes, and tideland availability.[12] But wild species of shellfish in Humboldt Bay are also important recreational and subsistence fisheries for tribal members, the local Hmong community, and other residents.

Polluted surface runoff also impacts water-based contact recreation (REC-1) in Humboldt Bay, which includes swimming, stand up paddling boarding, kayaking, fishing, and other activities that have the potential for human exposure to pathogenic bacteria.

Recent Cases: Failure to Ensure Protection of Domestic Water Supplies

The Draft Order is not adequate to prevent degradation of drinking water sources from dairy operations, nor is it adequate to demonstrate compliance. Without more stringent monitoring requirements, it fails to provide assurances that water quality will not be substantially degraded, including groundwater used for domestic water supplies.

The Monitoring and Reporting Program only requires testing of domestic supply wells at a dairy for total coliform bacteria (p. 8-9). Without requiring sampling for E. coli and other pathogens, the Order fails to protect human health in agricultural areas where residents rely on groundwater wells for domestic water supplies. As an indicator for the possible presence of other pathogenic bacteria and viruses, E. coli is a critical parameter to assess impacts to these drinking water supplies.

Hundreds of homes in areas where dairies are a dominant land use rely on groundwater wells for domestic water supplies, including the Arcata Bottoms, Lower Eel River, Lower Elk River, Little River. Most of these wells are in rural areas where municipal drinking water supplies are not available. These wells are not limited to dairies themselves, but also including neighboring residential areas.

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[12] Richmond, L. et al. November 2018. Humboldt Bay Shellfish Mariculture Business Survey: Assessing economic conditions and impact. Humboldt State University, Arcata, CA.

In conclusion, Russian Riverkeeper and Humboldt Baykeeper appreciate the opportunity to engage the Regional Board by commenting on the Draft General Waste Discharge Requirements Order No. R1-2019-0001 for Dairies in the North Coast Region. We look forward to receiving your written response to our comments and look forward to the adoption hearing. Please contact me directly at bob@russianriverkeeper.org or contact Jen Kalt www.humboldtbaykeeper.org Or call Bob directly at 707-433-1958 to discuss any questions or comments in response to this letter.

Sincerely,

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Attachments (5)

Zamora Order

Coastkeeper I

Rava Order

Triangle Order

Bishops Ranch VWIN Excel Sheet

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

CARMEN ZAMORA, an individual, and ENVIRONMENTAL LAW FOUNDATION, a California nonprofit organization,

Petitioners,

vs.

CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD, a California state agency,

Respondent.

CENTRAL COAST GROUNDWATER COALITION, INC., a California nonprofit organization,

Real Party in Interest.

CASE NO. 15CV-0247

RULING AND ORDER GRANTING DECLARATORY RELIEF AND PETITION FOR WRIT OF PEREMPTORY MANDATE AND ORDERING DISCLOSURE OF DOCUMENTS UNDER THE PUBLIC RECORDS ACT

I. INTRODUCTION

Percolation of fertilizers and pesticides into groundwater from more than 3,000 irrigated agriculture operations is a vast source of nitrate pollution, now widely recognized as a critical threat to the Central Coast's public water supply. The Porter-Cologne Water Quality Control Act (Water Code §13000, et seq.; "Water Quality Act")[1] mandates public access to all "monitoring results" related to discharges of pollution from agricultural operations.

Petitioners Carmen Zamora and Environmental Law Foundation seek a writ of mandate setting aside two actions taken in December 2014 by the Central Coast Regional Water Quality Control Board ("Regional Board") that restricted public access to the results of groundwater monitoring being conducted on agricultural lands in the Central Coast Region of California.

While individual farms provide their test results for public scrutiny, real-party-in-interest Central Coast Groundwater Coalition ("Coalition"), which performs monitoring services for large groups of farms on the Central Coast, does not. The Regional Board and Coalition take the position that letters from the Coalition informing dischargers (i.e., farmers) about the polluted level of their well water, letters from dischargers informing well users about the results, and letters from dischargers to the Coalition confirming they have informed well users of the high pollution levels, are not "monitoring results" and, therefore, need not be made public.

Two pillars of the Water Quality Act are to protect the *quality* of community water supplies and to promote public access. Giving a plain and commonsense meaning to the words of the statute, the written notification letters must be considered "monitoring results" because they summarize the numeric results of extensive nitrate pollution in well water and help verify whether farmers are doing enough to control agricultural runoff into groundwater aquifers. The public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public's water supplies.

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[1] All statutory references are to the Water Code unless indicated otherwise.

Instead of simply making these notification and confirmation letters available to the public, the Coalition generates three technical documents that intentionally make it difficult for all but the most sophisticated user to figure out the owners and locations of polluted well water. There is no justification for such obfuscation: the strong interest in public accountability cannot be overcome by vague notions of privacy or unsupported allegations of terrorist threats to polluted groundwater supplies.

The argument that Petitioners waited too long to file their Petition is meritless. During 2014, Petitioners were specifically authorized by the Regional Board, in accordance with newly-adopted procedures, to participate in administrative proceedings designed to address the exact issues now being raised in this lawsuit. The lawsuit is timely and the Regional Board is estopped from arguing otherwise.

The Coalition notification and confirmation letters are also subject to production under the Public Records Act because these documents relate to the conduct of the public's business and are "used" by the Regional Board in assuring compliance with on-farm best management practices.

Accordingly, for the reasons discussed more fully below, the Court grants the Petition.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The State Water Resources Control Board ("State Board"), together with the nine Regional Water Quality Control Boards (§13200), are primarily responsible for maintaining beneficial water quality in California. (§13001.) Anyone who discharges waste (i.e., pollution) into State waters must obtain a permit for doing so that contains waste discharge requirements ("WDRs"), unless the permit requirement is "waived" by a regional board. (§§13260, 13263, 13269.) Waivers are limited to five-year increments, must be in the public interest, and must contain a monitoring program to verify effectiveness. (§13269, subd. (a)(1) and (2).)

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Since 2004, the Regional Board has adopted several resolutions establishing, and then continuing in effect, conditional waivers for agricultural lands in the Central Coast Region.[2] A "conditional waiver" is subject to revocation by either the State or Regional Board for good cause. Eligible participants must "opt in" and agree to comply with a Monitoring and Reporting Program ("Monitoring Program"). Instead of doing their own monitoring, dischargers can participate in a "cooperative groundwater monitoring program" in order to lower costs. The Central Coast Groundwater Coalition ("Coalition"), the real-party-in-interest, is one such cooperative.

On September 24, 2013, the State Board issued an order that, for the first time, required participants in the agriculture waiver program to notify the Regional Board and drinking water well users of excess nitrate levels in the regional well-water supplies ("2013 State Board Order"). This new requirement prompted a dialogue among the Coalition, the Regional Board, and certain members of the public, over how best to implement the new requirements. The dialogue surrounded modifications to the Coalition's "Workplan," a written agreement between the Regional Board and Coalition containing details regarding monitoring, reporting, and related requirements designed to ensure compliance with the conditional waiver.

In December 2013, the Executive Officer approved modifications to the Coalition's Workplan by adding and revising certain time frames for: (a) notifying the Regional Board about exceedances of drinking water standards; (b) notifying Coalition members of their obligation to alert landowners and well users of exceedances (i.e., high pollution levels); (c) providing copies of notification letters to the Regional Board if requested to do so; and, (d) providing a summary of any follow-up actions undertaken.[3]

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[2] The 2004 resolution, Resolution No. R3-2004-0117, established a Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (2004 Agricultural Order). The 2012 Order, Order No. R3-2012-0011, refined and expanded the 2004 requirements in several respects.

[3] A regional board may delegate many of its powers and duties to its Executive Officer. (§13223, subd. (a).)

Six weeks after approving these changes, the Regional Board directed its staff to revise the Coalition's brand-new Workplan to bring it into alignment with the notification and exceedance reporting process for individual farms. Year-long negotiations then ensued over how this could best be accomplished.

In June 2014, in the midst of these negotiations, the Regional Board notified the public that, pursuant to the 2013 State Board Order, "interested parties" could seek discretionary review of the Executive Officer's approval of the Coalition's Workplan. "Interested parties" had 30 days from the date of the notice to seek discretionary review.

On July 3, 2014, accepting the invitation, CRLA requested discretionary review of the notification process for agricultural wells containing excessive nitrates.

On December 8, 2014, the Regional Board's Executive Officer approved a revised Drinking Water Notification process in the Workplan requiring the Coalition to: (a) provide a "relational key" so that the Regional Board could identify specific well locations; (b) submit reports identifying any drinking water wells containing excessive nitrates; (c) provide written notification to users of wells that exceed safe drinking water nitrate standards; and, (d) bring copies of all notification letters to quarterly meetings for inspection by Regional Board staff.

On December 11, 2014, CRLA submitted a California Public Records Act ("PRA") request for the discharger notification and confirmation letters sent and received by the Coalition.

On December 18, 2014, the Regional Board denied CRLA's request for discretionary review on the basis that the procedures adopted on December 8, 2014, would bring the Coalition's notification process in line with the notification process required for individual farmers.

On December 19, 2014, responding to the Public Records Act request, the Regional Board denied that it possessed discharger notification and confirmation letters but it confirmed that these documents were available to the Regional Board if it requested them from the Coalition.

On January 7, 2015, Petitioners petitioned the State Board for review of both the Executive Officer's (a) December 8, 2014 approval of the Coalition's revised Drinking Water Notification process; and, (b) December 18, 2014 denial of the CRLA's petition for discretionary review.

On April 8, 2015, the State Board having taken no action, the petition was denied by operation of law. (23 CCR §2050.5, subd. (e).)

On April 22, 2015, ELF joined CRLA in reiterating its request for the discharger notification and confirmation letters issued and received by the Coalition. That same day, CRLA and ELF sent a PRA request to the Coalition seeking the same notification and confirmation letters.

On April 27, 2015, the Coalition refused the PRA request on the basis that it had no legal obligation to respond.

On May 1, 2015, the Regional Board responded to both CRLA and ELF, stating that: (1) the letter superseded an April 30, 2015 response from the Regional Board; (2) it understood the CRLA and ELF were "re-requesting" the documents; (3) it did not have control or ownership over the Coalitions records; and, (4) a further response would be forthcoming.

On May 7, 2015, the Regional Board sent its further response containing a lengthier discussion of the reasons for its denial. (Kane Declaration, ¶7 and Exhibit 5.) That same day, the Regional Board asked the Coalition to provide the requested documents directly to ELF.

On May 8, 2015, Petitioners filed this litigation seeking a declaration of their rights to the monitoring results under the Water Code, as well as production of the discharger notification and confirmation letters under the Public Records Act.

III. DISCUSSION

A. Exhaustion of Administrative Remedies

The Regional Board and the Coalition argue that Petitioners cannot obtain a ruling on the merits of their Petition because they did not exhaust their administrative remedies and the

Petition is untimely. Had Petitioners sought to contest the terms of the monitoring and notification process, so the argument goes, they should have petitioned the State Board to review the Coalition's Workplan within 30 days of its approval by the Regional Board Executive Officer on December 17, 2013. (§13320.)

The exhaustion doctrine is designed to let administrative agencies wrestle with an issue until a final decision has been reached. (*Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 391.) "[W]hether exhaustion of administrative remedies has occurred depends upon the procedures applicable to the public agency in question." (See, e.g., *Citizens for Open Gov't. v. City of Lodi* (2006) 144 Cal.App.4th 865, 876.) There are three independent but equally compelling reasons why the exhaustion requirement has been satisfied in this case.

First, how to treat the Coalition's notification and confirmation letters was a controversial topic that was not resolved in December 2013. During the next year, Regional Board staff pressed for the submission of those letters so that it could ensure compliance with the agricultural waiver. (AR 156:022518-022519.)

On January 30, 2014, at the instigation of its staff, the Regional Board re-initiated its review of the Coalition's drinking water notification procedures in order to bring them into line with the public reporting process that existed for individual farmers. (AR 69:012771; 96:014332).

It was not until December 8, 2014, that the Regional Board reached a final decision as to how the Coalition needed to treat the notification and confirmation letters. Only then did Petitioners need to exhaust their administrative remedies. (*Farmers Ins. Exch.*, 2 Cal.4th at 391.)

Second, the September 2013 State Board order set up a new administrative review procedure. Section A.6 of Part 2 of the Monitoring Program was modified to allow "an interested person" to *first apply* to the Regional Board for discretionary review of the

Executive Officer's approval or denial of any cooperative groundwater monitoring program. (AR 41:001518 [emphasis added].)[4]

In June 2014, the Regional Board invited review of the Executive Officer's December 2013 order under Section A.6 of Part 2 of the Monitoring Program. CRLA requested discretionary review. (AR 117:014882; AR 134:015097.) The Regional Board *accepted* discretionary review and considered it as a parallel agenda item with its own review of the reporting procedures during the remainder of 2014.

The two items were placed on the agenda together because CRLA and the Regional Board were seeking the same thing: to bring the Coalition's "notification process into alignment with the individual monitoring program." (AR 134:015098; 140:015175; 174:022756 ["[I]t is appropriate for staff to also respond to the CRLA's request for discretionary review of the [Coalition's] drinking water notification process as part of this Board item" (i.e., staff's evaluation of the Coalition's October 2014 proposal)].)

The Regional Board did not deny CRLA's request for discretionary review until December 18, 2014, concluding that the CRLA's concerns had been addressed by adoption of the Coalition's October 2014 proposal. (AR 187: 022972-022973.)

Petitioners then petitioned the State Board under section 13320 to review the Regional Board's December 2014 denial of review. (AR 188:022976-023014; §13320.) When the State Board took no action on the petition, it was denied by operation of law on April 8, 2015. (23 CCR §2050.5, subd. (e); AR 190:023504.)

This lawsuit was timely filed 30 days after the State Water Board's denial of review. Requiring Petitioners to have pursued a piecemeal review of the Coalition's notification process, once in December 2013 and again in December 2014, would be inefficient and wasteful. (*Farmers Ins. Exch.*, 2 Cal.4th at 391.)

Third, having affirmatively authorized Petitioners' participation in its 2014 administrative review of the Coalition's notification process, the Regional Board cannot now

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[4] Section 13320 of the Water Quality Act ordinarily requires petitioning the State Board to review any action by the Regional Board, or its Executive Officer.

contend that Petitioners should have challenged its decision before the review process was completed. The estoppel doctrine has been applied in analogous situations and it prohibits the Regional Board from making such an argument. (See, e.g., *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 486-487 [County equitably estopped from asserting need for administrative exhaustion in retaliation lawsuit]; *J. H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 991-993 [Franchise Tax Board estopped from asserting administrative exhaustion after misleading Taxpayer]; *Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1496-1497.)

Petitioners took advantage of the September 2013 discretionary review procedures explicitly set forth by the State Board in section A.6 of Part 2 of the Monitoring Program. Their request to participate in the 2014 administrative proceedings to bring the Coalition's notification process into alignment with the individual monitoring program, the exact issue raised in this lawsuit, was endorsed by the Regional Board.

By petitioning the State Board for review of the two pertinent Regional Board orders (i.e., the December 8, 2014 approval of the Coalition's revised Drinking Water Notification process, and the December 18, 2014 denial of CRLA's petition for discretionary review), Petitioners sufficiently exhausted their administrative remedies. (*Farmers Ins. Exch.*, 2 Cal.4th at 391.) The Regional Board is estopped from arguing otherwise. (*Shuer,* 117 Cal.App.4th at 486-487; *J. H. McKnight Ranch, Inc.,* 110 Cal.App.4th at 991-993; *Farahani,* 175 Cal.App.4th at 1496-1497.)

B. Public Availability of "Monitoring Results" Under Section 13269

The parties dispute whether the notification letters sent to dischargers by the Coalition (informing them that their water wells contain excessive nitrates), and from dischargers to well users, and the confirmation letters from the dischargers back to the Coalition (confirming they have informed well users of the exceedance), are "monitoring results" that must be made available to the public under section 13269.

The Regional Board and Coalition argue that the Regional Board did not interpret "monitoring results" to include these items and that the Regional Board's interpretation is

entitled to deference. They claim the definition of "monitoring results" is highly technical and entwined with policy issues and that Petitioners' interpretation is in conflict with the plain understanding of the phrase.

Petitioners counter that the notification letters and confirmations are a consequence and outcome of the monitoring and reporting program, that a plain reading of the statute supports a broad interpretation of the phrase "monitoring results," and that the Regional Board's interpretation is cramped and at odds with the statute.

Statutory construction is a question of law on which a court exercises independent judgment. (*Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District* (2015) 235 Cal.App.4th 957, 963.) "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent – the 'weight' it should be given – is [] fundamentally situational." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

> ... greater weight may be appropriate when an agency has a "comparative interpretive advantage over the courts," as when "the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." [Citation.] "Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility." [Citation.] (*Friends of Oceano Dunes,* 235 Cal.App.4th at 963, quoting *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415–416.)

When construing a statute, courts "first examine the statutory language, giving it a plain and commonsense meaning." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Courts do not examine the language "in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. ... If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]" (*Ibid.*)

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As in *Friends of Oceano Dunes*, the issues of statutory construction in this case are not highly technical, scientific, obscure, or complex. (*Friends of Oceano Dunes, Inc.*, 235 Cal.App.4th at 963.) The term "monitoring requirements" and "monitoring results" are discussed in the waiver provision of the Water Quality Act, section 13269, subd. (a)(2):

> ... The conditions of the waiver shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring . . . **Monitoring requirements** shall be designed to support the development and implementation of the waiver program, including, but not limited to, **verifying the adequacy and effectiveness of the waiver's conditions.** In establishing monitoring requirements, the regional board may consider the volume, duration, frequency, and constituents discharge; the extent and type of existing monitoring activities, including, but not limited to, existing watershed-based, compliance, and effectiveness monitoring efforts; the size of the project area; and other relevant factors. **Monitoring results shall be made available to the public.** ([emphasis added].)

Attachment A of the 2012 Agricultural Order broadly defines "monitoring" as:

> Sampling and analysis of receiving water quality conditions ... **Monitoring includes** but is not limited to: **surface water or groundwater sampling, on-farm water quality monitoring undertaken in connection with agricultural activities** ... and **effectiveness monitoring, maintenance of on-site records** and management practice reporting. (AR 63:012671 [emphasis added].)

The term "monitoring" is defined in Webster's Online Dictionary as "to watch, observe, listen to, or check (something) for a special purpose over a period of time." Webster's New World Dictionary defines a "result" as "anything that comes about as a consequence or outcome of some action, process, etc." (5th College edition, 2014, at 1239.)

The letters informing dischargers that their well water exceeds maximum contaminant levels for nitrates come about as a consequence of "observing" and "checking" their well water over time. These letters provide "sampling and analysis" results of "groundwater sampling" regarding "on-farm water quality monitoring undertaken in connection with agricultural activities" and they help verify "the adequacy and effectiveness of the waiver's conditions."

The confirmation letters from the dischargers back to the Coalition also "come about as a consequence" of "observing" and "checking" their well water over time, and they are "designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions."

The same is true of the notification letters from dischargers to well users informing them of the exceedance.

The policies of the Water Quality Act and the governing waiver orders support a broad interpretation of the phrase "monitoring results." One of the "highest priorities" of the 2012 Agricultural Order is "[p]rotecting public health and ensuring safe drinking water." (AR 6:000135.) Both the State Board and Regional Board have repeatedly acknowledged that that the serious pollution of central coast groundwater supplies "presents a significant threat to human health as pollution gets substantially worse each year, and the actual numbers of polluted wells and people affected are unknown." (AR 6:000135.)[5]

In issuing the 2012 Agricultural Order, the Regional Board reported that:

> Since the issuance of the 2004 Agricultural Order, the Central Coast Water Board has compiled additional and substantial empirical data demonstrating that water quality conditions in agricultural areas of the region continue to be severely impaired or polluted by waste discharges from irrigated agricultural operations and activities that impair beneficial uses, including drinking water.... The most serious water quality degradation is caused by fertilizer and pesticide use, which results in runoff of chemicals from agricultural fields into surface waters and percolation into groundwater. ...
>
> Nitrate pollution of drinking water supplies is a critical problem throughout the Central Coast Region. Studies indicate that fertilizer from irrigated agriculture is the largest primary source of nitrate pollution in drinking water wells and that significant loading of nitrate continues as a result of agricultural fertilizer practices. (AR 6:000134.)

In issuing the 2013 State Board Order, the State Board recognized "the potential severity and urgency of the health issues associated with drinking groundwater with high concentrations of nitrates...." (AR 41:001517-001518). That is an important reason why the

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[5] See also AR 6:000134-000135, fns. 1-7.

State Board strengthened section A.7 of Part 2 of the Monitoring and Reporting Program as follows:

> If a discharger conducting individual groundwater monitoring or a third party conducting cooperative groundwater monitoring determines that water in any well that is used or may be used for drinking water exceeds or is projected to exceed [the MCL for nitrate], the discharger or third party must provide notice to the Central Coast Water Board within 24 hours of learning of the exceedance or projected exceedance. For wells on a Discharger's farm/ranch, the Central Coast Water Board will require that the Discharger notify the users promptly. (AR 41:001519.)[6]

Critical to the effectiveness of groundwater monitoring programs in general, and the Central Coast agricultural program in particular, is *transparency*, a strong public policy of public disclosure expressed in the Water Quality Act and acknowledged by the State Board. (See, e.g., §13269, subd. (a)(2) ('[m]onitoring requirements [must be designed to verify] the adequacy and effectiveness of the waiver's conditions [and that] [m]onitoring results shall be made available to the public.')) Public accountability of administrative agencies is an important tenet of American jurisprudence. (See *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329 ["Openess in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions.' [Citation.]" (addressing PRA request)].)

The State Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program ("NPS Policy") (§13369; AR 3:000062) emphasizes that monitoring programs must include "sufficient feedback mechanism so that the [Regional Board], dischargers, and *the public* can determine whether the program is achieving its stated

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[6] The State Water Board expected the Regional Board to "reevaluate any previously approved cooperative groundwater monitoring programs to ensure that they are consistent with this Order." (AR 41:001517, fn. 82.) The Regional Board subsequently modified the 2012 Agricultural Order and related Monitoring Program as directed. (AR 63:012583; 118:14885; 119:014904; 125:014956.)

purpose(s), or whether additional or different [management practices] or other actions are required." (AR 3:000076 [emphasis added].)

While acknowledging that monitoring groups such as the Coalition provide valuable expertise, technical assistance and training to growers, thereby saving precious staff resources (AR 41:001498), the State Board's 2013 Order went on to emphasize "the need to be wary of third party programs that report compliance at too high a level of generality." (AR 41:001498-001499.) In the face of efforts by the regulated community to obfuscate groundwater monitoring data, the State Board's 2013 Order recognizes that monitoring programs "may be equally concerning to interested persons" "because a proposed project may not be sufficiently protective of water quality or a third party monitoring program may be designed to obscure accountability" (AR 41:001498); and "[b]ecause the data to be generated through groundwater monitoring is of significant public interest and value ...." (AR 41:001517.)

It must be plainly stated that the monitoring and reporting data of *individual farms* participating in the agricultural waiver are readily available to the public. Members of the public need only ask, and the monitoring results are provided by the Regional Board as a matter of course.

The Coalition monitoring program, on the other hand, essentially buries the monitoring results by necessitating "manipulation" of three different documents: (1) an Exceedance Report, which identifies dischargers by "Field Point Name";[7] (2) the Coalition's membership list, which identifies members' contact information and includes each member's ranch-specific "Global ID";[8] and (3) a relational key, which links the Field Point Name of all wells monitored under the Coalition's Workplan with the members' ranch-specific Global ID. (AR 155:022515; see also AR 185:022957 [Relational Key].)

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[7] "Field Point Name" is a well identifier used on GeoTracker. (AR 155:022515.) GeoTracker is the State Water Board's online data management system for sites that impact groundwater or have the potential to impact groundwater.

[8] The Exceedance Report also included a Global ID but that ID was "a Coalition ID (AGL100000001) as opposed to the ranch specific Global ID ...." (AR 156:022517, fn. 2.)

All along, "one of the central tenants of [the Coalition's] program includes not providing individual member information that specifically ties domestic well exceedances with individual growers, companies, or landowners in a manner that would then be public." (AR 120:014937.) Its approach is specifically designed to "protect well location and grower identity," because a member of the public "would need to request all three documents and manipulate the data in order to match up a nitrate value with an individual's name." (AR 155:022514; 155:022515.)

The justification for such legerdemain rests upon the privacy rights of farmers, as well as the potential threat of terrorism to individual drinking water wells. Yet neither the Regional Board nor the Coalition has provided this Court any authority endorsing the privacy rights of dischargers as a counterweight to the public's interest in obtaining monitoring results. (Coalition Opp., pp. 6 and 21-23.) Regional Board staff accurately assessed the situation: "This is a sensitive issue for growers, [but] the real public health risk component of this issue outweighs the desire for privacy." (AR 96:014332.) Nor has either party provided evidence of a realistic threat of terrorism directed toward (already polluted) individual drinking water wells on the Central Coast of California.

The Regional Board and Coalition strenuously contend that "[t]he Workplans as approved by the Executive Officer contain sufficient mechanisms to ensure that the Regional Board is informed that notification letters were sent by the Coalition and farmers, has sufficient means to verify that such representations are true, and all the enforcement tools necessary to deter and punish for noncompliance." (Resp. Opp., pp. 17-18.)

Whatever may be the efficacy of the Workplan mechanisms vis-à-vis the Regional Board, the *public* is entitled to know whether the Regional Board is doing enough in the way of on-farm best management practices to protect the public's water supplies. Given the heavily polluted condition of Central Coast groundwater supplies, it is debatable whether the Regional Board is doing an adequate job of achieving the important goals of the Water Quality Act.

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Reasonably construed, both the notification and confirmation letters constitute "monitoring results" that must be made available to the public under section 13269. They are a direct consequence of monitoring well-water pollution levels over time. They verify whether the best management practices of farmers are effective in reducing groundwater pollution and they are designed to support the development and implementation of the waiver program.

The Coalition's Drinking Water Notification process, as modified by the Regional Board in December 2014, does not meet the requirements of law and is therefore arbitrary and capricious.

C. Petitioners' Public Records Act Request[9]

Aside from claiming that the discharger notification or confirmation letters are "monitoring results" that must be made available under the Water Quality Act, Petitioner ELF alternatively requests their production under the Public Records Act because these documents relate to the conduct of the public's business and are "used" by the Regional Board in assuring compliance with on-farm best management practices.

Between December 11, 2014 and May 7, 2015, the Regional Board, CRLA, and ELF engaged in back-and-forth correspondence regarding their legal positions. The Regional Board eventually declined to produce the notification or confirmation letters because it claimed not to have control or ownership of them. Instead, it asked the Coalition to produce the documents directly to ELF, which the Coalition declined to do.

The Regional Board and Coalition urge that ELF lacks standing to challenge the adequacy of the Regional Board's PRA responses because neither ELF nor Petitioner Zamora was the author of the December 11, 2014 PRA request. (Resp. Opp., pp. 25-26.) ELF responds that its latter joinder in the original request is sufficient for standing purposes. (Reply, pp. 18-20.)

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[9] Petitioner Zamora did not participate at all in the requests for documents under the Public Records Act. She is therefore not entitled to relief under this cause of action.

Whether considered a new request or a joinder in an existing request, ELF's April 22, 2015 letter was a specific demand on behalf of one of the Petitioners that the Regional Board produce the discharger notification and confirmation letters sent and received by the Coalition. (Kane Declaration, ¶¶ 2, 4, 5-6, and 8, Exh. 1, Attachment A, Attachment B, Exh. 3, Exh. 4 and Exh. 6 [showing history of correspondence].)

The Regional Board's May 1, 2015 response, both to ELF and CRLA, did not express any confusion as to who was making the request. (*Id.*) It acknowledged that those two entities were requesting information pursuant to the PRA and it recognized that the new letter constituted a follow-up to the previous PRA request. (*Id.*) The Regional Board also stated that it understood the new request was a "re-request" of the same documents. (*Id.*)

ELF's name appears on more than one of the PRA requests, and ELF engaged in negotiations with both the Regional Board and Coalition prior to filing suit. While it is true that a request under the PRA must be personally made by the individual or group that subsequently seeks judicial review (*McDonnell v. U.S.* (3d Cir. 1993) 4 F.3d 1227, 1236–37), such requirement is satisfied here. ELF plainly has standing to file suit under the PRA. (*McDonnell v. U.S.*, 4 F.3d 1227 at 1238 [individual who pursues administrative appeals and exhausts remedies has standing for purposes of the federal Freedom of Information Act ("FOIA")].)[10] To rule otherwise would promote form over substance.

Interpretation of the Public Records Act is a question of law that rests with the court. (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 397 ("*Regents*").) Each word and phrase in the statute should be given meaning. (*Id.*) The California Constitution provides that the PRA be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. Const., Art. I, §3.)

The critical issue facing the Court under the Public Records Act is whether the notification and confirmation letters maintained by the Coalition must nevertheless be

[10] Courts may look to federal case law interpreting the FOIA to interpret the PRA because the latter was modeled on the FOIA. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.)

produced as public records either due to their status under the Water Quality Act and/or their treatment or use by the Regional Board.

The most closely analogous case is *Regents*, *supra*, wherein the Court of Appeal was asked to decide whether certain documents held by a venture capital fund in which the Regents had invested millions of dollars were public records. The court started from the premise that, to satisfy the definition of public record, a document must: (1) relate to the conduct of the public's business; and (2) "be prepared, owned, used or retained" by a public agency. (222 Cal.App.4th at 400.)

While conceding the first prong, i.e., that the requested documents relate to the conduct of the public's business, the Regional Board and Coalition contend that, since the discharger notification and confirmation letters are maintained by the Coalition and are not in the Regional Board's actual possession, they do not satisfy the second prong of the test.

The Court of Appeal in *Regents* had the following to say about the second prong of the test:

> To qualify as an "agency record" subject to FOIA disclosure rules, "an agency must 'either create or obtain' the requested materials...," and "the agency must be in control of [them] at the time the FOIA request is made." The fact that an agency has access to data produced by its grantee does not mean that production of the data is required under the FOIA. Similarly to the FOIA, no language in the CPRA creates an obligation to create or obtain a particular record when the document is not prepared, owned, used, or retained by the public agency. (222 Cal.App.4th at 400)

The Regional Board and Coalition point out that notification and confirmation letters are not "prepared" or "owned" by the Regional Board, and that the agency has not "retained" any of them. Nor has the Regional Board "used" such documents except on occasions when it conducts an audit.

While recognizing that discharger notification and confirmation letters are not "prepared" or "owned" by the Regional Board, ELF focuses on the argument that these documents are in the "constructive possession" of the Regional Board as discussed in

Consolidated Irr. Dist. v. Superior Court (2012) 205 Cal.App.4th 697, which involved a dispute under the California Environmental Quality Act ("CEQA") over the definition of documents that should be "included in the ... public agency's files on the project" (Public Resources Code §21167.6, subd. (e)(10).)

Because the terms of a written contract stated that the agency "owned" all the consultants' work product, the court in *Consolidated Irr. Dist.* concluded that all of the consultants' documents were therefore "constructively possessed" by the agency and needed to be included in the administrative record.

For several reasons, ELF's reliance upon the decision in *Consolidated Irr. Dist.* is misplaced. First, the *Consolidated Irrigation District* court was directly addressing an issue under CEQA, rather than the PRA. Second, the court never analyzed the PRA's use of the words "prepared, owned, used, or retained." Third, the *Regents* court limited the importance of *Consolidated Irrigation District* and seriously questioned its rationale. (222 Cal.App.4th at 401 and fn. 15.)

At oral argument, counsel for the Regional Board conceded that the agency had indeed reviewed all of the then-existing Coalition notification and confirmation letters during compliance meetings with the Coalition on February 10, 2015, and March 18, 2015. (August 3, 2016 Transcript at pp. 19-20.)[11] While it is urged that merely reviewing these letters does not equate with "using" them, it is unclear to the Court what other use *could be made* of such documents other than reviewing them during an audit or compliance meeting.

To review a notification or confirmation letter is to "use" it, particularly when the point of reviewing it is to confirm compliance with the law. Since these documents have been

[11] Counsel for the Regional Board claimed that his concession in response to the Court's questions was inadmissible hearsay and that Petitioners had not met their burden of establishing a "prima facie" case. As an officer of the court, Regional Board's counsel has a duty of candor (Bus. & Prof. Code, § 6068(e).) Public agencies have an affirmative duty to assist members of the public in making an effective PRA request (Gov't. Code, § 6253.1). The burden of proof rests on the agency, "the only party able to explain" why materials sought are not agency records or have been properly withheld. (222 Cal. App.4th at 398, fn. 10, quoting *United States Dept. of Justice v. Tax Analysts* (1989) 492 U.S. 136, 142, fn. 3.)

"used" by the Regional Board, they must be considered subject to production under the Public Records Act.

Based upon the pertinent legal authorities, ELF is entitled to any discharger notification and confirmation letters that were reviewed, i.e., "used," or retained by the Regional Board on or before April 22, 2015 (the date of the amended PRA request by CRLA and ELF). Unlike discovery in a civil case, there is no ongoing or "rolling" duty to produce such records. (*United States Dept. of Justice v. Tax Analysts* (1989) 492 U.S. 136, 144–145 [agency need only produce documents as of the date a FOIA request is made].) Similarly to the FOIA, no language in the CPRA creates an obligation to create or obtain a particular record when the document is not prepared, owned, used, or retained by the public agency." (*Regents,* 222 Cal.App.4th at 400 [emphasis added].)

IV. CONCLUSION

The Petition for a peremptory writ of mandate is GRANTED. Accordingly, a writ of mandate will be issued declaring that any discharger notification and confirmation letters reviewed by the Regional Board on or before April 22, 2015, are public records, and directing the Regional Board to: 1) set aside its December 8, 2014 approval of the Coalition's revised Drinking Water Notification process; 2) set aside its December 18, 2014 denial of CRLA's petition for discretionary review; 3) take such action as to bring the Coalition's Drinking Water Notification process into compliance with section 13269 of the Water Quality Act; 4) produce all discharger notification and confirmation letters that were reviewed, i.e., "used," or retained by the Regional Board on or before April 22, 2015; and, 5) undertake any further proceedings in a manner consistent with this Ruling and Order.

The Court encourages the parties to reach agreement on the form of the Writ of Mandate and Judgment and to submit them for signature as soon as possible.

If agreement cannot be reached on or before November 14, 2016, counsel for Petitioners shall file and serve the proposed Writ of Mandate and Proposed Judgment. Any objections (as to form only) shall be filed and served on or before November 28, 2016. If

disagreements remain, they will be considered at a Case Management Conference on December 5, 2016, at 2:00 p.m. No other pleadings are authorized.

IT IS SO ORDERED.

Dated: October 28, 2016

CHARLES S. CRANDALL
Judge of the Superior Court

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Exempt from Filing Fees Pursuant to Gov. Code § 6103

FILED
12/29/2016
TERESA A. RISI
CLERK OF THE SUPERIOR COURT
Lisa Dalia DEPUTY
Lisa Dalia

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

TRIANGLE FARMS, INC., Petitioner, v. CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION, and DOES 1-50, inclusive, Respondent.	Case No. 16CV000257 ~~[PROPOSED]~~ **ORDER DENYING PETITION FOR WRIT OF MANDATE** Judge: Hon. Lydia M. Villarreal Dept: 1 Hearing: August 19, 2016 Action Filed: January 26, 2016

This matter came on regularly for hearing before this Court on August 19, 2016, at 9:00 a.m. in Department 1, the Honorable Lydia M. Villarreal presiding.

Scott Allen appeared as attorney for Petitioner Triangle Farms, Inc. Gary Alexander appeared as attorney for Respondent California Regional Water Quality Control Board. Cherokee Melton appeared as attorney for Intervenor Environmental Law Foundation.

Having considered the record, evidence, and briefs submitted by each party; having heard the argument of counsel; and having considered supplemental briefing by the parties, the Court issued a Statement of Decision denying the petition for writ of mandate. This Statement of

Decision was signed and filed on November 15, 2016. A true and correct copy of that Statement of Decision is attached hereto as Exhibit 1, and it is incorporated by this reference as though fully set forth herein.

For the reasons stated in the Statement of Decision, it is hereby ordered that:

1. The petition for writ of mandate filed in this action is denied; and

2. The preliminary injunction order issued in this action is dissolved as of the filing of the Notice of Entry of Judgment in this matter.

IT IS SO ORDERED.

Date: Dec. 29, 2016

Hon. Lydia M. Villarreal

Approved as to form:

Date: 12/6/16

Scott J. Allen
Attorney for Petitioners

Date: December 2, 2016

Nathaniel Kane
Attorney for Intervenor

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

TRIANGLE FARMS, INC., Petitioner, vs. CALIFORNIA WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION, Respondent, ENVIRONMENTAL LAW FOUNDATION, Intervenor.	Case No.: 16CV000257 Statement of Decision

The Petition for Writ of Mandate by Petitioner Triangle Farms, Inc. ("Petitioner") came on for hearing before the Honorable Lydia M. Villarreal on August 19, 2016, at 9:00 a.m., in Department 1.[1] Petitioner, Respondent California Regional Water Quality Control Board, Central Coast Region ("Respondent"), and Intervenor Environmental Law Foundation ("Intervenor") were represented by their respective attorneys. The parties filed supplemental briefs after the hearing. The matter was submitted on September 2, 2016, and the court has fully considered all of the evidence, arguments, and authorities submitted by each party. This Statement of Decision resolves factual and legal disputes as to all matters contained herein.

[1] The Court has issued a separate statement of decision for the case tried concurrently with this matter, *Rava Ranches, Inc., et al. v. California Water Quality Board* (16CV000255) ("*Rava*").

Background

Pursuant to Code of Civil Procedure ("CCP") section 1085, Petitioner seeks issuance of a writ of traditional mandamus against Respondent to compel performance of its duty under Water Code section 13267(b)(2). Specifically, Petitioner seeks a writ of mandate to compel Respondent to *refrain from making un-redacted versions of the "TNA Reports" available for inspection* by the public. (Petitioner's Opening Brief, p. 2:2-6.) Petitioner argues the TNA Reports – reports that disclose the Total Nitrogen Applied (TNA) to crops - might disclose trade secrets or secret processes. Intervenor has made a request for public disclosure of the un-redacted TNA Reports pursuant to the California Public Records Act ("CPRA").

Petitioner commenced this action by filing the complaint/petition ("Petition") on January 26, 2016.[2] Pursuant to a stipulation and order, Intervenor filed its petition in intervention on February 9, 2016. Respondent filed its answer on April 27, 2016.

On January 26, 2016, concurrently with the filing of the Petition, Petitioner filed an ex parte application for a temporary restraining order ("TRO"), declarations by President William Tarp and its counsel in support of the TRO application, and a request to file documents under seal.[3] The court (Hon. Thomas W. Wills) granted the request to file documents under seal and advised that the parties stipulated that no information/documents would be released until after the hearing on the preliminary injunction. Petitioner filed a motion for a preliminary injunction on January 28, 2016. The court (Hon. Susan J. Matcham) granted Petitioner's motion in an order filed on April 1, 2016.

On May 13, 2016, Petitioner filed an opening brief in support of its Petition for Writ of Mandate. On June 10, 2016, Respondent filed its opposing brief, supporting evidence, and a request for judicial notice in support thereof. Intervenor also filed its opposing brief and supporting evidence. Petitioner filed a reply brief on July 1, 2016. At the hearing on August 19, 2016, the parties proffered oral arguments, and Petitioner submitted slides as an

[2] The petitioners in *Rava* ("*Rava* Petitioners") filed their substantially similar petition on the same date.

[3] Petitioner filed a redacted version of Tarp's declaration on January 26, 2016, and an un-redacted version on January 27, 2016.

exhibit. The Court directed the parties to submit supplemental briefs, and advised that the matter would be taken under submission once all filings were received. On August 26, 2016, Petitioner filed a supplemental brief with two exhibits.[4] Respondent and Intervenor filed their respective responsive supplemental briefs on September 2, 2016.

Evidence Submitted

Petitioner relies on the following evidence: (1) a declaration by Petitioner's president, William Tarp ("Tarp"), filed in support of the application for TRO; (2) Petitioner's TNA Reports (Tarp decl., Ex. A); (3) the Petition; (4) Intervenor's Petition in Intervention; (5) Respondent's answer; (6) slides submitted at the hearing; (7) a table listing statutes and portions of the California Constitution that use the phrase "may not" (Petitioner's Supp. Brief, Ex. A); and (8) Assembly Bill 1664 (Stats. 2001, ch. 869) ("AB-1664") (*id.*, Ex. B).[5]

Respondent submits the following evidence: (1) declaration by its water resources control engineer, Monica Barricarte ("Barricarte"); (2) declaration by the senior staff counsel for the State Water Resources Control Board ("State Board"), Jessica Jahr ("Jahr"); (3) declaration by its attorney, Myung J. Park ("Park")[6]; (4) Order WQ 2013-0101, 2013 WL 5958786 ("2013 Order") issued by the State Board (Park decl., Ex. 1); (5) Order No. R3-2012-0011 issued by Respondent, as modified by the 2013 Order ("the Agricultural Order") (*id.*, Ex. 2); (6) a blank Total Nitrogen Applied Report form ("TNA Form") for 2015 (*id.*, Ex. 3); (7) TNA Form for 2014 (*id.*, Ex. 4); (8) Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (Cal. Code Regs., tit. 23, § 2915) issued by the State Board (*id.*, Ex.

[4] The *Rava* Petitioners filed a supplemental brief with a footnote stating that Petitioner in this case joins in its submission in lieu of filing its own separate brief. No supplemental brief or motion for joinder has been filed with the Court under the case number for Petitioner's case. That being said, since neither Respondent nor Intervenor has objected to this procedure, the Court will construe the *Rava* Petitioners' supplemental brief as a supplemental brief filed by Petitioner.

[5] Petitioner did not submit evidence with the opening brief or reply brief. Rather, it states that the brief is supported by: (a) Tarp's declaration in support of the TRO application; (b) the Petition; (c) "the other pleadings on file in this case"; and (d) "such other and further matters as may be presented to the Court in Petitioner's reply brief or during the hearing on the petition." (Petitioner's Opening Brief, at p. 2:6-10.) The other pleadings on file in this case are the Petition in intervention and the answer. Petitioner submitted slides as an exhibit at the hearing and two exhibits attached to the supplemental brief.

[6] One document contains Respondent's request for judicial notice and Park's declaration.

5); (9) Resources for Growers, Protection of Trade Secrets, Secret Processes, and Private Information issued by Respondent on January 28, 2013 (*id.*, Ex. 6); (10) instructions for reporting information in the TNA Form ("TNA Form Instructions") issued by Respondent, December 10, 2015 version (*id.*, Ex. 7); and (11) TNA Form Instructions issued by Respondent, May 29, 2014 version (*id.*, Ex. 8).[7]

Intervenor proffers the following evidence: (1) declaration by its attorney, Nathanial Kane ("Kane"); (2) the Agricultural Order (Kane's decl., Ex. A); (3) TNA Forms for 2014 and 2015 (*id.*, Ex. B); (3) Intervenor's CPRA request for all TNA Reports for all Tier 2 and Tier 3 dischargers for the reporting periods ending in 2014 and 2015, dated November 2, 2015 (*id.*, Ex. C); (4) Respondents' letter (dated 11/12/15) to Intervenor advising that all requested reports that did not involve an assertion of trade secrets were attached; it was reviewing the reports that involved an asserted trade secret; and it would later disclose all reports that were not exempt under CPRA (*id.*, Ex. D); (5) Respondent's letter (dated 1/5/16) to all reporting entities inviting them to submit additional justifications against disclosure (*id.*, Ex. E); (6) Respondent's letter (dated 1/20/16) to all reporting entities advising that their TNA Reports did not contain trade secrets, were not otherwise exempt from disclosure, and would be released in response to the CPRA request (*id.*, Ex. F); (7) Respondent's final letter (dated 1/29/16) to Intervenor in response to the CPRA request, advising that all TNA Reports would be delivered to Intervenor with the exception of the two operations that sought TROs/preliminary injunctions to prevent the release of said reports (*id.*, Ex. G).

No objections have been submitted.

Legal Standard

"A writ of mandate may be issued by any court to any . . . board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . ." (CCP, § 1085, subd. (a)) where there is no plain, speedy, and adequate remedy at law

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[7] Respondent's unopposed request for judicial notice of all 8 exhibits is GRANTED. (See Evid. Code, § 452, subds. (c) & (h); see also Evid. Code, § 453; see also *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518; see also *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125; see also *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 886, fn. 1.)

(CCP, § 1086). To obtain relief, a petitioner must demonstrate (1) no plain, speedy, and adequate alternative remedy exists; (2) a clear, present, ministerial duty on the part of the respondent; and (3) a correlative clear, present, and beneficial right in the petitioner to the performance of that duty. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339-340.) It is "well settled that where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued to control his action." (*Drummey v. State Board of Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 83.)

The court will address whether

1. Petitioner has shown that there is no plain, speedy and adequate remedy in the ordinary course of law;
2. There is a clear, present ministerial duty on the part of Respondent;
3. Petitioner has shown a clear, present corresponding right to compel performance of that duty, including the occurrence of any contingency required to trigger Respondent's duty.

No Plain, Speedy, and Adequate Legal Remedy

The petitioner must show that there is no plain, speedy and adequate remedy in the ordinary course of law. (See *Flores v. California Department of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199, 206.) The determination is largely within the trial court's discretion and depends upon the circumstances of the case. (*Ibid.*)

Petitioner alleges that it has no adequate remedy available in the course of law. (Compl., ¶ 13.) Respondent and Intervenor do not dispute this allegation. The Court therefore finds that Petitioner has shown that there is no plain, speedy and adequate legal remedy.

Ministerial Duty

The petitioner must show a clear, present ministerial duty on the part of the respondent. (*People v. Picklesimer*, *supra*, 48 Cal.4th, at pp. 339-340.) "A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act. (*Kavanaugh v. West*

Sonoma County Union High School Dist. (2003) 29 Cal.4th 911, 916, 129 Cal.Rptr.2d 811, 62 P.3d 54.)" (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340.) Generally, mandamus may only be employed to compel the performance of a duty that is purely ministerial in character. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-233.) Whether a statute imposes a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation. (*Id.*, at p. 233.)

"In interpreting a statutory provision, 'our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.' (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291, 48 Cal.Rptr.3d 183, 141 P.3d 288.)" (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.) "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

Under the rules of statutory interpretation, the court first consults the statutory language, giving words "their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) If the language is unambiguous, then no statutory construction is necessary. (*Ibid.*) If the statutory language is ambiguous, then the court may also consider extrinsic evidence, such as the ostensible objects to be achieved, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme. (*People v. Zambia* (2011) 51 Cal.4th 965, 972; see also *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442.)

In a traditional mandamus proceeding, even if mandatory language appears in the statute, the duty is discretionary if the entity must exercise significant discretion to perform the duty. (*Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 701.) Thus, in addition to examining the statutory language, the court must examine the entire statutory scheme to determine whether the entity has discretion to perform a mandatory duty. (*Mooney v. Garcia*,

supra, 207 Cal.App.4th, at p. 233; *Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 965.)

I. Does Water Code section 13267 (b)(2) Impose a Mandatory Duty to keep TNA Reports Confidential?

According to Petitioner, the issue presented is whether Water Code section 13267(b)(2) imposes a mandatory duty on Respondent to refrain from disclosing Petitioner's un-redacted TNA Reports. Water Code section 13267(b)(2) provides, in relevant part: "*When requested by the person furnishing a report*, the portions of a report that might disclose trade secrets or secret processes *may not be made available* for inspection by the public . . . ." (Wat. Code, § 13267, subd. (b)(2).) Emphasis added.

Petitioner argues Water Code section 13267(b)(2): (1) denotes a mandatory duty by the use of the phrase "may not"; and (2) provides an absolute exemption under the CPRA for reports "when requested by the person furnishing a report" (such as Petitioner) asserts that the documents might disclose trade secrets.

A. Is "May Not" Mandatory or Permissive?

Respondent's arguments focus on the statutory language that arguably forbids release of the records: "the portions of a report that might disclose trade secrets or secret processes *may not* be made available for inspection by the public . . . ." (Wat. Code, § 13267, subd. (b)(2).). The pertinent language is "may not." Petitioner persuasively argues that the usual and ordinary meaning of "may not" imposes a mandatory prohibition, as demonstrated in *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197 ("*Woolls*").[8] In *Woolls*, the court acknowledged that, generally speaking, the word "may" is permissive and the word "shall" is mandatory. (*Woolls*, *supra*, 127 Cal.App.4th, at p. 208.) In that case, however, "the pertinent language is 'may not,' rather than 'may' . . . ." (*Id.*, at pp. 208-209.) "'May not' is prohibitory, as opposed to

[8] Petitioner's reliance on other statutes, constitutional provisions, literary references, and a hypothetical involving schoolchildren as examples of "may not" being used to denote a mandatory prohibition is misguided. Aside from *Woolls*, Petitioner proffers no legal authority or analysis to support its contention that the phrase "may not," as used in those examples, may be properly construed as a mandatory prohibition.

permissive." (*Id.*, at p. 209.) Thus, Petitioner has shown that the usual and ordinary meaning of the phrase "may not" is an unambiguous mandatory prohibition.

Assuming *arguendo* that "may not" is ambiguous, the court may rely on extrinsic evidence, such as legislative history information, to interpret the statute. (See, e.g., *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442.) In 2001, the Legislature passed AB-1664 to amend various provisions in the Water Code, including Water Code section 13267(b)(2). Before the amendments came into effect, Water Code section 13237(b)(2) stated, in relevant part, that "portions of a report *which* might disclose trade secrets or secret process *shall not* be made available for inspection by the public." (Former Water Code, § 13267, subd. (b)(2), as amended by Stats. 1992, ch. 729, emphasis added.) AB-1664 changed "which" to "that," and "shall not" to "may not," such that this aspect of the statute now states that "portions of a report *that* might disclose trade secrets or secret process *may not* be made available for inspection by the public." (Water Code, § 13267, subd. (b)(2), as amended by Stats. 2001, ch. 869, § 3, emphasis added.) Analyses for AB-1664 refer to the changes as "technical and clarifying amendments." [See Assem. Com. on Environmental Safety and Toxic Materials, Analysis of Assem. Bill 1664 (2001-2002 Reg. Sess.) April 3, 2001; see also Assem. Floor, Analysis of Assem. Bill 1664 (2001-2002 Reg. Sess.) June 5, 2001, as amended June 5, 2001.] The legislative history therefore shows that the Legislature merely intended for this change to be a technical update, as opposed to a change in the protection afforded by the statute.

Lastly, the court must examine the entire statutory scheme to determine whether the entity has discretion to perform a mandatory duty. (See *Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; see also *Weinstein v. County of Los Angeles*, *supra*, 237 Cal.App.4th, at p. 965.) Water Code section 13267 (b)(2) is a provision in the Porter-Cologne Water Quality Control Act (Wat. Code, Div. 7, § 13000 et seq.) ("Porter-Cologne Act"). The Porter-Cologne Act does not define "may not." However, many other provisions in the Porter-Cologne Act that use "may not" were amended by AB-1668 to state "may not" instead of "shall not" in 2001. (See, e.g., Wat. Code, §§ 13261, 13350, & 13385, as amended by Stats. 2001, ch. 869, §§ 1, 5, & 7.) Legislative history materials suggest that these were merely technical and clarifying

amendments, and the Legislature did not intend to substantively change the law. [See, e.g., Assem. Floor, Analysis of Assem. Bill 1664 (2001-2002 Reg. Sess.) June 5, 2001, as amended June 5, 2001.] Simply put, nothing in the larger statutory scheme suggests that the phrase "may not" imposes a discretionary duty.

Accordingly, the use of the phrase "may not" in Water Code section 13267, subdivision (b)(2) denotes a mandatory duty, so long as the facts triggering the duty are present.

B. Does Water Code section 13267(b)(2) Mandate Non-Disclosure Whenever Requested by the Person Furnishing the Report?

According to Petitioner, if Petitioner requests nondisclosure based on an assertion of trade secrets, Respondent cannot release the documents. It is undisputed that when no California Public Record Act (CPRA) request for records has been made, Water Code section 13267 (b)(2) provides that the regional board cannot make available for public inspection the portion of any report that might disclose trade secrets or secret processes.

Here, however, the question presented is whether and to what extent Water Code section 13267 (b)(2) provides protection when a CPRA request for records has been made. Intervenor and Respondent argue that to determine whether Water Code section 13267 (b)(2) mandates non-disclosure, the court must look to a different statute – the California Public Records Act (CPRA). This necessarily requires Water Code section 13267 (b)(2) to be construed in context of both the Porter-Cologne Act (Water Code, Div. 7 section 13000, et seq.) and the CPRA.

As an initial matter, the reports referenced in Water Code section 13267 (b)(2) will only be subject to the CPRA's general rule requiring disclosure if the reports fall within the CPRA's definition of "public records." (See Gov. Code, § 6263, subd. (a).) The CPRA defines "public records" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (e).) Local agency includes any board. (*Id.*, subd. (a).) The reports at issue in Water Code section 13267 (b)(2) are monitoring reports required by, submitted to, and maintained by regional water boards, and such reports are relevant

to the regional boards' business. (See Wat. Code, § 13267, subds. (a)-(b).) Accordingly, the reports at issue in Water Code section 13267 (b)(2) are public records under the CPRA.

Both the Porter-Cologne Act and the CPRA provide that, as a general rule, such reports/records are to be made available for public inspection. (See Wat. Code, § 13267 (b)(2); see also Wat. Code, § 13269 (a)(2); see also Gov. Code, § 6263 (a).) The Porter-Cologne Act does not contain any procedure applicable to determine whether reports/records should be disclosed, or if they are protected from disclosure, in response to a CPRA request.

According to Intervenor and Respondent, once a CPRA request has been made and the requested record qualifies as a public record (see Gov. Code, § 6252, subd. (e)), *CPRA requires public disclosure unless a CPRA exemption applies*. (See Gov. Code, § 6253.) To determine whether a CPRA exemption exists the court must first consult the statutory language. (See *DaFonte v. Up-Right, Inc.*, *supra*, 2 Cal.4th, at p. 601.) If the statutory language is ambiguous, then the court may rely on extrinsic evidence, such as the ostensible objectives to be achieved, the legislative history, public policy, and contemporaneous administrative construction. (*People v. Zambia*, *supra*, 51 Cal.4th, at p. 972; see also *County of Santa Clara v. Perry*, *supra*, 18 Cal.4th, at p. 442.) The court must also examine the entire statutory scheme. (See *Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; see also *Weinstein v. County of Los Angeles*, *supra*, 237 Cal.App.4th, at p. 965.) "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." (*Tuolumne Jobs & Small Business Alliance v. Superior Court*, *supra*, 59 Cal.4th, at p. 1037.) The court seeks to avoid a construction that would lead to unreasonable, impractical, or arbitrary results. (*See Poole v. Orange County Fire Authority*, *supra*, 61 Cal.4th, at p. 1385.)

In contrast to the Porter-Cologne Act, the CPRA sets forth a mandatory duty to disclose public records in response to a request for public records by a member of the public. The CPRA also sets forth exemptions to the disclosure requirement. Specifically, the CPRA's statutory language unambiguously imposes a separate ministerial duty in response to a CPRA request for public records: "Except with respect to records exempt from disclosure by *express provisions of law, each state or local agency, upon a request for a copy of records . . . , shall make the records*

promptly available to any person . . ." by providing copies of said records to the person. (Gov. Code, § 6263, subd. (b).) The CPRA enumerates various statutory exemptions, including (a) the exemption for *air pollution* data discussed in *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436 ("*Masonite*"). (See Gov. Code, § 6254.7 and the qualified *trade secret* exemption discussed in *Uribe v. Howie* (1971) 19 Cal.App.3d 194 ("*Uribe*"). (See Gov. Code, § 6254, subd. (k); see also Evid. Code, § 1060).

Under CPRA, the only exemption that could prevent public disclosure of TNA monitoring reports in response to a CPRA request is Government Code section 6254, subdivision (k).[9] That provision incorporates exemptions allowed under state and federal law, including provisions in the Evidence Code relating to privilege. (See Gov. Code, § 6264, subd. (k).) The Evidence Code provides a qualified trade secret privilege (see Evid. Code, § 1060) for information that falls within the definition of a trade secret under the California Uniform Trade Secrets Act ("CUTSA") (see Evid. Code, § 1061, subd. (a)(1)).

It is Petitioner's position that Water Code section 13267 (b)(2) is an absolute exemption to Intervenor's CPRA request for monitoring reports that might contain trade secrets. It insists that this protection applies after a CPRA request for the reports has been made, and is distinct from CPRA's qualified trade secret exemption.[10]

Strong policy considerations militate in favor of interpreting Water Code section 13267(b)(2) as providing a qualified trade secret exemption – thus requiring a balancing of interests if the information qualifies as trade secrets. (See *Uribe*, *supra*, at p. 206.) Petitioner cites the 2013 Order (Petitioner's Reply, at p. 6:16-17, fn. 2) proffered by Respondent (Park decl., Ex. 1). In the 2013 Order, the State Board advised that trade secrets in TNA Reports could be released in response to a CPRA request, depending on the outcome of a balancing test,

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[9] The exemption for air pollution data (see Gov. Code, § 6254.7) does not apply to the monitoring reports authorized under the Porter-Cologne Act (see Wat. Code, § 13267, subds. (a)-(b)), and Petitioner's reliance on *Masonite* is misplaced.

[10] Petitioner's reliance on OSHA is misplaced because the cited provisions do not provide absolute protection from public disclosure in response to a CPRA request. (See 29 U.S.C. § 664; see also 29 C.F.R. § 1903.9.)

pursuant to Water Code section 13267 (b)(2) and Government Code section 6254 (k). (Park decl., Ex. 1.) This buttresses the interpretation that Water Code section 13267 (b)(2) should be construed to provide the same qualified trade secret protection as the CPRA exemption and is subject to a balancing test. In contrast, nothing in the Porter-Cologne Act or the CPRA suggests that monitoring reports are subject to any special exemption from disclosure in response to a CPRA request. No legal authority or extrinsic evidence has been provided to support Petitioner's interpretation.

Therefore, Petitioner has failed to show that Water Code section 13267(b)(2) imposes a mandatory duty on Respondent to *refrain* from providing copies of reports that might contain trade secrets to members of the public in response to a CPRA request.

In light of the foregoing, Water Code section 13267, subdivision (b)(2) imposes a different duty on a regional board depending on whether a CPRA request has been made:

1. If no CPRA request has been made, then Water Code section 13267 (b)(2) imposes a mandatory duty on Respondent to refrain from making portions of a report available for public inspection when (1) requested by the person furnishing a report, and (2) the portions of the report might disclose trade secrets.
2. If a CPRA request for the records has been made, then Water Code section 13267(b)(2) imposes a mandatory duty on Respondent to refrain from releasing portions of a report to the public when
    a. requested by the person furnishing a report,
    b. the report *contains trade secrets* as defined by CUTSA; and
    c. *the interest* in maintaining the confidentiality of the trade secrets *outweighs* the public interest in disclosure. (See Wat. Code, § 13267, subd. (b)(2); see also Gov. Code, § 6254, subd. (k); see also Evid. Code, §§ 1060 & 1061, subd. (a)(1); see also *Uribe*, *supra*, at p. 206.)

Therefore, the court must now examine each of these elements.

The evidence shows that a CPRA request for public disclosure of the un-redacted TNA Reports has been made (Petition, ¶¶ 6-7) and these reports are public records as defined by CPRA. (Petition, ¶¶ 2-5 & 8; Petition in Intervention, ¶ 7; Kane decl., Ex. G; Tarp decl., Ex. A; see also Gov. Code, § 6252, subds. (e) & (f)(1).)

The court must examine whether the TNA reports contain trade secrets and, if so, does the interest in maintaining confidentiality of the trade secrets outweigh the public interest in disclosure. (See Wat. Code, § 13267, subd. (b)(2); see also Gov. Code, § 6254, subd. (k); see also Evid. Code, §§ 1060 & 1061, subd. (a)(1); see also *Uribe*, *supra*, at p. 206.)

II. Do the TNA Reports Contain Trade Secrets Thereby Prohibiting Public Disclosure?

California Uniform Trade Secrets Act's ("CUTSA") definition of a trade secret applies. Under CUTSA, "trade secret" means "means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).)

A. Do the TNA Reports Contain Information from which Others Can Obtain Economic Value?

Petitioner asserts that the TNA Reports contain proprietary formulas and methods. However, the evidence submitted in support of its petition does not support its claim. Petitioner's evidence shows that the information at issue in the TNA Reports consists of data showing the types of crops it plants, acreage, annual aggregate totals of nitrate levels, and average nitrate concentrations. (Tarp decl., Ex. A.) Tarp declares that the TNA Reports disclose the level of nitrogen in the soil, the level of nitrogen in the water, and the total amount of nitrogen applied to each crop for the yearlong reporting period. (Tarp decl., ¶ 12.) He further declares that Petitioner "firmly believes" that such data, "if made public, would reveal its proprietary trade secrets and/or secret processes." (*Ibid.*) Tarp describes the formulas/methods at issue and the effort and expense

incurred to develop said formulas/methods, and states that the data in the TNA Reports disclose several of the variables that Petitioner inputs into its proprietary formula to create its unique proprietary fertilizer blend. (*Id.*, ¶¶ 3-4, 6, 8-9, & 11.) According to Tarp, the data in the TNA Reports may be used by its competitors to learn its confidential and proprietary formulas and methods related to fertilizer and irrigation mixing and application. (*Id.* ¶¶ 2, 4, 6, & 15.)

Petitioner cites *U.S. v. Chung* (9th Cir. 2011) 659 F.3d 815, 824, for the proposition that "[i]n assessing whether information derives value from not being generally known, courts look chiefly to whether the information provides a competitive economic advantage."[11] Petitioner contends that it derives economic/competitive benefits from maintaining its formulas and methods in confidence.

Respondent and Intervenor assert that the TNA Reports omit most of the underlying data that Petitioner's competitors and others would need to know in order to learn its proprietary formulas/methods. For example, the TNA Reports do not disclose information about the length of growing/harvesting cycles per crop, the number of cycles per year, crop rotations, or the timing and frequency of fertilizer application. (Tarp decl., Ex. A; Barricarte decl.) The State Board "see[s] the timing and frequency of applications, which are not required to be reported, rather than data regarding total amount, as more relevant to competitive business practices." (Park decl., Ex. A, at p. *33, fn. 104.) The State Board does not consider the data sought by the TNA Form to be sensitive proprietary information. (*Id.*, Ex. A, at pp. *20, & *33, fn. 104.) Additionally, in his declaration, Tarp states that Petitioner's nitrate fertilizer formula is based on several transitory variables, such as weather and the age of the crop. (Tarp decl., ¶¶ 6, 8-9, & 11.) Such transitory data is not disclosed in the TNA Reports, and the variables that are disclosed—such as acreage and amount of nitrate applied to a particular crop on a particular property—would be affected by transitory conditions. (*Id.*, Ex. A.) Therefore, competitors would not be able to apply information derived from the TNA Reports to their own farming practices, and

[11] Petitioner's reliance on *Lion Raisins v. U.S. Dept. of Agriculture* (9th Cir. 2004) 354 F.3d 1072 is misplaced because that decision does not discuss CUTSA or CPRA; rather, it discusses the distinct definition of trade secret under the Freedom of Information Act.

Petitioner would not sustain any economic or competitive injury from disclosure of the TNA Reports. (See *Uribe*, *supra*, at pp. 208-209.)

Even though Petitioner might derive some value from maintaining its formulas, methods, and procedures in confidence, it has not shown that the TNA Reports actually contain trade secrets – that is - information from which it derives economic value from not being generally known to others trade secrets. In other words, Petitioner has not met its burden in showing the TNA Reports disclose trade secret formulas/methods, or sufficient underlying data from which such trade secrets may be derived.

B. Has Petitioner Shown It Has Made efforts to Maintain Confidentiality?

With respect to the efforts to maintain confidentiality, Petitioner contends that it made reasonable efforts to maintain its formulas/methods in confidence. (Tarp decl., ¶¶ 3-4, 7, & 10.) However, the only evidence Petitioner submits to show efforts to maintain the underlying data disclosed in the TNA Reports in confidence is (1) the form itself and (2) this Petition. The court concludes that more evidence is needed for Petitioner to meet its burden to show reasonable efforts to maintain information disclosed in the TNA Reports in confidence.

Accordingly, Petitioner has not met its burden to show that the TNA Reports contain information that falls within CUTSA's definition of a trade secret. It follows that Petitioner has not shown that it is entitled to compel Respondent to perform its mandatory statutory duty to refrain from disclosing the TNA Reports.

III. Does the Interest in Maintaining Confidentiality Outweigh the Public Interest in Disclosure?

Assuming arguendo, Petitioner is able to show that the TNA Reports contain trade secrets as defined by CUTSA, Respondent may nevertheless release the reports to Intervenor in response to the CPRA request if the public interest in favor of disclosure outweighs the interest in confidentiality. (See Gov. Code, § 6254, subd. (k); see also Evid. Code, § 1060; see also *Uribe*, *supra*, at pp. 209-210.) The court must balance the maintenance of trade secrets in confidence against the public interest in disclosure to determine whether the exemption will be allowed

under Evidence Code section 1060 and Government Code section 6254, subdivision (k). (See *Uribe*, *supra*, at p. 206.)

As Intervenor correctly notes, Petitioner does not argue that the balancing test weighs against disclosure. In evaluating the balancing test, the court considers Petitioner's evidence pertaining to the underlying information disclosed in the TNA Reports and its asserted trade secret formulas, methods, and procedures. (Tarp decl., ¶¶ 3-12 & 15, & Ex. A.) As discussed above, Petitioner's evidence is insufficient to show that the information disclosed in the TNA Reports constitutes a trade secret under CUTSA. To the extent Petitioner has an interest in maintaining the confidentiality of the data disclosed in the TNA Reports, that interest is minimal. In contrast, Intervenor and Respondent submit evidence showing the comparatively strong public interest in obtaining the information disclosed in the TNA Reports. (Park decl., Exs. 1 & 2; Kane decl., ¶¶ 3-5; Barricarte decl.) The court finds that Petitioner's interest in maintaining the TNA Reports in confidence is outweighed by the public interest in favor of disclosure.

Disposition

To obtain a writ of traditional mandamus, the Petitioner must demonstrate that the Respondent has a present ministerial duty, and the Petitioner has a present correlative beneficial right to performance. (See *People v. Picklesimer*, *supra*, 48 Cal.4th, at pp. 339-340.) A ministerial duty arises whenever a given state of facts exists. (See *id.*, at p. 340, citing *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) If a statute requires a prescribed act upon a contingency, then the court may issue a writ to compel performance upon the happening of the contingency. (See *Drummey v. State Board of Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 83.) Thus, to obtain a writ of mandate, Petitioner must show that all of the factual prerequisites that trigger the duty have occurred.

Petitioner has not shown that it is entitled to compel performance of Respondent's duty to refrain from disclosing the un-redacted TNA Reports in response to Intervenor's CPRA request. The petition for writ of traditional mandamus is respectfully DENIED.

The Court directs Respondent to prepare an order consistent with this ruling, present it to Petitioner's counsel and Intervenor's counsel for approval as to form, and return it to this Court for signature.

Dated: NOV 15 2016

Lydia M. Villarreal

Hon. Lydia M. Villarreal
Judge of the Superior Court

CERTIFICATE OF MAILING

(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the STATEMENT OF DECISION for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

Scott J. Allen
THE ALLEN LAW FIRM
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FIRST AMENDMENT PROJECT
1736 Franklin Street, 9th Floor
Oakland, CA 94612

Dated: NOV 15 2016

Teresa A. Risi, Clerk of the Superior Court,

Sally Lopez, Deputy Clerk

Sally Lopez

DECLARATION OF SERVICE BY E-MAIL

Case Name: **Triangle Farms, Inc. v. CA Regional Water Quality Control Board, Central Coast Region**

Case No.: **16-CV-000257**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General in the ordinary course of business.

On December 7, 2016, I served the attached **[PROPOSED] ORDER DENYING PETITION FOR WRIT OF MANDATE; [PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF MANDATE** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Cherokee Melton
E-mail: cmelton@thefirstamendment.org

Environmental Law Foundation
E-mail: mailto:ELFservice@envirolaw.org

Scott J. Allen
E-mail: scott@sjallenlaw.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 7, 2016, at San Francisco, California.

L. Rodriguez
Declarant

Signature

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Attorneys for Respondent/Defendant California Regional Water Quality Control Board, Central Coast Region

Exempt from Filing Fees Pursuant to Gov. Code § 6103

FILED
12/15/2016
TERESA A. RISI
CLERK OF THE SUPERIOR COURT
Carmen B. Orozco DEPUTY
Orozco, Carmen B.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

RAVA RANCHES, INC., FRESH FOODS, INC., and SOUTH COUNTY PACKING COMPANY CORP.,

Petitioners,

v.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION, and DOES 1-50, inclusive,

Respondent.

Case No. 16CV000255

~~[PROPOSED]~~ **ORDER DENYING PETITION FOR WRIT OF MANDATE**

Judge: Hon. Lydia M. Villarreal
Dept: 1

Hearing: August 19, 2016
Action Filed: January 26, 2016

This matter came on regularly for hearing before this Court on August 19, 2016, at 9:00 a.m. in Department 1, the Honorable Lydia M. Villarreal presiding.

Scott Allen appeared as attorney for Petitioners Rava Ranches, Inc., Fresh Foods, Inc., and South County Packing Company Corp. Gary Alexander appeared as attorney for Respondent California Regional Water Quality Control Board. Cherokee Melton appeared as attorney for Intervenor Environmental Law Foundation.

Having considered the record, evidence, and briefs submitted by each party; having heard the argument of counsel; and having considered supplemental briefing by the parties, the Court

issued a Statement of Decision denying the petition for writ of mandate. This Statement of Decision was signed and filed on November 17, 2016. A true and correct copy of that Statement of Decision is attached hereto as Exhibit 1, and it is incorporated by this reference as though fully set forth herein.

For the reasons stated in the Statement of Decision, it is hereby ordered that:

1. The petition for writ of mandate filed in this action is denied; and

2. The preliminary injunction order issued in this action is dissolved as of the filing of the Notice of Entry of Judgment in this matter.

IT IS SO ORDERED.

Date: Dec. 15, 2016

Hon. Lydia M. Villarreal

Approved as to form:

Date: 12/6/16

Scott J. Allen
Attorney for Petitioners

Date: December 2, 2016

Nathaniel Kane
Attorney for Intervenor

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

FILED
NOV 17 2016
TERESA A. RISI
CLERK OF THE SUPERIOR COURT
DEPUTY
R. Inofuentes

RAVA RANCHES, INC., FRESH FOODS, INC., and SOUTH COUNTY PACKING COMPANY CORP., Petitioners, vs. CALIFORNIA WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION, Respondent, ENVIRONMENTAL LAW FOUNDATION, Intervenor.	Case No.: 16CV000255 Statement of Decision

The Petition for Writ of Mandate by Petitioner Petitioners Rava Ranches, Inc., Fresh Foods, Inc. and South County Packing Company Corp. (collectively, "Petitioner") came on for hearing before the Honorable Lydia M. Villarreal on August 19, 2016, at 9:00 a.m., in Department 1.[1] Petitioner, Respondent California Regional Water Quality Control Board, Central Coast Region ("Respondent"), and Intervenor Environmental Law Foundation ("Intervenor") were represented by their respective attorneys. The parties filed supplemental briefs after the hearing. The matter was submitted on September 2, 2016, and the court has fully considered all of the evidence, arguments, and authorities submitted by each party. This Statement of Decision resolves factual and legal disputes as to all matters contained herein.

[1] The court has issued a separate statement of decision for the case tried concurrently with this matter, *Triangle Farms, Inc.. v. California Water Quality Board* (16CV000257) ("*Triangle Farms*").

Background

Pursuant to Code of Civil Procedure ("CCP") section 1085, Petitioner seeks issuance of a writ of traditional mandamus against Respondent to compel performance of its duty under Water Code section 13267(b)(2). Specifically, Petitioner seeks a writ of mandate to compel Respondent to *refrain from making un-redacted versions of the "TNA Reports" available for inspection* by the public. (Petitioner's Opening Brief, p. 2:2-7.) Petitioner argues the TNA Reports – reports that disclose the Total Nitrogen Applied (TNA) to crops - might disclose trade secrets or secret processes. Intervenor has made a request for public disclosure of the un-redacted TNA Reports pursuant to the California Public Records Act ("CPRA").

Petitioner commenced this action by filing the complaint/petition ("Petition") on January 26, 2016.[2] Pursuant to a stipulation and order, Intervenor filed its petition in intervention on February 9, 2016. Respondent filed its answer on April 27, 2016.

On January 26, 2016, concurrently with the filing of the Petition, Petitioner filed an ex parte application for a temporary restraining order ("TRO"), declarations by general manager Peter Anecito ("Anecito") and its counsel in support of the TRO application, and a request to file documents under seal.[3] The court (Hon. Thomas W. Wills) granted the request to file documents under seal and advised that the parties stipulated that no information/documents would be released until after the hearing on the preliminary injunction. Petitioner filed a motion for a preliminary injunction on January 28, 2016. The court (Hon. Susan J. Matcham) granted Petitioner's motion in an order filed on April 1, 2016.

On May 13, 2016, Petitioner filed an opening brief in support of its Petition for Writ of Mandate. On June 10, 2016, Respondent filed its opposing brief, supporting evidence, and a request for judicial notice in support thereof. Intervenor also filed its opposing brief and supporting evidence. Petitioner filed a reply brief on July 1, 2016. At the hearing on August 19, 2016, the parties proffered oral arguments, and Petitioner submitted slides as an

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[2] The petitioner in *Triangle Farms* filed its substantially similar petition on the same date.

[3] Petitioner filed a redacted version and lodged an un-redacted version of Anecito's declaration on that date.

exhibit. The court directed the parties to submit supplemental briefs, and advised that the matter would be taken under submission once all filings were received. On August 26, 2016, Petitioner filed a supplemental brief with two exhibits. Respondent and Intervenor filed their respective responsive supplemental briefs on September 2, 2016.

Evidence Submitted

Petitioner relies on the following evidence: (1) Anecito's declaration filed in support of the application for TRO; (2) Petitioner's TNA Reports (Anecito decl., Exs. A & B); (3) Order No. R3-2012-0011 issued by Respondent (*id.*, Ex. C); (4) Petitioner's letters dated November 30, 2015 (*id.*, Ex. D); (5) Respondent's letter dated December 28, 2015 (*id.*, Ex. F); (6) Respondent's letter dated January 5, 2016 ("Respondent's January 5, 2016 Letter") (*id.*, Ex. G); (7) Petitioners' letter dated January 8, 2016 (*id.*, Ex. H); (8) Respondent's letter dated January 20, 2016 ("Respondent's January 20, 2016 Letter") (*id.*, Ex. I); (9) the Petition; (10) Intervenor's Petition in Intervention; (11) Respondent's answer; (12) slides submitted at the hearing; (13) a table listing statutes and portions of the California Constitution that use the phrase "may not" (Petitioner's Supp. Brief, Ex. A); and (14) Assembly Bill 1664 (Stats. 2001, ch. 869) ("AB-1664") (*id.*, Ex. B).[4]

Respondent submits the following evidence: (1) declaration by its water resources control engineer, Monica Barricarte ("Barricarte"); (2) declaration by the senior staff counsel for the State Water Resources Control Board ("State Board"), Jessica Jahr ("Jahr"); (3) declaration by its attorney, Myung J. Park ("Park")[5]; (4) Order WQ 2013-0101, 2013 WL 5958786 ("2013 Order") issued by the State Board (Park decl., Ex. 1); (5) Order No. R3-2012-0011 issued by Respondent, as modified by the 2013 Order ("the Agricultural Order") (*id.*, Ex. 2); (6) a blank Total Nitrogen Applied Report form ("TNA Form") for 2015 (*id.*, Ex. 3); (7) TNA Form for

[4] Petitioner did not submit evidence with the opening brief or reply brief. Rather, it states that the brief is supported by: (a) Anecito's declaration in support of the TRO application; (b) the Petition; (c) "the other pleadings on file in this case"; and (d) "such other and further matters as may be presented" in the reply brief or during the hearing. (Petitioner's Opening Brief, at p. 2:7-11.) The other pleadings on file in this case are the Petition in intervention and the answer. Petitioner submitted slides as an exhibit at the hearing and two exhibits attached to the supplemental brief.

[5] One document contains Respondent's request for judicial notice and Park's declaration.

2014 (*id.*, Ex. 4); (8) Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (Cal. Code Regs., tit. 23, § 2915) issued by the State Board (*id.*, Ex. 5); (9) Resources for Growers, Protection of Trade Secrets, Secret Processes, and Private Information issued by Respondent on January 28, 2013 (*id.*, Ex. 6); (10) instructions for reporting information in the TNA Form ("TNA Form Instructions") issued by Respondent, December 10, 2015 version (*id.*, Ex. 7); and (11) TNA Form Instructions issued by Respondent, May 29, 2014 version (*id.*, Ex. 8).[6]

Intervenor proffers the following evidence: (1) declaration by its attorney, Nathanial Kane ("Kane"); (2) the Agricultural Order (Kane's decl., Ex. A); (3) TNA Forms for 2014 and 2015 (*id.*, Ex. B); (3) Intervenor's CPRA request for all TNA Reports for all Tier 2 and Tier 3 dischargers for the reporting periods ending in 2014 and 2015, dated November 2, 2015 (*id.*, Ex. C); (4) Respondents' letter (dated 11/12/15) to Intervenor advising that all requested reports that did not involve an assertion of trade secrets were attached; it was reviewing the reports that involved an asserted trade secret; and it would later disclose all reports that were not exempt under CPRA (*id.*, Ex. D); (5) Respondent's letter (dated 1/5/16) to all reporting entities inviting them to submit additional justifications against disclosure (*id.*, Ex. E); (6) Respondent's letter (dated 1/20/16) to all reporting entities advising that their TNA Reports did not contain trade secrets, were not otherwise exempt from disclosure, and would be released in response to the CPRA request (*id.*, Ex. F); (7) Respondent's final letter (dated 1/29/16) to Intervenor in response to the CPRA request, advising that all TNA Reports would be delivered to Intervenor with the exception of the two operations that sought TROs/preliminary injunctions to prevent the release of said reports (*id.*, Ex. G).

No objections have been submitted.

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[6] Respondent's unopposed request for judicial notice of all 8 exhibits is GRANTED. (See Evid. Code, § 452, subds. (c) & (h); see also Evid. Code, § 453; see also *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518; see also *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125; see also *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 886, fn. 1.)

Legal Standard

"A writ of mandate may be issued by any court to any . . . board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . ." (CCP, § 1085, subd. (a)) where there is no plain, speedy, and adequate remedy at law (CCP, § 1086). To obtain relief, a petitioner must demonstrate (1) no plain, speedy, and adequate alternative remedy exists; (2) a clear, present, ministerial duty on the part of the respondent; and (3) a correlative clear, present, and beneficial right in the petitioner to the performance of that duty. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339-340.) It is "well settled that where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued to control his action." (*Drummey v. State Board of Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 83.)

The court will address whether

1. Petitioner has shown that there is no plain, speedy and adequate remedy in the ordinary course of law;
2. There is a clear, present ministerial duty on the part of Respondent;
3. Petitioner has shown a clear, present corresponding right to compel performance of that duty, including the occurrence of any contingency required to trigger Respondent's duty.

No Plain, Speedy, and Adequate Legal Remedy

The petitioner must show that there is no plain, speedy and adequate remedy in the ordinary course of law. (See *Flores v. California Department of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199, 206.) The determination is largely within the trial court's discretion and depends upon the circumstances of the case. (*Ibid.*)

Petitioner alleges that it has no adequate remedy available in the course of law. (Petition, ¶ 13.) Respondent and Intervenor do not dispute this allegation. The court therefore finds that Petitioner has shown that there is no plain, speedy and adequate legal remedy.

Ministerial Duty

The petitioner must show a clear, present ministerial duty on the part of the respondent. (*People v. Picklesimer*, *supra*, 48 Cal.4th, at pp. 339-340.) "A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916, 129 Cal.Rptr.2d 811, 62 P.3d 54.)" (*People v Picklesimer* (2010) 48 Cal.4th 330, 340.) Generally, mandamus may only be employed to compel the performance of a duty that is purely ministerial in character. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-233.) Whether a statute imposes a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation. (*Id.*, at p. 233.)

"In interpreting a statutory provision, 'our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.' (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291, 48 Cal.Rptr.3d 183, 141 P.3d 288.)" (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.) "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

Under the rules of statutory interpretation, the court first consults the statutory language, giving words "their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) If the language is unambiguous, then no statutory construction is necessary. (*Ibid.*) If the statutory language is ambiguous, then the court may also consider extrinsic evidence, such as the ostensible objects to be achieved, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme. (*People v. Zambia* (2011) 51 Cal.4th 965, 972; see also *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442.)

In a traditional mandamus proceeding, even if mandatory language appears in the statute, the duty is discretionary if the entity must exercise significant discretion to perform the duty.

(*Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 701.) Thus, in addition to examining the statutory language, the court must examine the entire statutory scheme to determine whether the entity has discretion to perform a mandatory duty. (*Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; *Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 965.)

I. Does Water Code Section 13267 (b)(2) Impose a Mandatory Duty to Keep TNA Reports Confidential?

According to Petitioner, the issue presented is whether Water Code section 13267(b)(2) imposes a mandatory duty on Respondent to refrain from disclosing Petitioner's un-redacted TNA Reports. Water Code section 13267(b)(2) provides, in relevant part: "*When requested by the person furnishing a report*, the portions of a report that might disclose trade secrets or secret processes *may not be made available* for inspection by the public . . . ." (Wat. Code, § 13267, subd. (b)(2).) Emphasis added.

Petitioner argues Water Code section 13267(b)(2): (1) denotes a mandatory duty by the use of the phrase "may not"; and (2) provides an absolute exemption under the CPRA for reports "when requested by the person furnishing a report" (such as Petitioner) asserts that the documents might disclose trade secrets.

A. Is "May Not" Mandatory or Permissive?

Respondent's arguments focus on the statutory language that arguably forbids release of the records: "the portions of a report that might disclose trade secrets or secret processes *may not* be made available for inspection by the public . . . ." (Wat. Code, § 13267, subd. (b)(2).). The pertinent language is "may not." Petitioner persuasively argues that the usual and ordinary meaning of "may not" imposes a mandatory prohibition, as demonstrated in *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197 ("*Woolls*").[7] In *Woolls*, the court acknowledged that,

[7] Petitioner's reliance on other statutes, constitutional provisions, literary references, and a hypothetical involving schoolchildren as examples of "may not" being used to denote a mandatory prohibition is misguided. Aside from *Woolls*, Petitioner proffers no legal authority or analysis to support its contention that the phrase "may not," as used in those examples, may be properly construed as a mandatory prohibition.

generally speaking, the word "may" is permissive and the word "shall" is mandatory. (*Woolls, supra*, 127 Cal.App.4th, at p. 208.) In that case, however, "the pertinent language is 'may not,' rather than 'may' . . . ." (*Id.*, at pp. 208-209.) "'May not' is prohibitory, as opposed to permissive." (*Id.*, at p. 209.) Thus, Petitioner has shown that the usual and ordinary meaning of the phrase "may not" is an unambiguous mandatory prohibition.

Assuming *arguendo* that "may not" is ambiguous, the court may rely on extrinsic evidence, such as legislative history information, to interpret the statute. (See, e.g., *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442.) In 2001, the Legislature passed AB-1664 to amend various provisions in the Water Code, including Water Code section 13267(b)(2). Before the amendments came into effect, Water Code section 13237(b)(2) stated, in relevant part, that "portions of a report *which* might disclose trade secrets or secret process *shall not* be made available for inspection by the public." (Former Water Code, § 13267, subd. (b)(2), as amended by Stats. 1992, ch. 729, emphasis added.) AB-1664 changed "which" to "that," and "shall not" to "may not," such that this aspect of the statute now states that "portions of a report *that* might disclose trade secrets or secret process *may not* be made available for inspection by the public." (Water Code, § 13267, subd. (b)(2), as amended by Stats. 2001, ch. 869, § 3, emphasis added.) Analyses for AB-1664 refer to the changes as "technical and clarifying amendments." [See Assem. Com. on Environmental Safety and Toxic Materials, Analysis of Assem. Bill 1664 (2001-2002 Reg. Sess.) April 3, 2001; see also Assem. Floor, Analysis of Assem. Bill 1664 (2001-2002 Reg. Sess.) June 5, 2001, as amended June 5, 2001.] The legislative history therefore shows that the Legislature merely intended for this change to be a technical update, as opposed to a change in the protection afforded by the statute.

Lastly, the court must examine the entire statutory scheme to determine whether the entity has discretion to perform a mandatory duty. (See *Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; see also *Weinstein v. County of Los Angeles*, *supra*, 237 Cal.App.4th, at p. 965.) Water Code section 13267 (b)(2) is a provision in the Porter-Cologne Water Quality Control Act (Wat. Code, Div. 7, § 13000 et seq.) ("Porter-Cologne Act"). The Porter-Cologne Act does not define "may not." However, many other provisions in the Porter-Cologne Act that

use "may not" were amended by AB-1668 to state "may not" instead of "shall not" in 2001. (See, e.g., Wat. Code, §§ 13261, 13350, & 13385, as amended by Stats. 2001, ch. 869, §§ 1, 5, & 7.) Legislative history materials suggest that these were merely technical and clarifying amendments, and the Legislature did not intend to substantively change the law. (See, e.g., Assem. Floor, Analysis of Assem. Bill 1664 (2001-2002 Reg. Sess.) June 5, 2001, as amended June 5, 2001.) Simply put, nothing in the larger statutory scheme suggests that the phrase "may not" imposes a discretionary duty.

Accordingly, the use of the phrase "may not" in Water Code section 13267, subdivision (b)(2) denotes a mandatory duty, so long as the facts triggering the duty are present.

B. Does Water Code Section 13267(b)(2) Mandate Non-Disclosure Whenever Requested by the Person Furnishing the Report?

According to Petitioner, if Petitioner requests nondisclosure based on an assertion of trade secrets, Respondent cannot release the documents. It is undisputed that when no California Public Record Act (CPRA) request for records has been made, Water Code section 13267 (b)(2) provides that the regional board cannot make available for public inspection the portion of any report that might disclose trade secrets or secret processes.

Here, however, the question presented is whether and to what extent Water Code section 13267 (b)(2) provides protection when a CPRA request for records has been made. Intervenor and Respondent argue that to determine whether Water Code section 13267 (b)(2) mandates non-disclosure, the court must look to a different statute – the California Public Records Act (CPRA). This necessarily requires Water Code section 13267 (b)(2) to be construed in context of both the Porter-Cologne Act (Water Code, Div. 7 section 13000, et seq.) and the CPRA.

As an initial matter, the reports referenced in Water Code section 13267 (b)(2) will only be subject to the CPRA's general rule requiring disclosure if the reports fall within the CPRA's definition of "public records." (See Gov. Code, § 6263, subd. (a).) The CPRA defines "public records" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (e).) Local agency includes any board. (*Id.*,

subd. (a).) The reports at issue in Water Code section 13267 (b)(2) are monitoring reports required by, submitted to, and maintained by regional water boards, and such reports are relevant to the regional boards' business. (See Wat. Code, § 13267, subds. (a)-(b).) Accordingly, the reports at issue in Water Code section 13267 (b)(2) are public records under the CPRA.

Both the Porter-Cologne Act and the CPRA provide that, as a general rule, such reports/records are to be made available for public inspection. (See Wat. Code, § 13267 (b)(2); see also Wat. Code, § 13269 (a)(2); see also Gov. Code, § 6263 (a).) The Porter-Cologne Act does not contain any procedure applicable to determine whether reports/records should be disclosed, or if they are protected from disclosure, in response to a CPRA request.

According to Intervenor and Respondent, once a CPRA request has been made and the requested record qualifies as a public record (see Gov. Code, § 6252, subd. (e)), *CPRA requires public disclosure unless a CPRA exemption applies*. (See Gov. Code, § 6253.) To determine whether a CPRA exemption exists the court must first consult the statutory language. (See *DaFonte v. Up-Right, Inc.*, *supra*, 2 Cal.4th, at p. 601.) If the statutory language is ambiguous, then the court may rely on extrinsic evidence, such as the ostensible objectives to be achieved, the legislative history, public policy, and contemporaneous administrative construction. (*People v. Zambia*, *supra*, 51 Cal.4th, at p. 972; see also *County of Santa Clara v. Perry*, *supra*, 18 Cal.4th, at p. 442.) The court must also examine the entire statutory scheme. (See *Mooney v. Garcia*, *supra*, 207 Cal.App.4th, at p. 233; see also *Weinstein v. County of Los Angeles*, *supra*, 237 Cal.App.4th, at p. 965.) "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." (*Tuolumne Jobs & Small Business Alliance v. Superior Court*, *supra*, 59 Cal.4th, at p. 1037.) The court seeks to avoid a construction that would lead to unreasonable, impractical, or arbitrary results. (*See Poole v. Orange County Fire Authority*, *supra*, 61 Cal.4th, at p. 1385.)

In contrast to the Porter-Cologne Act, the CPRA sets forth a mandatory duty to disclose public records in response to a request for public records by a member of the public. The CPRA also sets forth exemptions to the disclosure requirement. Specifically, the CPRA's statutory language unambiguously imposes a separate ministerial duty in response to a CPRA request for

public records: "Except with respect to records exempt from disclosure by *express provisions of law, each state or local agency, upon a request for a copy of records . . . , shall make the records promptly available to any person . . .*" by providing copies of said records to the person. (Gov. Code, § 6263, subd. (b).) The CPRA enumerates various statutory exemptions, including (a) the exemption for *air pollution* data discussed in *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436 ("*Masonite*"). (See Gov. Code, § 6254.7 and the qualified *trade secret* exemption discussed in *Uribe v. Howie* (1971) 19 Cal.App.3d 194 ("*Uribe*"). (See Gov. Code, § 6254, subd. (k); see also Evid. Code, § 1060).

Under CPRA, the only exemption that could prevent public disclosure of TNA monitoring reports in response to a CPRA request is Government Code section 6254, subdivision (k).[8] That provision incorporates exemptions allowed under state and federal law, including provisions in the Evidence Code relating to privilege. (See Gov. Code, § 6264, subd. (k).) The Evidence Code provides a qualified trade secret privilege (see Evid. Code, § 1060) for information that falls within the definition of a trade secret under the California Uniform Trade Secrets Act ("CUTSA") (see Evid. Code, § 1061, subd. (a)(1)).

It is Petitioner's position that Water Code section 13267 (b)(2) is an absolute exemption to Intervenor's CPRA request for monitoring reports that might contain trade secrets. It insists that this protection applies after a CPRA request for the reports has been made, and is distinct from CPRA's qualified trade secret exemption.[9]

Strong policy considerations militate in favor of interpreting Water Code section 13267(b)(2) as providing a qualified trade secret exemption – thus requiring a balancing of interests if the information qualifies as trade secrets. (See *Uribe*, *supra*, at p. 206.) Petitioner cites the 2013 Order (Petitioner's Reply, at p. 6:16-17, fn. 2) proffered by Respondent (Park

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[8] The exemption for air pollution data (see Gov. Code, § 6254.7) does not apply to the monitoring reports authorized under the Porter-Cologne Act (see Wat. Code, § 13267, subds. (a)-(b)), and Petitioner's reliance on *Masonite* is misplaced.

[9] Petitioner's reliance on OSHA is misplaced because the cited provisions do not provide absolute protection from public disclosure in response to a CPRA request. (See 29 U.S.C. § 664; see also 29 C.F.R. § 1903.9.)

decl., Ex. 1). In the 2013 Order, the State Board advised that trade secrets in TNA Reports could be released in response to a CPRA request, depending on the outcome of a balancing test, pursuant to Water Code section 13267 (b)(2) and Government Code section 6254 (k). (Park decl., Ex. 1.) This buttresses the interpretation that Water Code section 13267 (b)(2) should be construed to provide the same qualified trade secret protection as the CPRA exemption and is subject to a balancing test. In contrast, nothing in the Porter-Cologne Act or the CPRA suggests that monitoring reports are subject to any special exemption from disclosure in response to a CPRA request. No legal authority or extrinsic evidence has been provided to support Petitioner's interpretation.

Therefore, Petitioner has failed to show that Water Code section 13267(b)(2) imposes a mandatory duty on Respondent to *refrain* from providing copies of reports that might contain trade secrets to members of the public in response to a CPRA request.

In light of the foregoing, Water Code section 13267, subdivision (b)(2) imposes a different duty on a regional board depending on whether a CPRA request has been made:

1. If no CPRA request has been made, then Water Code section 13267 (b)(2) imposes a mandatory duty on Respondent to refrain from making portions of a report available for public inspection when (1) requested by the person furnishing a report, and (2) the portions of the report might disclose trade secrets.
2. If a CPRA request for the records has been made, then Water Code section 13267(b)(2) imposes a mandatory duty on Respondent to refrain from releasing portions of a report to the public when
    a. requested by the person furnishing a report,
    b. the report *contains trade secrets* as defined by CUTSA; and
    c. *the interest* in maintaining the confidentiality of the trade secrets *outweighs* the public interest in disclosure. (See Wat. Code, § 13267, subd. (b)(2); see also Gov. Code, § 6254, subd. (k); see also Evid. Code, §§ 1060 & 1061, subd. (a)(1); see also *Uribe*, *supra*, at p. 206.)

Therefore, the court must now examine each of these elements.

The evidence shows that a CPRA request for public disclosure of the un-redacted TNA Reports has been made (Petition, ¶¶ 6-7) and these reports are public records as defined by CPRA. (Petition, ¶¶ 2-5 & 8; Petition in Intervention, ¶ 7; Kane decl., Ex. G; Anecito decl., Exs. A & B; see also Gov. Code, § 6252, subds. (e) & (f)(1).)

The court must examine whether the TNA reports contain trade secrets and, if so, does the interest in maintaining confidentiality of the trade secrets outweigh the public interest in disclosure. (See Wat. Code, § 13267, subd. (b)(2); see also Gov. Code, § 6254, subd. (k); see also Evid. Code, §§ 1060 & 1061, subd. (a)(1); see also *Uribe*, *supra*, at p. 206.)

II. Do the TNA Reports Contain Trade Secrets Thereby Prohibiting Public Disclosure?

California Uniform Trade Secrets Act's ("CUTSA") definition of a trade secret applies. Under CUTSA, "trade secret" means "means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).)

A. Do the TNA Reports Contain Information From Which Others Can Obtain Economic Value?

Petitioner asserts that the TNA Reports contain proprietary formulas and methods. However, the evidence submitted in support of its petition does not support its claim. Petitioner's evidence shows that the information at issue in the TNA Reports consists of data showing the types of crops it plants, acreage, annual aggregate totals of nitrate levels, and average nitrate concentrations.[10] (Anecito decl., Exs. A & B.) Anecito declares that information

[10] Contrary to Anecito's declaration, the TNA Reports do not disclose the total farmable acres, acres per crop type during the growing season, or total nitrogen fertilizer and other amendments applied to each crop. (See Anecito decl., ¶ 17(a)-(d), & Exs. A & B.) Instead, they disclose total "At Risk/Ranch Acres" or "Physical Acres Reporting" for each property, crop type(s) "Grown and Harvested During Reporting Period," and total nitrogen "Applied in Fertilizers & Amendments" per crop type during the reporting period. (*Id.*, Exs. A & B.)

disclosed in the TNA Reports is confidential and should be protected from disclosure for two reasons. (*Id.* decl., ¶ 17.) First, he states that the data qualifies as a trade secret because, if disclosed, it could be used by competitors to learn Petitioner's proprietary and confidential formulas and methods—specifically, its (1) crop mix/rotation patterns; (2) irrigation water blending practices; and (3) fertilizer recipe/mix—that Petitioner developed over "many years of farming" by "trial and error" that give it a competitive advantage by increasing its crop yields at a reduced cost. (*Id.*, ¶¶ 15 & 17(a)-(c).) Second, Anecito declares that data qualifies as a trade secret because, if disclosed, Petitioner's customers might learn its crop yields (pounds per acre) and production costs— closely-guarded information that affects the prices customers are willing to pay and, if disclosed, could undermine Petitioner's ability to negotiate favorable contracts and allow competitors to attract its customers—by combining data in the TNA Reports with (1) crop volume/weight information obtained through the customers' prior purchases to calculate crop yield; and (2) the "relatively narrow range of costs" for nitrogen/nitrate fertilizers to ascertain production cost data "with a good degree of accuracy." (*Id.*, ¶ 17(d).)

Petitioner cites *U.S. v. Chung* (9th Cir. 2011) 659 F.3d 815, 824, for the proposition that "[i]n assessing whether information derives value from not being generally known, courts look chiefly to whether the information provides a competitive economic advantage."[11] Petitioner contends that it derives economic/competitive benefits from maintaining its formulas, methods, crop yield data, and production costs in confidence.

Respondent and Intervenor assert that the TNA Reports omit most of the underlying data that competitors, customers, and others would need to know in order to learn its proprietary formulas/methods and crop yield and production cost data.

Petitioner's Formulas and Practices: Anecito declares that Petitioner's proprietary crop mix/rotation pattern involves multiple variables, including the timing/scheduling of planting, watering, fertilization, and harvesting of each crop. (Anecito decl., ¶ 17(a).) He further declares

[11] Petitioner's reliance on *Lion Raisins v. U.S. Dept. of Agriculture* (9th Cir. 2004) 354 F.3d 1072 is misplaced because that decision does not discuss CUTSA or CPRA; rather, it discusses the distinct definition of trade secret under the Freedom of Information Act.

that Petitioner's nitrogen fertilizer formula is based on the number of growth/harvest cycles per crop, and each crop's growth/harvest cycle varies in duration (e.g., spinach is as short as 23 to 26 days). (*Id.* decl., ¶ 17(c).) The TNA Reports, however, do not disclose information about the length or number of growing/harvesting cycles per crop, crop rotations, or the timing and frequency of fertilizer and water applications. (*Id.*, Exs. A & B; Barricarte decl.) The State Board does not consider the data sought by the TNA Form to be sensitive proprietary information; rather, it "see[s] the timing and frequency of applications, which are not required to be reported, rather than data regarding total amount, as more relevant to competitive business practices." (Park decl., Ex. A, at pp. *20 & *33, fn. 104.) Additionally, variables that are disclosed in the TNA Reports—such as acreage and amount of nitrate applied to a particular crop on a particular property—would be affected by transitory conditions that are not disclosed in the TNA Reports. (Anecito decl., Exs. A & B.) Therefore, competitors would not be able to apply information derived from the TNA Reports to their own farming practices, and Petitioner would not sustain any economic or competitive injury from disclosure of the TNA Reports. (See *Uribe*, *supra*, at pp. 208-209.) Anecito also declares that Petitioner's proprietary water blending practice involves testing water from its wells and combining water from multiple wells to achieve a particular nitrogen/nitrate concentration. (Anecito decl., ¶ 17(b).) The TNA Reports do not contain data about any particular well, water blending method, or other information that might allow others to discover Petitioner's water blending practices. (*Id.*, at Exs. A & B.) In sum, Petitioner has failed to show that the TNA Reports contain data from which its customers could ascertain its confidential and proprietary crop mix/rotation patterns, irrigation blending practices, and fertilizer formula.

Petitioner's Crop Yields & Production Costs: Anecito declares that customers could combine their prior knowledge of crop weight with total crop acreage data in the TNA Reports to learn Petitioner's crop yield. (Anecitor decl., ¶ 17(d).) To the contrary, to determine crop yield, customers would also need to know the number of planting/harvest cycles per crop, but the TNA Reports do not disclose such data. (*Id.*, Exs. A & B.) Finally, with respect to production costs, Anecito states that customers and competitors could combine their knowledge of the "relatively

narrow range of costs" for nitrogen/nitrate fertilizers with total nitrogen application data in the TNA Reports to ascertain Petitioners' "cost of nitrogen input . . . with a good degree of accuracy." (*Id.*, ¶ 17(d).) However, the TNA Reports do not disclose the price of any nitrogen/nitrate fertilizer or the particular type of fertilizer applied. (*Id.*, Exs. A & B.) Therefore, customers and competitors cannot ascertain Petitioner's nitrogen input costs from the data in the TNA Reports. In any event, Petitioner and Respondent each submit evidence to show that Petitioner's production costs include other variables—such as land, labor, equipment/machinery, and fertilizers other than nitrogen—that are not disclosed in the TNA Reports. (Anecito decl., ¶ 17(a)-(c), & Exs. A & B; Barricarte decl., ¶¶ 16-18.) Simply put, the data in the TNA Reports is insufficient to allow others to ascertain Petitioners' crop yields or production costs.

Even though Petitioner might derive some value from maintaining its formulas, methods, and procedures in confidence, it has not shown that the TNA Reports actually contain trade secrets – that is - information from which it derives economic value from not being generally known to others trade secrets. In other words, Petitioner has not met its burden in showing the TNA Reports disclose trade secret formulas/methods, or sufficient underlying data from which such trade secrets may be derived.

B. Has Petitioner Shown It Has Made Efforts to Maintain Confidentiality?

With respect to the efforts to maintain confidentiality, Petitioner contends that it made reasonable efforts to maintain its formulas/methods in confidence. (Anecito decl., ¶¶ 16-17.) However, the only evidence Petitioner submits to show efforts to maintain the underlying data disclosed in the TNA Reports in confidence is (1) the form itself and (2) this Petition. The court concludes that more evidence is needed for Petitioner to meet its burden to show reasonable efforts to maintain information disclosed in the TNA Reports in confidence.

Accordingly, Petitioner has not met its burden to show that the TNA Reports contain information that falls within CUTSA's definition of a trade secret. It follows that Petitioner has not shown that it is entitled to compel Respondent to perform its mandatory statutory duty to refrain from disclosing the TNA Reports.

III. Does the Interest in Maintaining Confidentiality Outweigh the Public Interest in Disclosure?

Assuming arguendo, Petitioner is able to show that the TNA Reports contain trade secrets as defined by CUTSA, Respondent may nevertheless release the reports to Intervenor in response to the CPRA request if the public interest in favor of disclosure outweighs the interest in confidentiality. (See Gov. Code, § 6254, subd. (k); see also Evid. Code, § 1060; see also *Uribe*, *supra*, at pp. 209-210.) The court must balance the maintenance of trade secrets in confidence against the public interest in disclosure to determine whether the exemption will be allowed under Evidence Code section 1060 and Government Code section 6254, subdivision (k). (See *Uribe*, *supra*, at p. 206.)

As Intervenor correctly notes, Petitioner does not argue that the balancing test weighs against disclosure. In evaluating the balancing test, the court considers Petitioner's evidence pertaining to the underlying information disclosed in the TNA Reports and its asserted trade secret formulas, methods, and procedures. (Anecito decl., ¶¶ 15-17, & Exs. A & B.) As discussed above, Petitioner's evidence is insufficient to show that the information disclosed in the TNA Reports constitutes a trade secret under CUTSA. To the extent Petitioner has an interest in maintaining the confidentiality of the data disclosed in the TNA Reports, that interest is minimal. In contrast, Intervenor and Respondent submit evidence showing the comparatively strong public interest in obtaining the information disclosed in the TNA Reports. (Park decl., Exs. 1 & 2; Kane decl., ¶¶ 3-5; Barricarte decl.) The court finds that Petitioner's interest in maintaining the TNA Reports in confidence is outweighed by the public interest in favor of disclosure.

Disposition

To obtain a writ of traditional mandamus, the Petitioner must demonstrate that the Respondent has a present ministerial duty, and the Petitioner has a present correlative beneficial right to performance. (See *People v. Picklesimer*, *supra*, 48 Cal.4th, at pp. 339-340.) A ministerial duty arises whenever a given state of facts exists. (See *id.*, at p. 340, citing *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) If a

statute requires a prescribed act upon a contingency, then the court may issue a writ to compel performance upon the happening of the contingency. (See *Drummey v. State Board of Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 83.) Thus, to obtain a writ of mandate, Petitioner must show that all of the factual prerequisites that trigger the duty have occurred.

Petitioner has not shown that it is entitled to compel performance of Respondent's duty to refrain from disclosing the un-redacted TNA Reports in response to Intervenor's CPRA request. The petition for writ of traditional mandamus is respectfully DENIED.

The court directs Respondent to prepare an order consistent with this ruling, present it to Petitioner's counsel and Intervenor's counsel for approval as to form, and return it to this court for signature.

Dated: 11/17/16

Hon. Lydia M. Villarreal
Judge of the Superior Court

16CV000255

CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **Statement of Decision Filed November 17, 2016**, for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

Scott Jeffrey Allen
2511 Garden Road Suite A-225
Monterey CA 93940

Cherokee Dawn-Marie Melton
1736 Franklin St 9th Floor
Oakland CA 94612

Myung J Park
455 Golden Gate Ave
San Francisco CA 94102

Date: 11/17/2016

Teresa A. Risi, Clerk of the Court

By:_____
Maria InofuentesDeputy Clerk

DECLARATION OF SERVICE BY E-MAIL

Case Name: **Rava Ranches, Inc. et al. v. CA Regional Water Quality Control Board, Central Coast Region**

Case No.: **16-CV-000255**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General in the ordinary course of business.

On December 7, 2016, I served the attached **[PROPOSED] ORDER DENYING PETITION FOR WRIT OF MANDATE; [PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF MANDATE** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Cherokee Melton
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 7, 2016, at San Francisco, California.

L. Rodriguez
Declarant

Signature

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MONTEREY COASTKEEPER et al.,

Plaintiffs and Respondents,

v.

STATE WATER RESOURCES CONTROL BOARD,

Defendant and Appellant;

GROWER-SHIPPER ASSOCIATION OF CALIFORNIA et al.,

Interveners and Appellants.

C080530

(Super. Ct. No. 34-2012-80001324-CU-WM-GDS)

The Central Coast Region is one of the great agricultural regions of California. Unfortunately, waste discharges from irrigated agricultural operations, particularly from the use of fertilizers and pesticides, have impaired the quality of both surface water and groundwater in the region. The State Water Resources Control Board (State Board) and nine regional boards are responsible for regulating waste discharges to protect water quality. (Wat. Code, § 13263.) [1] Discharge requirements may be waived "if the state board or a regional board determines . . . that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest." (§ 13269, subd. (a).)

This case involves a challenge to a section 13269 waiver of waste discharge requirements for irrigated agricultural land.

In 2012, the Central Coast Regional Water Quality Control Board (Regional Board) issued a waiver of discharge requirements for irrigated agricultural operations in the region. We refer to this as the 2012 waiver. After review, the State Board modified the waiver. We refer to the State Board's modification as the modified waiver, which is the document at issue here.

Monterey Coastkeeper,[2] San Luis Obispo Coastkeeper, California Sportfishing Protection Alliance, and Santa Barbara Channelkeeper (collectively Coastkeeper) petitioned for a writ of mandate, challenging the modified waiver. They contended it did not meet the requirements of the Water Code and applicable state water policies. The trial court agreed in part, and issued a peremptory writ of mandate directing the State Board to set aside the modified waiver and issue a new waiver consistent with its decision.

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[1] Further undesignated statutory references are to the Water Code.

[2] An entity self-described as "a program of The Otter Project, a non-profit organization."

The State Board and various agricultural interests as interveners appeal. They contend generally that the trial court erred in comparing the modified waiver (unfavorably) to a 2010 *draft* of the 2012 waiver, failing to defer to the State Board's expertise and apply a presumption of correctness, and ignoring the appropriate reasonableness standard. They raise specific objections to several of the trial court's findings.

As we explain, we agree with appellants as to two of their points; the trial court's findings as to the inadequacy of the tiering and monitoring provisions of the modified waiver are not supported by substantial evidence. We modify the judgment accordingly and otherwise affirm.

LEGAL BACKGROUND

The Porter-Cologne-Act

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (§§ 13000 et seq.) governs water quality regulation in California. It establishes the policy that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.)

The State Board and regional boards are charged with "primary responsibility for the coordination and control of water quality." (§ 13001.) The State Board formulates and adopts state policy for water quality control. (§ 13140.) The regional boards "formulate and adopt water quality control plans for all areas within the region." (§ 13240.) The regional boards' water quality plans, called basin plans, must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).) Water quality objectives are the limits or levels of constituents or characteristics allowed to protect the quality of the water. (§ 13050, subd. (h).)

Basin Plans

Basin plans cover both point source and nonpoint source pollution. Point source discharge is discharge from a discrete conveyance, such as a pipe, ditch, canal, tunnel, or conduit, while discharge that is not from a point source, such as agricultural runoff, is nonpoint source (NPS) pollution. (*City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1403.) Here, we are concerned with NPS pollution.

The Central Coast basin plan "encompasses all of Santa Cruz, San Benito, Monterey, San Luis Obispo, and Santa Barbara Counties as well as the southern one-third of Santa Clara County, and small portions of San Mateo, Kern, and Ventura Counties. Included in the region are urban areas such as the Monterey Peninsula and the Santa Barbara coastal plain; prime agricultural lands [such] as the Salinas, Santa Maria, and Lompoc Valleys; National Forest lands, extremely wet areas like the Santa Cruz mountains; and arid areas like the Carrizo Plain."

The basin plan has three components: (1) identification of the beneficial uses to be protected; (2) water quality objectives to protect those uses; and (3) an implementation program to accomplish those objectives. The basin plan identifies numerous beneficial uses of water, including municipal and domestic water supply, protection of recreation and aquatic life, and agricultural supply.

The water quality objectives relevant here are for toxicity, pesticides, and nitrates.

Toxicity: "All waters shall be maintained free of toxic substances in concentrations which are toxic to, or which produce detrimental physiological responses in, human, plant, animal, or aquatic life."

Pesticides: "No individual pesticide or combination of pesticides shall reach concentrations that adversely affect beneficial uses. There shall be no increase in pesticide concentrations found in bottom sediments or aquatic life."

Nitrates: For municipal water: 45 mg/L (milligrams per liter). (By comparison, it is 100 mg/L for agricultural use.)

The implementation component relies on waste discharge requirements and waivers and enforcement actions. The basin plan recognizes that the Porter-Cologne Act constrains regional boards from specifying the manner of compliance, and calls for encouraging implementation of best management practices.

The NPS Policy

Basin plans must be consistent with "state policy for water quality control." (§ 13240.) Two such policies are relevant here. The first is the Policy for Implementation and Enforcement of Nonpoint Source Pollution Control Program (the NPS Policy). The NPS Policy was adopted in 2004 to fulfill the requirements of Section 13369. Section 13369 requires the State Board, in consultation with other agencies, to prepare a detailed program for implementing the state's NPS management plan. The NPS Policy reflects that the discharge of waste into the waters of the state is a privilege not a right. (§ 13263, subd. (g).)

Under the NPS Policy, implementation programs for NPS pollution control shall include the following five key elements: (1) address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements; (2) have a high likelihood that the program will attain water quality requirements, including consideration of the management practices to be used and the process for ensuring their proper implementation; (3) include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements; (4) include sufficient feedback mechanisms to determine if the program is achieving its stated purpose; and (5) make clear, in advance, the potential consequences for failure to achieve the program's stated purposes.

The NPS Policy recognizes that the "challenges to implementing statewide prevention and control of NPS pollution discharges are significant." "Current land use management practices that have resulted in NPS pollution have a long and complicated physical, economic and political history. . . . Therefore, it is expected that it will take a

significant amount of time for the [regional boards] to approve or endorse NPS control implementation programs throughout their regions, and even longer for those programs to achieve their objectives." "Most NPS management programs typically depend, at least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution."

The Antidegradation Policy

The second relevant water policy is Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality of Waters in California. This policy is known as the antidegradation policy. (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1259, fn. 2 (*AGUA*).) It sets forth the policy of the state to regulate the granting of permits and licenses for the disposal of wastes into the waters of the state to achieve the "highest water quality consistent with maximum benefit to the people of the State" and where the quality of water is higher than that established by adopted policies, the higher quality must be maintained "to the maximum extent possible consistent with the declaration of the Legislature."

In *AGUA, supra*, 210 Cal.App.4th 1255, this court explained the process for an antidegradation analysis. "[T]he Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives. If the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved. In that case the antidegradation policy is not triggered. However, if the baseline water quality is better than the water quality objectives, the baseline water quality must be maintained in the absence of findings required by the antidegradation policy." (*Id*. at p. 1270.)

Discharge Requirements and Waivers

Anyone discharging waste that could affect the quality of waters in California must file a discharge report. (§ 13260, subd. (a).) The regional boards regulate such

waste discharges by prescribing requirements. (§ 13263.) Such discharge requirements "may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted." (§ 13243.)

The discharge requirements may be waived "if the state board or a regional board determines . . . that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest." (§ 13269, subd. (a)(1).) A waiver may not exceed five years, may be renewed, and may be terminated at any time by the State Board or the regional board. (*Id*., subd. (b)(1).) "The conditions of the waiver shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring . . . . Monitoring requirements shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions." (*Id*., subd. (a)(2).)

Neither a waste discharge requirement nor a waiver thereof is permitted to specify a particular *manner* of compliance with the discharge standard, with two exceptions not pertinent here. (§ 13360, subd. (a).) "Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants. It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd*. (1989) 210 Cal.App.3d 1421, 1438.)

In its challenge to the modified waiver, Coastkeeper contended and the trial court found, for the most part, that the modified waiver did not comply with section 13269 because it was not consistent with the Central Coast basin plan, including the NPS Policy and antidegradation policy, and was not in the public interest.

FACTUAL AND PROCEDURAL BACKGROUND

The 2004 Waiver

In July 2004 the Regional Board adopted a conditional waiver pursuant to section 13269 (the 2004 waiver) "to regulate discharges from irrigated lands to ensure that such discharges are not causing or contributing to exceedances of any Regional, State, or Federal numeric or narrative water quality standard." At that time, the Central Coast Region had 600,000 acres of farmland and over 2,500 operations that could potentially discharge waste in the state's waters. Under the 2004 waiver, "Agricultural dischargers enrolled and established farm plans based on education and outreach, and created an industry-led, nonprofit, monitoring program."

The Regional Board's Draft Waivers and Comments

Beginning in late 2008, the Regional Board staff began working on a subsequent waiver. In July 2009 the 2004 waiver was renewed for one year. In 2010 the Regional Board staff declared a need to change the 2004 waiver because it lacked clarity and did not focus on accountability and verification of directly resolving the known water quality problems. "The conditions of the 2004 Conditional Waiver address all common problems associated with all agricultural operations equally and without specific targets or timelines for compliance." Staff found no evidence that the 2004 waiver improved water quality.

Over the next few years, the Regional Board held a series of meetings and workshops with various stakeholders, including environmental interest groups and agricultural interest groups. Staff produced the first preliminary draft waiver in February 2010. We refer to this document as the 2010 preliminary draft. The 2010 preliminary draft directly addressed "agricultural discharges – especially contaminated irrigation runoff and percolation to groundwater causing widespread toxicity, unsafe levels of nitrate, unsafe levels of pesticides, and excessive sediment in surface waters and/or groundwaters. The [draft] also focuse[d] on those areas of the Central Coast Region

already known to have, or [be] at great risk for, severe water quality impairment. In addition, the [draft] require[d] the effective implementation of management practices (related to irrigation, nutrient, pesticide and sediment management) that will most likely yield the greatest amount of water quality protection. The [draft] include[d] immediate requirements to eliminate or minimize the most severe or impactful agricultural discharges and additional requirements with specific and reasonable time schedules to eliminate or minimize degradation from all agricultural discharges. The [draft] also includes clear and direct methods and indicators for verifying compliance and monitoring progress over time."

The 2010 preliminary draft required enhanced monitoring, including individual monitoring. It prohibited certain discharges, including prohibiting "excessive use or over-application of fertilizer in excess of crop needs." It required annual updated farm plans and provided a schedule (two to four years) for implementing management measures, and prohibited certain pesticide usage.

Numerous agricultural interests commented on the 2010 preliminary draft; in general, they were disappointed in its direction away from a collaborative approach to a regulatory approach that some found heavy handed. Many expressed concern about the economic impact of such regulation. The comments of environmental interests were in support of the 2010 preliminary draft. These interests agreed with the new emphasis on clear standards and timelines instead of training and education.

After more workshops, in late 2010 the Regional Board staff prepared a new draft waiver. The new draft retained much of the 2010 preliminary draft but introduced the idea of categorizing dischargers into three tiers based on size of farm operation, proximity to impaired watercourse, use of certain chemicals (chlorpyrifos and diazinon), and the type of crop grown. Dischargers in Tier 3 posed the highest threat to water quality and correspondingly faced the greatest amount of discharge control conditions, individual monitoring, and reporting.

Agricultural interests again objected to the new draft and its regulatory requirements. Environmental interests, on the other hand, were concerned that the new draft was weaker on environmental protection than the 2010 preliminary draft. A group of environmental interests, including some of those constituting Coastkeeper, objected that the new draft did not contain adequate mechanisms to address the degraded state of central coast waterways, lacked a vision for maintenance of vegetative buffers, exempted tile drains[3] from regulation, and defined Tier 3 too narrowly as dischargers could escape the requirements of Tier 3 by changing the pesticides used.

A third draft waiver was released in March 2011. This draft focused on two particular pesticides that were known sources of toxicity--chlorpyrifos and diazinon. A further draft waiver was issued in September 2011. A group of environmental interests, including Coastkeeper, "agreed to disagree" on many substantive points in the latest draft.

In a presentation in a workshop in February 2012, Coastkeeper indicated its support for the 2010 preliminary draft, with certain additions and revisions, including requiring a 30-foot vegetative buffer along Tier 2 and Tier 3 streams.

The Regional Board's 2012 Waiver

In March 2012 the Regional Board adopted a final order, Order No. R3-2012-0011 (the 2012 waiver). At that time the Central Coast Region had 435,000 acres of irrigated land and approximately 3,000 agricultural operations. The 2012 waiver classified dischargers into three tiers based on their risk to water quality and the level of discharge. Staff reported the 2012 waiver imposed fewer requirements on Tier 1 dischargers than the 2004 waiver, comparable requirements for Tier 2 dischargers, and greater requirements on Tier 3 dischargers. Tier 1 dischargers were required to provide online

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[3] Tile drains are subsurface drainage generated by installing drainage systems to lower the water table below irrigated lands.

compliance information annually. Tier 2 dischargers were required to develop a farm plan and implement management practices for irrigation, nutrients, pesticides, and erosion, with schedules for implementation. There were requirements for education, surface receiving and groundwater monitoring, backflow prevention, and annual reporting requirements for the total amount of nitrogen applied to farmlands, and riparian and wetland photographic monitoring and reporting. There were additional monitoring and reporting requirements for Tier 3 dischargers, particularly those posing the greatest risk to water quality. These requirements included nitrogen balance reporting, water quality buffer plans, irrigation and nutrient management plans, and individual surface runoff monitoring.

Review by the State Board

In April 2012 Coastkeeper petitioned the State Board to review the 2012 waiver pursuant to section 13320. Coastkeeper objected that the Tier 3 standard that dischargers "meet the nitrate balance ratio targets" proposed by staff in earlier drafts of the waiver had been arbitrarily revised by replacing "meet" with "make progress." Moreover, the hard "targets" in the earlier versions became soft "milestones" in the modified waiver. Coastkeeper argued, "Removing the only firm and measurable requirements for nitrate discharges renders the [2012 waiver] inconsistent with California Water Code Section 13269 because the conditional waiver is not consistent with the Basin Plan and not in the public interest."

Agricultural interests also petitioned for review, arguing the 2012 waiver was not legally adopted, was not reasonable, did not properly consider all economic, social, tangible, and intangible values involved, and imposed regulations that were unfeasible.

At the request of certain agricultural interests, the State Board stayed certain provisions of the 2012 waiver (§ 13320, subd. (e)) and reviewed it on its own motion (§ 13320, subd. (a)).

Coastkeeper petitioned for a writ of mandate challenging this stay and requested a preliminary injunction. A group of agricultural interests intervened, including appellants Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, Western Growers Association, and California Farm Bureau Federation (interveners). Interveners united with the State Board in opposing Coastkeeper's petition and request.

The trial court denied the request for a preliminary injunction.

In comments to an earlier draft of the 2012 waiver, Coastkeeper opposed provisions relating to containment structures, nutrient management plan, and nitrogen balance ratios, and proposed additional discussion on monitoring. In further comments, Coastkeeper lamented the changes from the 2010 preliminary draft, and emphasized the need for reporting nitrogen balance ratios. Coastkeeper also objected to compliance provisions and argued broader toxicity requirements were required.

The State Board's Modified Waiver

At its meeting on September 24, 2013, the State Board adopted Order No. R3-2012-0011 (the 2012 waiver) as modified by Order No. WQ-2013-0101 (the modified waiver). The modified waiver recognized that nitrate pollution of drinking water was a critical problem in the region, with hundreds of drinking wells having nitrate levels in excess of state standards. It further recognized that fertilizer from irrigated agriculture was the largest source of nitrate pollution.

In a media release announcing the modified waiver, the State Board noted that an expert panel was to be convened "to assess existing agricultural nitrate control practices and propose new practices to protect groundwater as appropriate." This expert panel would "consist of a broad spectrum of experts from relevant disciplines and will hold several public workshops to take input and comment before making proposals to the [State Board]. Many of the groundwater issues contested in the petitions are best addressed by the Expert Panel, and we will task the Expert Panel with certain issues

related to the impact of agricultural discharges on surface water as well." The State Board would request the expert panel to consider "the indicators and methodologies for determining risk to surface and groundwater quality, the appropriate targets for measuring progress in lowering that risk, and the efficacy of groundwater and surface water discharge monitoring in evaluating practice effectiveness." [4] The State Board stressed the modified waiver "constitutes only an interim determination as to how to move forward on the difficult and complex questions presented."

The modified waiver regulated discharges of wastes from irrigated agricultural lands, commercial nurseries and greenhouses, and lands planted with commercial crops that were not yet marketable, such as vineyard and tree crops. The regulated discharges included waste discharges to surface water and groundwater.

The State Board upheld most of the 2012 waiver, but amended certain requirements. Farm plans for water quality were no longer required to provide the results of methods used to verify effectiveness and compliance, but only to describe the method and provide a schedule for assessing the effectiveness of each management practice. The nitrogen balance ratio reporting requirements for high risk Tier 3 dischargers were eliminated.

The modified waiver added provision No. 83.5 which addressed compliance with the water quality standards, the basin plan, and the time schedules for the effective control of various discharges. It provided: "Dischargers must (1) implement management practices that prevent or reduce discharges of waste that are causing or

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[4] On November 3, 2016, this court denied the State Board's request for judicial notice of a report by the expert panel. The trial court had denied the interveners' request to take judicial notice of an unrelated declaration and attached reports. On appeal, interveners note this court may take judicial notice of this material, but do not request that we do so or provide a cogent argument why we should. Therefore, we also decline to take judicial notice of this additional material.

contributing to exceedances of water quality standards; and (2) to the extent practice effectiveness evaluation or reporting, monitoring data, or inspections indicate that the implemented management practices have not been effective in preventing the discharges from causing or contributing to exceedances of water quality standards, the Discharger must implement improved management practices."

The legality of provision No. 83.5 is hotly contested on appeal, as we discuss in Part IVB, *post*.

Proceedings in the Trial Court

Coastkeeper filed an amended petition for a writ of mandate seeking judicial review of the modified waiver pursuant to section 13330. It alleged the modified waiver violated section 13269, subdivision (a) because it did not require dischargers to comply with water quality objectives and did not have monitoring requirements to verify the adequacy and effectiveness of the waiver's conditions. Coastkeeper further alleged the modified waiver violated the antidegradation policy by failing to provide for effective monitoring to adequately and effectively detect degradation. It contended the State Board improperly excluded relevant scientific evidence, the U.C. Davis Report, and violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) by failing to consider supplemental environmental review.

The State Board demurred to the fifth cause of action, violation of CEQA, arguing Coastkeeper had failed to exhaust its administrative remedies on this issue because it had failed to raise any CEQA issue before the State Board.

The Trial Court's Ruling

Section 13330, subdivision (e), provides that Code of Civil Procedure section 1094.5 shall govern proceedings in the trial court and that the trial court shall exercise its independent judgment on the evidence. "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of

convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 (*Fukuda*).)

In its ruling, the trial court reviewed the terms of the 2004 waiver (12AA 2814) and the 2010 preliminary draft. It compared the Regional Board's 2012 waiver to both the 2004 waiver and to the 2010 preliminary draft. It found the 2012 waiver "more demanding" than the 2004 waiver, but "less demanding" than the 2010 preliminary draft.

The court found the modified waiver was "not consistent with the Basin Plan because it lacks sufficiently specific, enforceable measures and feedback mechanisms needed to meet the Basin Plan's water quality objectives." "The problem with the Modified Waiver is that there is little to support a conclusion that the Waiver will lead to quantifiable improvements in water quality or even arrest the continued degradation of the region's waters."

The court found the modified waiver's iterative approach of requiring improved management practices until discharges no longer cause or contribute to exceedances of water quality standards was unlikely to work because the modified waiver contained no provisions that would identify the individual dischargers causing or contributing to exceedances. The court noted that "implementing management practices is not a substitute for actual compliance with water quality standards." Further, the modified waiver failed to define what constituted an "improved" management practice or to include any standards for verification of reduced pollution. The court also faulted the modified waiver for subjecting only a small number of growers (3 percent of growers and 14 percent of irrigated acreage) to the more stringent requirements of Tier 3. The vast majority of growers were not subject to individual surface monitoring to identify sources of exceedances or the effectiveness of individual farm management practices.

The court found the modified waiver did not comply with the NPS Policy (discussed *ante* in the Legal Background) "because it lacks adequate monitoring and reporting to verify compliance with requirements and measure progress over time;

specific time schedules designed to measure progress toward reaching quantifiable milestones; and a description of the action(s) to be taken if verification/feedback mechanisms indicate or demonstrate management practices are failing to achieve the stated objectives."

The court did not decide whether the modified waiver complied with the antidegradation policy (also discussed *ante*), but instead found it was unable to determine compliance because the State Board had failed to follow the procedure set forth in *AGUA, supra,* 210 Cal.App.4th 1255, as necessary to determine compliance with the antidegradation policy.

The court further found the modified waiver did not have adequate monitoring provisions because the cooperative surface receiving water monitoring for those in Tier 1 and Tier 2 fail to identify the source of exceedances. The court found the modified waiver was not in the public interest "because there is no evidence it will lead to quantifiable improvement in water quality or arrest the continued degradation of the Central Coast Region's waters."

The court found the State Board did not abuse its discretion in refusing to admit the U.C. Davis Report. However, it directed the State Board on remand to reconsider whether the report should be admitted.

The trial court did not rule on the demurrer to the CEQA claim. While it was not persuaded that supplemental CEQA review of the State Board's changes to the 2012 waiver (that resulted in the modified waiver) was required, the court directed the State Board on remand to consider whether supplemental review is required to comply with CEQA.

The trial court issued a peremptory writ of mandate compelling the State Board to set aside the modified waiver and reconsider the 2012 waiver, and to take sufficient action to "to formulate a new or modified waiver under Water Code § 13269 or another program that satisfies the waste discharge requirements of the Water Code." The court

permitted the State Board to allow the modified waiver to remain in effect while it formulated a new waiver as directed.

The State Board and interveners appealed.

DISCUSSION

I

Exhaustion of Administrative Remedies

The State Board contends Coastkeeper failed to exhaust administrative remedies as to multiple issues by failing to raise those issues at appropriate times during the administrative process. The State Board identifies five such issues: (1) pesticide control provisions; (2) tile drain provisions; (3) the buffer provisions; (4) the tiering provisions; and (5) the individual monitoring provisions (the five specific provisions). Both the State Board and interveners contend Coastkeeper failed to exhaust administrative remedies as to the antidegradation policy claim.

Coastkeeper argues it does not contend any or all of the five specific provisions make the modified waiver unlawful. Rather, Coastkeeper claims to be challenging the modified waiver's failure to comply with the provisions of section 13269 requiring consistency with the basin plan and public interest and mandating effective verification requirements. Thus, according to Coastkeeper, the exhaustion requirement does not apply to the five specific provisions.

A. *The Exhaustion Doctrine*

"In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) The rule "is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts." (*Id*. at p. 293.)

"The primary purpose of the doctrine 'is to afford administrative tribunals the opportunity to decide in a final way matters within their area of expertise prior to judicial

review.' [Citation.] 'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' [Citations.] The doctrine prevents courts from interfering with the subject matter of another tribunal. [Citation.]" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874.) Another purpose of the doctrine " 'is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' [Citation.]" (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501.)

To advance the purpose of the exhaustion doctrine, the exact issue, not merely generalized statements, must be raised. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) " 'The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [Citation.]' [Citation.] An appellate court employs a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies. [Citation.]" (*Id.* at p. 536.)

In a petition for review by the State Board, the issues an aggrieved party may raise are limited. "If the action or inaction that is subject of the petition was taken by the regional board after notice and opportunity to comment, the petition to the state board shall be limited to those substantive issues or objections that were raised before the regional board." (Cal. Code Regs., tit. 23, § 2050(c).)

B. *The Five Specific Provisions*

We begin by noting that we need not decide whether Coastkeeper properly exhausted its administrative remedies as to the provisions relating to pesticide controls, tile drains, and vegetation or riparian buffers because the trial court did not rely on any of these provisions in finding the modified waiver failed to comply with the law. Instead, the court indicated that it was "not persuaded that an adequate Waiver necessarily must

include nitrogen balancing ratios, broader farm plan reporting, more rigorous pesticide controls, mandatory vegetation/riparian buffers, and/or more comprehensive tile drain monitoring." (Fn. omitted.) Thus, no issue relating to pesticide controls, tile drains, and vegetation or riparian buffers is before us because none of these subjects formed a basis for the trial court's ruling or otherwise supported it in any way.

The trial court found the "fundamental problem" with the modified waiver was that the number of growers subject to the stringent requirements of Tier 3 was too small. Dischargers are in Tier 3 if they meet one of two criteria: (1) they grow crops with a high potential to discharge nitrogen to groundwater and their total irrigated acreage is 500 acres or more; or (2) they apply chlorpyrifos and diazinon and irrigation or stormwater is discharged to a listed impaired waterbody. Coastkeeper did raise the issue, before both the Regional Board and the State Board, that dischargers can change use of the two named pesticides to others such as malathion, and thus reduce the number of growers in Tier 3. To that extent only, Coastkeeper exhausted administrative remedies as to the challenge to Tier 3.

The trial court found the modified waiver had inadequate monitoring provisions. That finding was based in part on the limitations (e.g., inability to identify specific dischargers) of representative monitoring as opposed to individual monitoring. Coastkeeper did raise the need for individual monitoring before both the Regional Board and the State Board. Indeed, the State Board conceded the issue of cooperative groundwater monitoring was properly raised. Thus, the issue of the inadequacy of representative or cooperative monitoring was properly exhausted.

C. *The Antidegradation Policy*

The first time the issue of noncompliance with the antidegradation policy was raised was a July 3013 comment to a draft of the modified waiver by a group of environmental interests that did not include Coastkeeper. That comment specifically objected that the antidegradation analysis had not been conducted in accordance with the

recent case, *AGUA, supra,* 210 Cal.App.4th 1255. Although *AGUA* was not yet decided when the waiver was before the Regional Board or when Coastkeeper filed its petition for review with the State Board, the State Board found that compliance with the antidegradation policy in general had not been raised during the relevant processes. For this reason, the State Board found failure to exhaust administrative remedies as to that policy.[5] (See Cal. Code Regs., tit. 23, § 2050(c) [where challenged action or inaction taken by the regional board, the petition to the state board shall be limited to those substantive issues or objections that were raised before the regional board].)

Coastkeeper argues administrative remedies were exhausted because the Regional Board was apprised of the need to satisfy the antidegradation policy. Several comments urged the board to act to prevent further degradation. Coastkeeper notes the Regional Board made findings that the policy had been satisfied. While it is clear the Regional Board was aware of the policy and the need to comply with it, there was no specific objection that it had failed to do so. Coastkeeper has not pointed to any comment before the Regional Board that mentioned the policy. Thus, administrative remedies were not exhausted as to the objection of noncompliance with the antidegradation policy.

II

Standard of Review of Adequacy of Modified Waiver

Where, "as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. [Citations.]" (*Fukuda, supra,* 20 Cal.4th at p. 824.) "[W]e review its factual determinations under the

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[5] The State Board noted it had undertaken a review of the antidegradation policy in light of *AGUA* and understood "the need to provide better tools for regional boards to conduct an appropriate analysis." "These resources will be available to the Central Coast Water Board as it develops its next iteration of the [modified waiver]."

substantial evidence standard and its legal determinations under the de novo standard. [Citations.] '[W]e are not bound by the legal determinations made by the state or regional agencies or by the trial court. [Citation.] But we must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.' [Citation.]" (*Coastal Environmental Rights Foundation v. California Regional Water Quality Control Board* (2017) 12 Cal.App.5th 178, 190.)

Accordingly, we review the factual findings of the trial court for substantial evidence. The ultimate question of whether the modified waiver complies with the law is a question of law we review de novo. (*AGUA, supra,* 210 Cal.App.4th at p. 1268 [de novo review of whether regional board order complied with law].)

III

Compliance with Basin Plan

A. *The Trial Court's Findings*

The trial court found "the Modified Waiver is not consistent with the Basin Plan because it lacks sufficiently specific, enforceable measures and feedback mechanisms needed to meet the Basin Plan's water quality objectives." The court found "little to support a conclusion that the [Modified] Waiver will lead to quantifiable improvements in water quality or even arrest the continued degradation of the region's waters."

After setting out at length the parties' contentions, the trial court found three areas in which the modified waiver was inadequate: (1) it continued the failed approach of the 2004 waiver which had failed to improve the region's water quality or even halt its continued degradation; (2) its coverage was inadequate because it included too few growers (about 3 percent of growers and 14 percent of irrigated acreage) in Tier 3 and subjected the vast majority of growers to the same or less stringent requirements than the 2004 waiver; and (3) its monitoring requirements were inadequate because the cooperative monitoring would not identify the individual dischargers who were causing

or contributing to the pollution problem and there were no standards or benchmarks for showing improvement.

Significantly, the court did not find that an adequate waiver must include "nitrogen balancing ratios, broader farm plan reporting, more rigorous pesticide controls, mandatory vegetation/riparian buffers, and/or more comprehensive tile drain monitoring."[6] (Fn. omitted.)

B. *Contentions of Error*

The State Board and interveners contend, in general, that the trial court made three significant errors in approaching this case. First, they contend the court erroneously compared the modified waiver to the 2010 preliminary draft. They argue the draft, which was never adopted by the Regional Board, had no legal significance and should not be used as evidence. The State Board adds that the court erred in using the 2010 preliminary draft as the baseline for adequate standards.

Second, appellants and interveners contend the trial court failed to defer to the State Board's technical expertise and failed to apply a presumption of correctness to its findings. In particular, appellants contend the court failed to recognize and defer to the State Board's plan to refer many of the difficult, technical questions to an expert panel. They correctly note that deference is required.

Administrative findings come before the court with "a strong presumption of correctness." (*Fukuda, supra,* 20 Cal.4th at p. 817.) "An administrative agency's construction of the authority vested in the agency to carry out a statutory provision is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized." (*Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1006.) "Greater deference should be given to an agency's

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[6] Rather than focus their briefing on the trial court's actual ruling, appellant and interveners devote extensive (and needless) briefing on these uncontested issues.

interpretation where ‘ “the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.” ’ ” (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1041.)

Third, appellant and interveners argue the trial court ignored the reasonableness standard of the Porter-Cologne Act and the need to balance competing interests. The goal of water quality regulation is “to attain the highest water quality which is *reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (§ 13000, italics added.) Water quality objectives are established for “the *reasonable* protection of beneficial uses of water or the prevention of nuisance within a specific area.” (§ 13050, subd. (h), italics added.)

With these claims and considerations in mind, we turn to the question of whether substantial evidence supports the trial court’s findings. While the court primarily criticized the *approach* of the modified waiver, we focus on whether the *conditions* in the modified waiver are consistent with the basin plan. (§ 13269, subd. (a).)

1. *Coverage*

The trial court found the low number of growers in Tier 3 was a “fundamental problem” with the modified waiver. In addition, the court noted Tier 3 growers could move to a lower tier by participating in approved program or project or, in some cases, using pesticides other than diazinon or chlorpyrifos.

The modified waiver categorizes dischargers into three tiers. These tiering categories are the same as those originally contained in the 2012 Waiver. A discharger falls in Tier 3 if the individual farm or ranch meets one of the two following criteria: (1) grows crop types with a high potential to discharge nitrogen to the groundwater at the farm/ranch, and the total irrigated acreage of the farm/ranch is greater than or equal to

500 acres; or (2) applies chlorpyrifos or diazinon at the farm/ranch, and the farm/ranch discharges irrigation or stormwater runoff to a waterbody listed as impaired due to toxicity or pesticides.

As discussed *ante* in Part IB, Coastkeeper objected very narrowly to only one aspect of the tiering system; its objection was only to the ability of a Tier 3 grower to move to a lower tier by using different pesticides. In other words, Coastkeeper objected that the modified waiver's focus, evident in the tiering structure, was limited to two pesticides--chlorpyrifos and diazinon.

The Regional Board decided to include only these two pesticides as part of the tiering structure because they were the major causes of severe toxicity in agricultural areas. It had considered using the list of high risk or restricted use pesticides developed by the Department of Pesticide Regulation, but had determined that many of these pesticides were not in broad use in the region and had not been documented to cause toxicity or pesticide specific problems. The Regional Board also considered including, in the tiering, the more than 75 pesticides in use, but concluded the result would have been a very complicated process. It explained its final decision: "To focus on priority water quality issues and provide for a less complicated tiering process, staff chose to include only those pesticides that are currently documented as a primary cause of toxicity in the Central Coast region – chlorpyrifos and diazinon."

In comments to a draft of the modified waiver, Coastkeeper claimed, "New information indicates that growers are switching away from Diazinon and chlorpyrifos and towards malathion, which will result in many fewer growers being enrolled in the most stringent regulatory tier, Tier 3." This "new information," however, is not included in the record (or at least Coastkeeper has not identified it on appeal). Given the lack of evidence to refute the reasonable determination to focus regulation on the main pesticides known to be in use and causing the water quality problems, the trial court's finding as to the inadequacy of the tiering structure is not supported by substantial evidence.

2. *Adequacy of Monitoring Requirements*

Section 13269, subdivision (b) provides a waiver shall include monitoring requirements. "Monitoring requirements shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions." (*Id*., subd. (a)(2).) The issue here is whether the monitoring provisions of the modified waiver are adequate.

a. Monitoring Provisions in the Modified Waiver

The modified waiver includes three monitoring and reporting programs, one for each tier. For Tier 1, surface receiving water quality must be monitored, either individually or cooperatively; cooperative monitoring is encouraged. Dischargers must develop a plan describing how the monitoring will achieve objectives, providing for certain analyses by a certified laboratory, and including a schedule for sampling. Dischargers must file an annual report that includes a summary of reported exceedances, a discussion of data illustrating compliance with water quality standards, and the evaluation of pesticide and toxicity analyses. Groundwater monitoring requires sampling of wells for private domestic drinking water and agricultural groundwater. Again, this monitoring may be cooperative. The focus of the groundwater monitoring is on drinking water and the presence of nitrates.[7]

The monitoring program for Tier 2 contains the same requirements as that for Tier 1 and adds a calculation of nitrate-loading risk factors, reporting of the total nitrogen applied and an annual compliance form, and photo monitoring. The annual compliance

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[7] The trial court criticized the monitoring program for emphasizing the quality of drinking water over the effectiveness of implemented management practices. Coastkeeper's brief, however, stresses the problem of polluted drinking water. We do not fault the State Board and Regional Board for focusing on the most immediate problem. (See *U.S. Cellular Corp. v. F.C.C.* (D.C. Cir. 2001) 254 F.3d 78, 87 [Regulatory "agencies need not address all problems 'in one fell swoop' "], cited in *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 421.)

form required verifications of compliance, identification of discharges and management practices, disclosure of nitrogen concentrations and application of fertilizers, and proof of backflow prevention. There were additional requirements for dischargers with a high nitrate-loading risk or who were adjacent to an impaired waterbody.

The monitoring program for Tier 3 added individual surface discharge monitoring and reporting, an irrigation and nutrient plan for dischargers with a high nitrate-loading risk, and a water quality buffer plan for those adjacent to impaired waterbodies.

The trial court rejected some of Coastkeeper's claims of deficiency, such as the failure to require all dischargers to perform individual monitoring, the frequency of sampling, statistical monitoring, and the disclosure of monitoring information to the public. Nonetheless, the court found the monitoring requirements were inadequate because (1) they failed to provide for the identification of the individual discharger responsible for exceedances, and (2) they failed to verify compliance and assess the effectiveness of management practices.

b. Failure to Identify Specific Discharger

As the trial court recognized, both the section 13269 and the NPS Policy ("third-party programs") expressly allow the use of group or watershed monitoring. Individual monitoring would be costly and could overwhelm the Regional Board with paperwork from over 3,000 dischargers. The court concluded, therefore, that the State Board acted within its discretion in limiting individual surface discharge monitoring to high risk dischargers. The court also found, however, that group monitoring failed to identify the particular source of an exceedance. It noted that the State Board acknowledged this limitation and suggested a possible solution, but failed to include any changes to address the problem. For this reason, the court concluded the modified waiver was inadequate.

The State Board expressed skepticism that the Regional Board had selected a monitoring program "best suited to meet the purpose of identifying and following up on high-risk discharges." It suggested the monitoring program adopted by the Central

Valley Regional Water Quality Control Board may be more appropriate. That program provided that a detected exceedance may trigger source identification, management practice implementation, and follow up reporting. The State Board then decided to "ask the Expert Panel to consider both the receiving water and discharge monitoring approaches to identification of problem discharges." It found that in the interim, focusing the monitoring program on the high-risk dischargers was appropriate.

The trial court, however, failed to consider the State Board's referral of the issue to the expert panel for long-term solutions. This referral reflects the State Board's view that modified waiver "constitutes only an interim determination as to how to move forward on the difficult and complex questions presented." The only alternative solution offered by Coastkeeper was mandatory individual monitoring for all dischargers. The court upheld the State Board's finding that mandatory individual monitoring was too costly, too burdensome, and would overwhelm the Regional Board.

Without any evidence of a viable alternative, the trial court's finding that the State Board did nothing to address the identification of the source of exceedances is not supported by substantial evidence.

c. Verification

Monitoring requirements must be designed to verify "the adequacy and effectiveness of the waiver's conditions." (§ 13269, subd. (a)(2).) The trial court found the monitoring requirements would show whether the implemented management practices were reducing pollution. The court found, however, that the modified waiver did not "set any benchmarks for defining how much 'improvement' a grower must show to demonstrate compliance" and thus was inadequate.

It appears these problems that the trial court perceived in the modified waiver do not signal a failure to meet section 13269's requirement to verify "the adequacy and effectiveness of the waiver's conditions." The court found the monitoring *met* this requirement by determining and reflecting whether current management practices

reduced pollution. Rather, the question posed by the absence of benchmarks or a definition of "improvement" is whether the monitoring provisions fail to meet the requirements of the NPS Policy. That policy mandates that an NPS program have a high likelihood of attaining water quality standards, with specific time schedules and quantifiable milestones to measure progress. We next discuss whether the modified waiver complies with that policy.

IV

Compliance with NPS Policy

As set forth *ante* in the Legal Background, to comply with the NPS Policy, five key elements must be present: (1) address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements; (2) have a high likelihood that the program will attain water quality requirements, including consideration of the management practices to be used and the process for ensuring their proper implementation; (3) include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements; (4) include sufficient feedback mechanisms to determine if the program is achieving its stated purpose; and (5) make clear, in advance, the potential consequences for failure to achieve the program's stated purposes.

A. *Time Schedules and Milestones*

The trial court found the modified waiver did not meet the requirements of the NPS Policy because it lacked (1) adequate monitoring and reporting to verify compliance; (2) specific time schedules and quantifiable milestones; and (3) a description of enforcement actions if management actions fail to achieve objectives. The court found the State Board had failed to show a high likelihood that the modified waiver would be successful in attaining the applicable water quality standards.

The State Board stresses that the NPS Policy envisions an iterative approach, with ongoing adjustments and improvements to control NPS pollution. This less structured

approach is necessary given the "significant" challenges of preventing and controlling NPS pollution. Interveners argue instantaneous compliance with water quality objectives is not required. They fault the trial court for expecting "a step-by-step time schedule with specific dates, and a monitoring and reporting program designed to determine compliance with said time schedule." Interveners further argue the modified waiver does indeed include time schedules and milestones.

We agree that the modified waiver does contain a number of time schedules and milestones set forth in tables two, three, and four thereto. Most of the time schedules relate to dates by which certain reports must be submitted. Some address specific actions, such as installing backflow prevention devices and destroying abandoned groundwater wells. There are specific milestones for Tier 3 dischargers relating to percentage reduction in turbidity or sediment load, nutrients, and nitrogen.

Four provisions in the modified waiver set time schedules for Tier 3 dischargers to effectively control waste discharges of pesticides and toxic substances, sediment and turbidity, nutrients, and nitrates.

B. *Provision No. 83.5*

Compliance with these four Tier 3 time schedules, as well as compliance with the requirements not to cause or contribute to exceedances and to comply with the basin plan, is governed by provision No. 83.5. That provision requires dischargers to implement management practices to reduce or prevent discharges that cause or contribute to exceedances of water quality standards. If those practices are ineffective, the discharger must implement improved management practices.

Provision No. 83.5 is the crux of this dispute. It effectively overrides the specific time schedules by defining compliance to mean the implementation of increasingly improved management practices and it does so without any definition or quantification of improvement. The State Board added this provision as part of its review and modification of the 2012 Waiver. The State Board explained this provision was added to

clarify that it would not take any enforcement action against a discharger who was implementing and improving management practices to address water quality problems. Dischargers need only make "a conscientious effort to identify and implement the management practices that effectively address the water quality issue." The State Board noted this approach was consistent with the NPS Policy and public interest in addressing a complex water quality issue that has few (if any) immediate and easy solutions.

Interveners contend the definition of an improved management practice is provided by the NPS Policy's citation to *Northwest Indian Cemetery Protective Ass'n. v. Peterson* (9th Cir. 1985) 764 F.2d 581, rev. on another ground in *Lyng v. Northwest Indian Cemetery Protective Ass'n*. (1988) 485 U.S. 439. In *Northwest Indian*, the State of California and various non-profit organizations challenged federal plans to permit timber harvesting and construct a road in a national forest. One point of contention was that implementation of the federal plans would not meet the water quality requirements for turbidity set by the regional board. The federal government argued those requirements had been replaced by the acceptance of Forest Service Best Management Practices (BMPs). The Ninth Circuit rejected this argument, finding that BMPs are not standards in and of themselves and adherence to BMPs does not assure compliance. The court made the point that a BMP can be terminated or modified if a stricter BMP is required, such as to meet state water quality standards. (*Id*. at pp. 588-589.)

We read *Northwest Indian* to distinguish between adherence to a BMP and compliance with the applicable water quality standard. The NPS Policy makes the same distinction. Management practice "implementation never may be a substitute for meeting water quality requirements." *Northwest Indian* notes that compliance with the water quality standard may require a stricter (or improved) management practice. That is also what provision No. 83.5 says. Neither *Northwest Indian* nor provision No. 83.5 provides any guidance as to how much improvement is required once a certain management practice is determined to be ineffective in meeting the water quality standard.

As we have explained, the NPS Policy *expressly* requires time schedules and quantifiable milestones; the purpose is to assure that the water quality objectives are eventually met. But there is no requirement that the ultimate goal of preventing and cleaning up NPS pollution be accomplished within the lifespan of the modified waiver. Although the State Board has discretion to determine how much time is reasonable as well as appropriate milestones and how quickly they must be met, the modified waiver does not reflect any such determinations. Rather than establishing time schedules and milestones, it requires only vague and indefinite improvement--"a conscientious effort." Without specific time schedules and quantifiable milestones, there is not a "high likelihood" the program will succeed in achieving its objectives, as required by NPS Policy.

In *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, this court found the State Board failed to implement certain salinity objectives of the 1995 Bay-Delta Plan at three locations. The State Board delayed implementation at these three locations by several years. We found this delay was not an adequate implementation because nothing in the 1995 Bay-Delta Plan allowed for such delay. The State Board was in effect amending the 1995 Bay-Delta Plan without complying with the procedural requirements for an amendment. (*Id*. at p. 735.)

Here, the State Board is rewriting--or amending--the NPS Policy by replacing the required element of specific time schedules and quantifiable milestones with a vague requirement of "improved" management practices and a "conscientious effort." As in *State Water Resources Control Bd. Cases*, rewriting the NPS Policy to delay, diminish, or dilute a requirement that is part of the policy is improper. While we defer to an administrative agency's interpretation of a statute, regulation, or policy involving its area of expertise, we owe no deference to an interpretation that "flies in the face of the clear language and purpose of the interpreted provision." (*Communities for a Better Environment v. State Water Resources Control Bd*. (2003) 109 Cal.App.4th 1089, 1104.)

The trial court did not err in finding the modified waiver did not comply with the NPS Policy due to the absence of "specific time schedules designed to measure progress toward reaching quantifiable milestones."

Because the modified waiver does not comply with the NPS Policy, it does not meet the requirements for a waiver under section 13269, subdivision (a). We need not separately determine whether the modified waiver is "in the public interest" because it fails to meet the legal requirements in any event.

V

Other Contentions

A. *Failure to Consider U.C. Davis Report*

The fourth cause of action in Coastkeeper's petition for writ of mandate alleged the State Board improperly excluded relevant scientific evidence, the U.C. Davis Report. The trial court was "not persuaded that the [State] Board abused its discretion in refusing to admit the U.C. Davis report. However, on remand the [State] Board is directed to reconsider whether the Report should be admitted into the record."

The State Board contends it was inappropriate to direct reconsideration of the decision not to admit the report and the court's ruling is inconsistent with the finding of no abuse of discretion. "The trial court's Ruling[] seems to reflect an approach that since the court remanded the Modified Waiver back to the State Board, then everything else that Coastkeeper wanted should also be reconsidered on remand."

We reject this view of the trial court's ruling. We note that the modified waiver was originally scheduled to expire in 2017. Thus, a replacement may well be on the horizon. Consequently, it is appropriate that the Regional and State Boards be open to considering new material, such as the report of the expert panel and any new reports from other experts. We find no error in this aspect of the ruling.

B. *CEQA Review*

Coastkeeper alleged the State Board had violated CEQA by failing to undertake any environmental review of the modifications to the 2012 waiver. The State Board demurred to this cause of action on the basis that Coastkeeper had failed to exhaust administrative remedies on this issue. The trial court did not specifically rule on the demurrer, but did find it possible "some additional environmental review was required." The court directed the State Board on remand to consider what supplemental environmental review was required to comply with CEQA. The State Board contends the trial court erred in failing to rule on its demurrer and argues strenuously no further CEQA review was required. It further objects that the court is opening remand to a reconsideration of "everything else Coastkeeper wanted."

When changes are made to a project, such as the State Board's modifications to the 2012 waiver, the agency making the modifications must determine whether the initial environmental document remains sufficient or whether revisions to that document or supplemental review is required. (*Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 952-953.) The trial court merely directed compliance with this requirement, and did not err in so doing.

DISPOSITION

The judgment is modified to provide that a writ of mandate shall issue commanding the State Board to commence further proceedings as appropriate to formulate a new or modified waiver under Water Code section 13269 or another program that satisfies the waste discharge requirements of the Water Code and applicable state

water policies, consistent with this opinion. The parties shall bear their own costs of appeal. (Cal. Rules of Court, rule 8.278(a).)

Duarte, J.

We concur:

Robie, Acting P.J.

Murray, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Monterey Coastkeeper et al. v. State Water Resources Control Board
C080530
Sacramento County
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Site #1 - KC30
Keepo Creek

site	location	month	day	year	Flow CFS	rain type	24-rain inches	48-rain inches	Previous 30-day rain	water temp Celsius	*reporting limit NH3 mg/L 0.02*	NO3 mg/L 0.1*
001-2002	**Rain Season**											
1	**KC30-Keepo Cre**	**11**	**11**	**2002**		**1**	**0**	**0**	**6.6**		**0.20**	**40.0**
2002-2003	**Rain Season**											
1	KC30-Keepo Creek	12	16	2002		2	3.21	8	17.44	13	0.49	53.8
1	KC30-Keepo Creek	1	15	2003	1.08		0.2		15	12	0.20	23.8
1	KC30-Keepo Creek	2	10	2003	0.15	1	0		0.24	7	0.10	27.5
1	KC30-Keepo Creek	3	17	2003	1.22	3	0.25	2.5	8.84	12	0.18	25.0
1	KC30-Keepo Creek	4	14	2003		3	0.75	3	3.92	10	0.20	17.5
1	KC30-Keepo Creek	5	12	2003	0.17	4	0	0	4.72	12	0.07	22.0
1	KC30-Keepo Creek	6	9	2003		1	0	0	0	13	0.08	30.0
2003-2004	**Rain Season**											
1	KC30-Keepo Creek	11	12	2003		1	0	0	4.68	10.3	0.19	34.0
1	KC30-Keepo Cree	12	17	2003		1	0		4.8	9.78	0.17	60
1	KC30-Keepo Creek	2	9	2004		1	0	0.25	5.2 20.84	9.0	0.12	35.0

Nitrate on Turtle Cre	KC30	TUR(	TUR2(	Ideal	Legal
Dec-02	53.8	3	12.5	1	45
Jan-03	23.8	1.5	4.2	1	45
Feb-03	27.5	0.5	2	1	45
Mar-03	25.0	1.1	3.4	1	45
Jan-03	17.5	0.6	1.5	1	45
May-03	22.0	0.4	2.1	1	45
Jun-03	30.0	0.3	0.3	1	45
Nov-03	34.0	0.1	0.1	1	45
Dec-03	60	2.7	8.8	1	45
Feb-04	35.0	1.2	4.5	1	45

OrthoP	rbidity	TSS	Cond	alinity	pH	opper	zinc	lead	BacT -Tot	BacT-ecoli	Lab
mg/L	NTU	mg/L	umhos/cm	mg/L		ug/L	ug/L	ug/L	mpn/100ml		all UNCA e
0.02*	1.0*	4.0*	10.0*	1.0*		2.0*	20.0*	1.0*			
8.00	40.0	49.2	737.0	84.0	7.4	11.5	<20	1.0			
1.16	6.5	3.2	596.4	64.0	7.4	3.4	0.0	0.0	>2419.2	126.7	
0.64	4.2	0.0	643.8	86.6	7.5	<2	<20	<1	<2419.2	18.9	
0.73	12.0	7.2	627.9	96.2	7.6	3.1	<20	<1	>2419.2	>2419.2	
0.79	6.8	9.2	478.0	124.7	7.7				>2419.2	>2419.2	
0.56	1.2	<4	616.0	119.6	7.7	<2.0	<20.0	<1.0	533.5	135.4	
0.74	1.1	<4	758.2	154.0	8.0	<2.0	<20.0	<1.0			
0.43	1.1	<4	1031.9	176.6	7.5	2.1	<20	<1			
1.05	2	<4	1020	52	7.6						
0.64	4.4	<4	768.9	86.0	7.5						

other notes
xcept as noted

Site #2 - TUR60
Upper Turtle Creek

site	location	month	day	year	Flow CFS	rain type	24-rain inches	48-rain inches	Previous 30-day rain	water temp Celsius	NH3 mg/L 0.02*	NO3 mg/L 0.1*	OrthoP mg/L 0.02*
2001-2002	**Rain Season**												
2	**TUR60-Tur**	**10**	**25**	**2002**		**1**	**0**	**0**	**0**	**12**	**<0.2**	**<0.2**	**<0.06**
2002-2003	**Rain Season**												
2	TUR60-Turtle	12	16	2002		2	3.21	8	17.44	10.5	0.14	3.0	0.43
2	TUR60-Turtle	1	15	2003	34.2		0.2		15	12	0.23	1.5	0.08
2	TUR60-Turtle	2	10	2003	1.52	1	0		0.24	9.5	0.03	0.5	0.02
2	TUR60-Turtle	3	17	2003	13.2	3	0.25	2.5	8.84	10.75	0.43	1.1	0.06
2	TUR60-Turtle	4	14	2003		3	0.75	3	3.92	11.4	0.14	0.6	0.15
2	Tur60-Turtle	5	12	2003		4	0	0	4.72	12	0.07	0.4	0.07
2	Tur60-Turtle	6	9	2003		1	0	0	0	13.5	0.19	0.3	0.06
2	Tur60-Turtle	7	14	2003		1	0	0	0	15	0.08	0.1	0.23
2003-2004	**Rain Season**												
2	Tur60-Turtle	11	12	2003		1	0	0	4.68	12.2	0.13	0.1	0.04
2	Tur60-Turtle	12	17	2003		1	0		4.8	9.5	0.2	2.7	0.08
2	Tur60-Turtle	2	9	2004		1	0	0.25	5.2 20.84	8.0	0.14	1.2	0.09

urbidity	TSS	Cond	lkalinity	pH	copper	zinc	lead	Lab
NTU	mg/L	mhos/cm	mg/L		ug/L	ug/L	ug/L	
1.0*	4.0*	10.0*	1.0*		2.0*	20.0*	1.0*	
0.8	**<1.0**	**250.0**		**7.0**	**<0.5**	**<0.05**	**<0.005**	**B&R**
160.0	69.6	99.3	47.6	7.2	12.0	<20	1.4	
16.0	4.0	129.2	53.0	7.3	2.3	0.0	0.0	
5.3	0.0	170.8	78.4	7.3	<2	<20	<1	
39.0	8.8	155.9	75.4	7.4	3.7	<20	<1	
5.2	<4	186.0	100.0	7.5				
1.7	<4	199.0	107.8	7.4	<2.0	<20.0	<1.0	
1.0	<4	233.3	144.0	7.6	<2.0	<20.0	<1.0	
1.3	<4	267.5	151.2	7.0	<2.0	<20.0	<1.0	
1.9	<4	283.4	133.8	6.8	<2	<20	<1	
45	9.2	170.4	54	8				
8.7	<4	174.4	82.0	7.6				

other notes

›s, EC- Oakton mtr frm EPA

Site #3 - TUR40
Turtle Creek by Westside Rd

site	location	month	day	year	Flow CFS	rain type	24-rain inches	48-rain inches	Previous 30-day rain	water temp	NH3 mg/L	NO3 mg/L	rthoP mg/L
2002-2003	**Rain Season**									**Celsius**	**0.02***	**0.1***	**0.02***
3	TUR40-Turtle	12	16	2002		2	3.21	8	17.44	14	0.14	2.6	0.45
3	TUR40-Turtle	1	15	2003	37.04		0.2		15	10	0.21	1.1	0.33
3	TUR40-Turtle	2	10	2003		1	0		0.24	8.75	0.03	0.3	0.06
3	TUR40-Turtle	3	17	2003	19.38	3	0.25	2.5	8.84	10.5	0.40	1.0	0.11
3	TUR40-Turtle	4	14	2003		3	0.75	3	3.92	10	0.16	0.5	0.10
3	Tur40-Turtle	5	12	2003	2	4	0	0	4.72	13	0.05	0.3	0.07
3	Tur40-Turtle	6	9	2003		1	0	0	0	12.5	0.06	0.2	0.14
2003-2004	Rain Season												
3	Tur40-Turtle	12	17	2003		1	0		4.8	8	0.14	2.3	0.17
3	Tur40-Turtle	2	9	2004		1	0	0.25	5.2	8.5	0.09	1.2	0.09
									20.84				

urbidity NTU	TSS mg/L	Cond ios/cm	kalinity mg/L	pH	opper ug/L	zinc ug/L	lead ug/L	BacT -Tot ipn/100ml	BacT-ecoli	Lab
1.0*	**4.0***	**10.0***	**1.0***		**2.0***	**20.0***	**1.0***			
170.0	119.6	98.7	51.8	7.1	11.6	<20	1.5			
15.0	1.6	127.1	53.0	7.3	2.0	0.0	0.0			
8.3	0.0	165.9	76.2	7.1	<2	<20	<1			
31.0	5.6	153.5	80.6	7.4	3.0	<20	<1			
6.3	<4	179.4	95.6	7.4						
1.3	<4	187.0	103.0	7.2	<2.0	<20.0	<1.0			
<1	<4	219.2	132.0	7.6	<2.0	<20.0	<1.0			
30	4	176.9	62	7.5						
5.9	<4	172.6	82.0	7.4						

other notes

Site#4 - TUR20
Turtle Creek at Hop Kiln Bridge

site	location	month	day	year	Flow-CFS	rain type	24-rain inches	48hr rain inches	Rainfall Previous 30 days	water temp	NH3 mg/L	NO3 mg/L	OrthoP mg/L
2002 - 2003	**Rain Season**									**Celsius**	**0.02***	**0.1***	**0.02***
4	TUR20-Turtle	12	16	2002		2	3.21	8	17.44	11	0.25	12.5	1.13
4	TUR20-Turtle	1	15	2003			0.2	1.56	15	12	0.20	4.2	0.14
4	TUR20-Turtle	2	10	2003		1	0	0	0.24	8.25	0.04	2.0	0.12
4	TUR20-Turtle	3	17	2003		3	0.25	2.5	8.84	10	0.34	3.4	0.36
4	TUR20-Turtle	4	14	2003		3	0.75	3	3.92	10.5	0.16	1.5	0.14
4	Tur20-Turtle	5	12	2003		4	0	0	4.72	11.5	0.04	2.1	0.08
4	Tur20-Turtle	6	9	2003		1	0	0	0		0.05	0.3	0.21
4	Tur20-Turtle	7	14	2003		1	0	0	0	15	0.08	0.1	0.34
2003-2004	Rain Season												
4	Tur20-Turtle	12	17	2003		1	0	0	4.8		0.17	8.8	0.26
4	Tur20-Turtle	2	9	2004		1	0	0.25	5.2	10.0	0.09	4.5	0.10
									20.84				

urbidity NTU	TSS mg/L	Cond umhos/cm	Alkalinity mg/L	pH	opper ug/L	zinc ug/L	lead ug/L
1.0*	**4.0***	**10.0***	**1.0***		**2.0***	**20.0***	**1.0***
140.0	92.5	164.5	55.6	7.2	11.0	<20	1.7
14.0	3.2	179.9	54.2	7.3	2.2	0.0	0.0
2.9	0.8	208.0	75.8	7.3	<2	<20	<1
29.0	5.8	207.9	80.2	7.5	2.7	<20	<1
5.3	<4	202.9	102.4	7.4			
1.6	<4	230.0	98.6	7.4	<2.0	<20.0	<1.0
<1	<4	222.5	130.0	7.7	<2.0	<20.0	<1.0
1.6	<4	303.9	155.2	6.7	<2.0	<20.0	<1.0
19	<4	274.5	62	7.6			
10.0	<4	235.1	83.0	7.5			

Draft Flow Calculator

Upstrm

Intervals	0	1	2	3	4	5	6	7	8
depth-inches	0	1	2	4	0	0	0	5	0
depth 1/10's	0	0.083333	0.16666666	0.333333	0	0	0	0.416667	0

Dwnstrm

Intervals	0	1	2	3	4	5	6	7	8
depth inches	0	1	3.75	6.5	1.75	0.75	1	0	
depth 1/10's	0	0.083333	0.31249999	0.541667	0.145833	0.0625	0.083333	0	0

Upstrm		**Dwnstrm**				**Float Trials**
Total Depth	1	Total Depth	1.229167	Upstrm Area	2	
+		+		+		#1
#intervals	8	#intervals	7	Dwnstrm area	2.458333	#2
=		=		div'd by 2		#3
Avg Depth	0.125	Avg Depth	0.175595	=		AVG
X		X		Avg cross	2.229167	
Stream width	16	Stream width	14	sectional area		
=		=				
Sq Feet area	2	Sq Feet area	2.458333			

Area	X	Length	X	Correction	div'd by	Time	=	CFS
2.229167		20		0.8		34.66667		1.028846

Inches/X=tenths

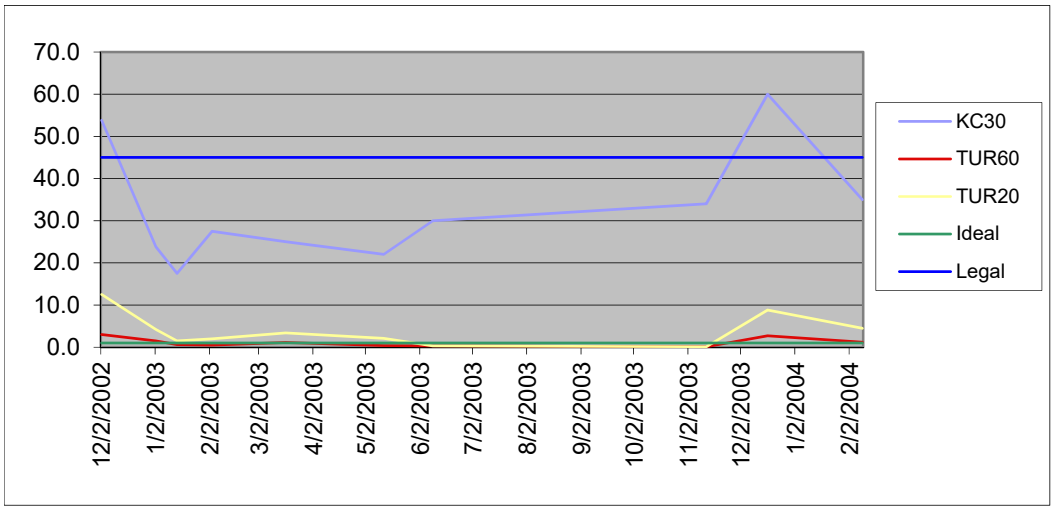
9	10	11	12	0.08333333
0	0	0	0	

9	10	11	12
0	0	0	0

;

26
39
39

34.66667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60.0
50.0
40.0
30.0
20.0
10.0
0.0
12/2/2002
1/2/2003
2/2/2003
3/2/2003
4/2/2003
5/2/2003
6/2/2003
7/2/2003
8/2/2003
9/2/2003
10/2/2003
11/2/2003
12/2/2003
1/2/2004
2/2/2004
KC30
TUR60
TUR20
Ideal
Legal