June 22, 2020

Chairman Jean-Pierre Wolff
California Regional Water Quality Control Board
Central Coast Region
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906

RE: Agricultural Association Partners' Comprehensive Submittal, Including Redline Revisions to the General Order (Ag Partner Submittal) in Response to Draft Environmental Impact Report (DEIR) and Draft General Waste Discharge Requirements for Discharges from Irrigated Lands within the Central Coast Region.

Dear Chairman Wolff:

Numerous agricultural partners in the Central Coast Region have come together to evaluate and respond collectively to the Draft Environmental Impact Report (DEIR) and Draft General Waste Discharge Requirements for Discharges from Irrigated Lands within the Central

Coast Region (Draft Order). The Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, Monterey County Farm Bureau, Western Growers Association, Western Plant Health Association and California Farm Bureau Federation have all put forward significant time and resources to carefully consider the Draft Order and its potential impacts to Central Coast agriculture, develop alternatives to what is proposed, and have retained subject matter experts to evaluate certain provisions contained within the Draft Order and the DEIR. Other agricultural partners also supporting this effort include: California Strawberry Commission, California Association of Pest Control Advisors, Monterey County Vintners & Growers Association, San Benito County Farm Bureau, San Luis Obispo County Farm Bureau, San Mateo County Farm Bureau, Santa Barbara County Farm Bureau, Santa Clara County Farm Bureau and Santa Cruz County Farm Bureau (hereafter all of the Agricultural Association Partners identified above are referred to collectively as "Ag Partners").

We thank you and your staff for providing the additional consideration for submittal of public comment given the unprecedented circumstances associated with the COVID-19 pandemic. That time has allowed us to communicate with our collective grower members, and to obtain input from them and the professionals they rely on for implementation of the Central Coast Regional Water Quality Control Board's (Central Coast Water Board) Irrigated Lands Regulatory Program. Please be assured that we have used the time judiciously to prepare comprehensive and constructive responses to the Draft Order and DEIR. Also, we wish to convey a special thank you to the Irrigated Lands Program staff led by Chris Rose. Mr. Rose and his staff have been available to answer many questions that have arisen over the last five (5) months, and prior to that as well. We very much appreciate their continued availability via email, phone and Zoom.

The Ag Partners identified here cannot support the Draft Order as proposed. As a practical matter, the economic impact of this Draft Order will devastate agriculture in the Central Coast region. The economic cost of nitrogen discharge limits alone (for one crop, in one area) would be over $635 million *annually*. This, coupled with mandatory riparian and operational setbacks, ranch level monitoring, other prescriptive requirements and a seriously deficient DEIR leaves us no choice but to oppose the Draft Order.

However, after much careful thought and deliberation, the Ag Partners have developed revisions to the Draft Order and offer them in redline format in Exhibit 3. These revisions incorporate several alternative approaches that are more refined versions of what was conveyed in concept with our January 21, 2019 submittal. The alternatives proposed by the Ag Partners are consistent with the State Water Resources Control Board's (State Water Board) precedential provisions of Order WQ 2018-0002, *In the Matter of Review of Waste Discharge Requirements General Order No. R5-2012-0116* (ESJ Order), and are intended to provide a reasonable path forward towards our mutual goal of protecting and improving water quality. Importantly, the Ag Partners consider the revisions to be a package approach for Central Coast Water Board consideration and the rejection of any single revision may still render the Draft Order unsupportable for the Ag Partners collectively or individually.

We look forward to working with you and your staff as the process continues to move forward. We are hopeful that we can all agree on an approach that is designed to protect and improve water quality while maintaining stable agricultural economies in our Central Coast communities. The comments and information provided with this submittal were prepared in part by Theresa Dunham of Kahn, Soares & Conway, and Kari Fisher of the California Farm Bureau Federation. Any general legal questions should be directed to Theresa Dunham at tdunham@kscsacramento.com, or (916) 718-5774; CEQA legal questions should be directed to Kari Fisher at kfisher@cfbf.com, or (530) 574-7727. For all other questions, please feel free to contact Abby Taylor-Silva at abby@growershipper.com, or (831) 422-8844, who can then coordinate with all Ag Partners.

Sincerely,

Abby Taylor-Silva
Grower-Shipper Association of Central California

Kari Fisher
California Farm Bureau Federation

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California Association of Pest Control Advisors
California Strawberry Commission
Monterey County Vintners & Growers
Santa Barbara County Farm Bureau
San Benito County Farm Bureau
San Luis Obispo County Farm Bureau
Santa Clara County Farm Bureau
Santa Cruz County Farm Bureau
San Mateo County Farm Bureau

EXHIBIT 1

AGRICULTURAL ASSOCIATION PARTNERS' LEGAL AND POLICY RESPONSES TO DRAFT WASTE DISCHARGE REQUIREMENTS FOR AGRICULTURAL WASTE DISCHARGES FROM IRRIGATED LANDS WITHIN THE CENTRAL COAST REGION

On February 21, 2020, the Central Coast Regional Water Quality Control Board (Central Coast Water Board) issued a Notice of Availability and Opportunity to Comment on the Draft Environmental Impact Report (DEIR) and Draft Waste Discharge Requirements from Irrigated Lands within the Central Coast Region (Draft Order). The public review period on the DEIR and Draft Order as issued on February 21, 2020, ends at 11:59 p.m. on June 22, 2020.

In response to the Notice of Availability and Opportunity to Comment, the Agricultural Association Partners (Ag Partners) have compiled a complete packet of materials that includes the following: 1) Exhibit 1 – Legal and Policy Responses to Draft Order; 2) Exhibit 2 – Legal and Policy Responses to DEIR; 3) Exhibit 3 – Revised Draft Order, New Table C.5-1, Revised MRP,; 4) Exhibit 4 – Narrative Comments/Reasoning for Revisions to Draft Order; Exhibit 5 – ERA Technical Memorandum, *Economic Review of Central Coast Water Board Ag Order 4.0 and Draft Environmental Impact Report* (May 11, 2020) (ERA TM 1); Exhibit 6 – ERA Technical Memorandum, *Example Economic Impacts of the Central Coast Water Board Ag Order 4.0* (June 19, 2020) (ERA TM 2); Exhibit 7 – Exponent *Technical Memorandum on the Central Coast Regional Board's Draft Ag Order 4.0* (June 22, 2020) (Exponent TM); and Exhibit 8 – Other Materials. This Exhibit (Exhibit 1) provides written comments on the legal and policy issues raised by the Draft Order, and its many requirements.

Notably, the Ag Partners submitted exhaustive comments on January 21, 2019, in response to the Central Coast Water Board's Conceptual Regulatory Requirement Option Tables. Many of the comments provided then remain applicable to the Draft Order. To avoid duplication, we incorporate by reference the comments in Exhibit 1 to our January 21, 2019 submittal, which are already part of the Administrative Record. We specifically incorporate all of Parts I and II (*General Legal and Policy Concerns* and *Legal Limitations on Ag Order 4.0*, respectively), which establish foundational legal requirements, limitations and considerations for Central Coast Water Board actions related to the issuance of this Draft Order. (Included in Exhibit 8 to the Ag Partners Comprehensive Submittal.)

Here, we address legal and policy issues specifically associated with requirements in the Draft Order. We reserve the right to augment these comments if new or additional information is obtained after the close of the public comment period.

I. If Adopted as Proposed, the Draft Order Will Have Devastating Economic Impacts on the Central Coast Region

The Ag Partners support the fundamental goal and purpose of the Draft Order to protect water quality. However, it is critical that in adopting the Draft Order, the Central Coast Water

Board does not devastate the Central Coast Region and its inhabitants economically. In the first six months of 2020, the world has faced unprecedented circumstances with the onset of COVID-19. This global pandemic has dramatically changed the way the world operates and has left in its wake economic devastation in many sectors. Even though agriculture is considered an essential industry, it too has endured significant economic impacts caused by the world's response to controlling COVID-19 to protect public health. It is estimated that the direct economic impact of COVID-19 on California agriculture to date is between $5.6 and $8.3 billion this year. (ERA Economics, *Impacts of the COVID-19 Pandemic on California Agriculture* (June 16, 2020).) Between April 2019 and April 2020, California total farm employment declined by over 23%, or 94,800 jobs; Monterey County went from 54,000 jobs in April 2019 to 32,400 jobs in April 2020, which is a 40% reduction in farm employment. The total annual impact of COVID-19 on California's agricultural industry will depend greatly on how rapidly the food service sector and other sectors of the economy recover. While significant, direct and indirect economic impacts from COVID-19 are hopefully temporal in nature as treatments and vaccines become available to address the public health threat of this virus.

Unlike COVID-19, economic impacts from the Draft Order would not be temporal in nature but permanent. Thus, a true and comprehensive economic impacts analysis needs to accompany the Draft Order so that the Central Coast Water Board is fully informed as to the short-term and long-term economic impacts that may occur from Draft Order implementation. Because of the importance of this issue, the Ag Partners engaged ERA Economics to evaluate the adequacy of economic analysis contained in the Draft Order and the DEIR collectively. (See Exhibit 5, ERA TM 1.) The team from ERA that conducted the analysis are known experts in conducting economic analysis of environmental regulations and have particular expertise as it relates to agricultural economics. (See Exhibit 5, ERA TM 1, Attachment 1 for ERA Team resumes.) The results of their initial review are documented in ERA TM 1, which is attached as Exhibit 5. In summary, ERA found that "[t]he economic analysis developed by the CCWB and its consultants is limited and fails to capture important, quantifiable economic and associated impacts of the proposed Order." (Exhibit 5, ERA TM 1, page 1.)

As a follow up to ERA's initial analysis, the Ag Partners then engaged ERA to conduct an example analysis that illustrates the likely cost and economic impacts of the Order. For this analysis, ERA looked specifically at the nitrogen discharge limits and developed an impact analysis for iceberg lettuce in Monterey County as an example crop. The results of this analysis are staggering! For lettuce in Monterey County alone, the total gross cost of nitrogen discharge limits will range between $119.4 million at the 200 lb/ac limit to $683 million per year at the 50 lb/ac limit. (Exhibit 6, ERA TM 2, page 2.) ERA's results are discussed in more detail below.

The results of ERA's illustrative analysis for lettuce in Monterey County clearly shows that the Draft Order will have devasting economic impacts. Unfortunately, the Draft Order, Attachment A and the DEIR collectively fail to actually estimate the full impact of the Draft Order. Attachment A provides short-term cost estimates (which themselves are inadequate) for some monitoring and reporting requirements but completely ignores the cost of meeting substantive Draft Order requirements such as nitrogen discharge limits, surface water receiving water limits, and other provisions. The Central Coast Water Board cannot properly consider the

full impact of the Draft Order until a comprehensive, economic impacts analysis has been performed.

A. The Central Coast Water Board Must Consider Economic Impacts When Adopting Draft Order

When adopting waste discharge requirements, the Porter Cologne Water Quality Control Act (Porter-Cologne) requires regional boards to take into consideration "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." (Wat. Code, § 13263(a).) These provisions that are required to be considered include, in part, water quality conditions that can reasonably be achieved through the coordinated control of all factors affecting water quality as well as economic considerations. (See Wat. Code, § 13241.) In other words, in its development of waste discharge requirements, the Central Coast Water Board is mandated to consider the reasonableness of meeting the water quality objectives (WQOs) in question, as well as economic considerations. Such considerations must be more than conclusory findings, and findings must be supported by substantial evidence in the record. (See *Environmental Protection Information Center v. California Department of California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516-517; see also *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1268.)

Also, adequate consideration of economics does not stop with a blanket acknowledgement of potentially heightened costs of compliance but needs at least some estimate of the costs of compliance. (See, e.g., *City of Gardena v. Regional Water Quality Control Board, Los Angeles Region* (Super Ct. Orange County, Dec. 31, 2018, No. 30-2016-00833722-CU-WM-CJC).) Further, Porter-Cologne provides regional boards with the authority to relax permit requirements due to consideration of costs. (See *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 626, fn. 7 ["State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit."].)"

In addition to needing to consider costs of compliance under Porter-Cologne, the Central Coast Water Board is also required to consider economic impacts that result in environmental impacts under the California Environmental Quality Act (CEQA). This issue is addressed exhaustively in Exhibit 2, and is not repeated here.

As shown in ERA TM 1, the Draft Order has failed to properly consider the economic impact that will occur if the order is adopted as proposed. Moreover, as illustrated in ERA TM 2, the costs are likely to be extraordinary, which directly challenges the reasonableness of the requirements being proposed.

B. Draft Findings In Attachment A Are Not Supported by Evidence in the Record

As explained by ERA, the cost of regulatory compliance with the Draft Order falls across 5 general categories: "1. Direct costs of fees, assessments, and paperwork 2. Changing management practices, inputs, rotations, and land use to comply with discharge targets/limits (additional direct costs), and potential loss of commercially marketable yield 3. Changing land use to comply with riparian and operational set back requirements and developing a RAMP 4. Opportunity costs of management time for compliance paperwork, training and other administration 5. Opportunity costs of land out of production (e.g. riparian setbacks)." (ERA TM 1, page 12.) While Attachment A includes a number of findings that are purported to convey cost considerations, only example costs for category 1 are included. (Attachment A, pages 9-25.) Thus, the findings collectively are inadequate as they fail to consider any costs associated with the other 4 categories.

Additional comments on specific findings are provided here.

- Paragraph 13, page 9: Per paragraph 13, the findings discuss changes in regulatory costs between the 2017 agricultural order (Ag Order 3.0) and the Draft Order. Such a focus is too narrow and ignores the fact that regulatory costs are cumulative. "Any economic assessment should acknowledge the current regulatory environment and how that is changing so that the incremental cost of additional regulations can be assessed *in addition* to the cumulative effect on the industry." (ERA TM 1, page 19, emphasis added.)

- Paragraph 14, page 9: The finding in this paragraph cannot be supported by evidence in the record. The paragraph claims that when the Central Coast Water Board adopted water quality objectives that "it took economic considerations into account…." (Attachment A, page 9.) First, it is well known that when many water quality objectives were first adopted into water quality control plans in the early 70's that little to no economic consideration was given towards the adoption and economic impact of the water quality objectives in question, and more specifically how they would apply to irrigated agriculture. (See, e.g., LWA and FlowScience reviews of LA and Central Valley Water Board Basin Plans, attached to Exhibit 8.) Second, the Central Coast Water Board has not included the administrative records for adoption of the Central Coast Water Quality Control Plan (Basin Plan) into this administrative record. Thus, there is no evidence in this record to support this blanket statement. Third, previously considered costs are not directly relevant to an assessment of the economic impact of the Draft Order. To the extent the Central Coast Water Board intends to rely on previously considered costs, the findings need to identify with specificity such costs and explain their applicability to the Draft Order and its requirements in question.

- Paragraph 15 (and its sub-paragraphs), pages 10-11: Throughout paragraph 15 and its sub-paragraphs, Attachment A refers to "total costs." Such a reference is misleading in that, as identified by ERA, Attachment A only considers direct costs associated with fees, assessments and paperwork. (ERA TM 1, page 3.) No consideration is given to economic impacts of surface water limits, nitrogen

discharge limits or riparian setbacks, and therefore, these are *not* total costs. Sub-paragraph c, Attachment A explains that the cost analysis represents estimated costs over a five-year project period, and in fact is limited to the first five years of Draft Order implementation (2021-2025). Limiting the cost analysis to the first five years is arbitrary and not reflective of the longer-term nature of a General WDR versus a five-year Conditional Waiver. Sub-paragraph e assumes that all Dischargers subject to the Draft Order would perform compliance tasks with in-house employees. The assumption is not supported by evidence in the record, nor is it supported by practical experience and knowledge based on implementation of Ag Order 3.0. To estimate costs, Attachment A uses an average hourly rate of $45. This rate is significantly under-estimated, and is more than likely closer to $120 per hour.

- Further, we find it odd that Attachment A fails to identify the aggregated costs it identifies in the various paragraphs. By our calculation, these aggregated costs as identified in Attachment A may equal between $36,000,000 and $55,000,000 in monitoring and reporting costs alone over the first five years. This of course does not include any implementation costs associated with specific prescriptive requirements contained in the Draft Order.

C. Economic Impact of Nitrate Discharge Limits Are More than Significant

Although we do not know the true cost and impact of the nitrate discharge limits as proposed in the Draft Order, the ERA TM 2 illustrates just how large of an impact these limits are likely to be on the Central Coast economy. ERA TM 2 takes lettuce in Monterey County to estimate the potential economic impacts associated with these limits, including annual job losses, loss in labor wages and net local economic activity. (ERA TM 2, page 2.) Looking at lettuce alone in Monterey County, the economic impact of a nitrogen discharge limit set at 200 lbs/ac per year is likely to result in an economic impact of $119.4 million per year. At 50 lbs/ac per year the estimated impact climbs to $683 million per year. (ERA TM 2, page 2.) Using the Impacts for Planning and Analysis (IMPLAN) model, ERA estimates that job losses would be between 1,985 jobs at 200 lbs to 11,340 jobs lost at 50 lbs. Unaccountable in the impact summary is the socioeconomic and social justice impacts that would occur as many of these jobs would be lost for by those that reside in economically disadvantaged communities. (ERA TM 2, page 7.)

As noted in ERA TM 2, this analysis is an example for one crop, in one area. Without a doubt, the magnitude of the impacts would expand substantially as economic impacts are evaluated for more crops grown in the Central Coast region. The primary take away from ERA TM 2 is that the example provided shows that: "(i) an economic analysis of the requirements of the Order can and should be developed using standard applied economic principles, (ii) the costs of implementing the Order are substantial and would lead to land fallowing, crop switching, and severe business and job losses, and (iii) a standard economic analysis of the requirements specified in the Order would provide a foundation to identify ways to reduce implementation costs and resulting economic and environmental impacts." (ERA TM 2, page 2.)

Considering the information provided in ERA TMs 1 and 2, the Ag Partners fail to see how the Central Coast Water Board can further consider the Draft Order until a proper economic impact analysis is prepared. As ERA points out, "[s]tandard, peer-reviewed economic methods are available, and have been applied by the [Central Valley Water Board] and other state agencies, to quantify the economic impact of similar regulatory programs and policies." (ERA TM 1, page 19.) Thus, the failings of Attachment A cannot be overlooked and the Central Coast Water Board must direct Central Coast Water Board staff to prepare, or hire an outside consultant to prepare, a proper economic impact assessment. Until such an assessment is prepared, the Central Coast Water Board cannot properly move forward in considering the Draft Order.

II. Part 2, Section C.1 Irrigation and Nutrient Management for Groundwater Protection

A. The Central Coast Water Board Does Not Have the Legal Authority to Adopt Fertilizer Nitrogen Application Limits

The Central Coast Water Board is limited to regulating the discharge of waste, not the application or use of a lawful, useful substance. (Wat. Code, § 13263.) Waste is defined as "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation." (Wat. Code, § 13050(d).) Lawfully applied fertilizers are not waste substances, but rather beneficial substances that are integral to successful agricultural production.

The Clean Water Act also defines "pollutant" as, among other things, chemical or agricultural *waste*, and does not broadly define the term to include all agricultural chemicals, especially those applied for a beneficial purpose. (33 U.S.C. § 1362(6) [The Clean Water Act uses the term "pollutant" in a similar fashion to how Porter-Cologne uses the term "waste"].) The usage in the Clean Water Act acknowledges the difference between a useful substance and a waste substance, with only the latter being the focus.

Because the application fertilizers cannot be considered "waste," the application of such inputs to fields cannot then be considered a discharge of a waste and the Central Coast Water Board cannot impose fertilizer nitrogen application limits. However, despite this constraint on Central Coast Water Board authority, the Draft Order includes Fertilizer Nitrogen Application Limits. (See Draft Order, pages 24, 61 [Table C.1-1].)

Attachment A to the Draft Order (hereafter referred to as "Attachment A") purports to contain "additional findings that further describe the Water Board's legal and regulatory authority; … and the rationale for this Order." (Draft Order, page 12.) In Attachment A, there are several paragraphs that explain how the Central Coast Water Board derived the Nitrogen Fertilizer Application Limits. For example, paragraph 23 explains that the approach follows the State Water Board's ESJ Order by making comparisons among dischargers to determine outliers. Accordingly, the Draft Order sets crop specific Nitrogen Fertilizer Application Limits by using the 90th percentile of fertilizer nitrogen application for each crop. (See Attachment A, pages 110

and 111, Table A.C.1-3.) The Ag Organizations *do not* oppose the approach used for setting the values contained in Table C.1-1 (and also as shown in Table A.C.1-3) but rather the use of these values as "Application Limits." In fact, the Ag Organizations support using the values as outliers for an intervening time period. (See Exhibits 3 & 4 for further explanation.)

With respect to legal justification for the Nitrogen Fertilizer Application Limits, Attachment A is void of any legal justification except to state that the application limits are established "[t]o make progress towards reducing nitrogen waste discharges and reduce the risk of nitrogen discharge, …." While that may be the proposed goal, it is not legal justification for the imposition of Nitrogen Fertilizer Application Limits. Moreover, the adoption of Nitrogen Fertilizer Application Limits directly contravenes the State Water Board's direction in its precedential ESJ Order. As acknowledged in Attachment A, the State Water Board focused on identifying outliers and target values for the purpose of making progress towards reducing nitrogen waste discharges. (See, e.g., ESJ Order, pages 52-53.) The State Water Board specifically stated that any move towards a different regulatory approach would only occur after convening an expert panel to determine the appropriate use of targets for irrigated lands programs statewide. (ESJ Order, page 74.)

The State Water Board's intent regarding these provisions is further expressed in recent briefing associated with environmental petitioner challenges to the ESJ Order. In responding to environmental petitioner claims that nitrogen loading limits are required, the State Water Board states as follows:

> Protectores cites no authority for this proposition, as there is none. The State Water Board appropriately considered available evidence, made required findings, and determined that the Order had sufficient feedback mechanisms to deter or prevent exceedances. (citation omitted.) Specifically with regard to nitrogen application limits, consistent with the recommendations of the Agricultural Expert Panel, the State Water Board determined that it was premature to impose limits but directed the Central Valley Water Board to use data gathered through agricultural permits to develop appropriate targets.

(Exhibit 8 - Respondent State Water Resources Control Board, and Real Party in Interest Central Valley Water Quality Control Board's Brief, filed March 11, 2020 in *Protectores Del Agua Subterranea v. State Water Resources Control Board, et al.,* Sacramento County Superior Court, Case No. 34-2018-80002852, pp. 26:23-27:4.)

In conclusion, the adoption of Nitrogen Fertilizer Application Limits exceeds the Central Coast Water Board's legal authority under Water Code section 13263, and is not supported by previous State Water Board decisions. We recommend that calculated values be used to identify outliers for the first few years of the program until other appropriate targets can be developed.

B. The Proposed Nitrogen Discharge Targets and Limits Are Contrary to the State Water Board's Direction in the ESJ Order

The Draft Order proposes nitrogen discharge targets and limits as set forth in Table C.1-2. (Draft Order, page 61.) To determine compliance with such targets/limits, Dischargers are required to use one of two equations. Both equations are fundamentally based on the difference between the amount of fertilizer applied and the amount of nitrogen removed from the field either through crop harvest, sequestration, or other removal methods, in pounds per acre. (Draft Order, page 25.) Compliance with limits is to be assessed in pounds of nitrogen per acre per year and include all crops grown and harvested on the entire ranch. (Draft Order, page 61, Table C.1-2.) The targets/limits start applying in 2022 and ratchet down overtime until 2050 when a limit of 50 pounds becomes the final limit for compliance. This means that by 2050, growers in the Central Coast must show that the difference between the amount of nitrogen applied on the ranch for all crops collectively and the amount of nitrogen removed from all crops on the ranch in any given year does not exceed 50 pounds. For many crops in the Central Coast, such a requirement is impossible to meet and will greatly impact agriculture and the Central Coast economy. (See, e.g., ERA TM 2.) Putting aside the technical and economic infeasibility of the proposed 50 pound limit momentarily, the proposed approach is contrary to the State Water Board's precedential directives in the ESJ Order.

1. The Draft Order Attempts to Rationalize Discharge Limits as Being Compliant with State Board's Requirement for Groundwater Protection Formula, Values and Targets – Such Rationalization is Arbitrary and Misapplies Groundwater Protection Formula, Values and Targets

To justify the improper inclusion of nitrogen discharge limits into the Draft Order, Attachment A claims that the Groundwater Protection Formula for the Central Coast is A-R (which is the basis for determining compliance with nitrogen discharge limits). (Draft Order, page 76.) Attachment A then states that the Groundwater Protection Value that will be protective of drinking water is 50 pounds of nitrogen per acre per year. (*Id*.) Next, Attachment A claims that setting the Groundwater Protection Values at the farm level is equally or more effective in achieving the purposes of the values. The statements provided in Attachment A show a clear misunderstanding of the intent and purposes of the Groundwater Protection Formula, Values and Targets requirements that were adopted in the ESJ Order.

First, the purpose of the Groundwater Protection Formula is to "generate a value (the Groundwater Protection Value or GWP Value), expressed as either a nitrogen loading number or a concentration of nitrate in water (e.g., mg/L) as appropriate, reflecting the total applied nitrogen, total removed nitrogen, recharge conditions, and other relevant and scientifically supported variables that influence the potential average concentration of nitrate in water expected to reach groundwater in a given *township*[1] over a given *time period*." (ESJ Order, Attachment B to Appendix A, page 22.) Once a GWP Value is established, a GWP Target is to be developed for each township, and the purpose of the GWP Target is to set targets intended to achieve compliance with receiving water limits within specified time schedules. (*Id*.) In other words, the

[1] The ESJ Order uses townships to define an area spatially, and also states that other programs should apply the methodology to high priority townships "or other geographic areas." (ESJ Order, page 66.) Reference to "other geographic areas" is intended to be something similar to township or broad geographic area rather than having the methodology apply at a ranch level.

Formula is used to compute the GWP Values. The GWP Values are an estimate of the average concentration of nitrate in water that may be reaching groundwater from irrigated agriculture over a given specified area. Once there is an estimate of the average amount of nitrate that may be reaching groundwater for the specified area, then a GWP Target can be developed that is designed to achieve receiving water limits – over time.

Most significantly, the aggregation of information to the township level, or some other broad geographic area, is necessary because of the way discharges impact groundwater. The State Water Board, when it adopted the GWP Formula, Values and Targets processes relied on evidence in the record that field-level monitoring and reporting is not necessary, or scientifically justified, for detecting or preventing exceedances of the nitrate WQO in groundwater. As stated by Dr. Thomas Harter, a well-known expert on these matters, "[t]here's not a monitoring device that measures the discharge of nitrates to groundwater under every field." (Exhibit 8, Transcript of Proceedings Videoconferenced Open Meeting, Tuesday, May 17, 2016, Sacramento Workshop Review of Eastern San Joaquin Agricultural General WDRs (ESJ Proceedings Transcript), at SWBESJ005202.) Dr. Harter further explained that for irrigated agricultural areas, the landscape is complex and actual sources are difficult to identify. (ESJ Proceedings Transcript, SWBESJ005202 –005205.) In light of this complexity, Dr. Harter found that aggregating and reporting data at the township level was sufficient and appropriate.[2] The State Water Board was persuaded and required that data be reported at a township level. (ESJ Order, page 49 ["This data set sets out A-R difference data by crop aggregated at the township level, average A/R ratio data by crop at a township level, and some of the underlying data by crop again aggregated at the township level."].)

Next, the Draft Order misinterprets the use and purpose of the GWP Value. As explained above, the GWP Value is supposed to reflect the amount of nitrate (averaged over a large geographic area) in water that is expected to reach groundwater over a given time-period. As part of the GWP Value, many variables are to be considered in addition to A-R, including but not limited to, recharge conditions and other relevant and scientifically supported variables. The Nitrogen Discharge Targets/Limits in the Draft Order fail to do any of this. Specifically, the "limits" are designed to protect groundwater – not estimates of current nitrate in water that may reach groundwater as averaged over an appropriate geographic area; the limits are set at a ranch level rather than being associated with an appropriately scaled geographic area; the limits fail to consider other variables such as recharge conditions, gaseous losses, and other variables. In short, the Draft Order's Nitrogen Discharge Limits look nothing like the GWP Value requirement in the ESJ Order.

In the event that there is a future attempt to claim that the Nitrogen Discharge Targets/Limits are instead representative of being a GWP Target rather than a value GWP Value,

[2] See e.g., ESJ Transcripts Proceeding at SWB005206 ["…, the public data submitted to the Regional Water Board, if those are submitted, aggregated to the township level and include the total nitrogen applied per crop and total nitrogen removed by crop, the A over R ratio is completely sufficient to do an assessment of how much crops contribute relative to each other, to nitrate and groundwater, how farmers are doing relative to each other, and to give us a tool to do trend assessment and larger regional establishments.".]; see also (SWB005201 ["… I think the proposal by the Regional Board … and coalitions to aggregate data to the township level by crop, is perfectly sufficient for doing the kind of science analysis and assessment that needs to be done."].

this argument will also fail as the Draft Order's Nitrogen Discharge Targets/Limits are inconsistent with the ESJ Order's meaning of GWP Targets. Like with GWP Values, GWP Targets are intended to be established to reflect a geographic area that is larger than the individual ranch level. Moreover, targets are just that – targets – not limits. Attachment A notes that the values in Table C.1-2 that in 2022 and 2024 respectively are "targets" and thus not enforceable in the event of non-compliance. In contrast, the "limits" in Table C.1-2 that apply starting in 2026 and beyond are enforceable in the event of non-compliance. (See Attachment A, page 76.) The transition of these values from targets to limits directly contravenes the State Water Board's directives in the ESJ Order.

Like with the Nitrogen Fertilizer Application Limits, the State Water Board has not sanctioned the use of nitrogen discharge limits at this time. Rather, the State Water Board has specifically indicated that it is premature to adopt and apply limits until further data and information is available. The State Water Board clearly stated that any move to change the ESJ Order approach of utilizing A/R and/or A-R as multi-year targets would only occur "after convening an expert panel…." (ESJ Order, page 74.) In short, the Draft Order's attempt to justify its Nitrogen Discharge Targets/Limits by claiming that it satisfies the ESJ Order's requirements for GWP Formula, Values and Targets is farcical as there is no relationship or similarities between the two sets of provisions.

2. The Central Coast Water Board's Failure to Adopt More Precise Crop Conversion Coefficients Renders the Targets/Limits Meaningless per the ESJ Order

The State Water Board clearly expects that the Central Coast Water Board will spend time developing crop conversion coefficient values for Central Coast crops before using R as a metric in any Draft Order requirements. As noted in the ESJ Order, which is particularly applicable to the Central Coast's vast array of specialty crops, "[t]here is insufficient information currently available to calculate the R value for most crops." (ESJ Order, *supra*, p. 41.) In Exhibit 3, we recommend that the Central Coast Water Board develop and approve more precise crop conversion coefficients for 85 percent, and then 95 percent of the total crop acreage in the Central Coast before identifying crop-specific and/or crop type ranges of target values that are then used for identifying outliers based on A-R. Waiting until at least 85 percent of crop acreage has an approved R metric is consistent with the ESJ Order as applied in the Central Valley, in that the East San Joaquin Coalition needs to identify coefficients for 95 percent of crop acreage, and because the State Water Board specifically called out regional board discretion to determine the number of crops and the timeline for development of coefficients. (ESJ Order, *supra*, p. 42.)

Second, the ESJ Order refers to A and R, and in particular the ratio of A/R as a "new metric for nitrogen application management." (ESJ Order, *supra*, p. 36.) Relying on the Agricultural Expert Panel, the ESJ Order sets forth the multi-year A/R ratio (or alternatively a multi-cropping cycle) as a performance metric for measuring nitrogen left in the field. A high multi-year or multi-cropping cycle ratio is then to be used, in this case by the regional board, to conduct education and outreach to outliers. Use of such information for purposes beyond education and outreach to outliers is not anticipated or directed in the ESJ Order. (*Id.* at p. 73.) Rather, the State Water Board clearly states that it is premature to use the A/R ratio target values

as a regulatory tool: "It is premature at this point to project the manner in which the multi-year A/R ratio target values might serve as regulatory tools. That determination will be informed by the data collected and the research conducted in the next several years. If we move forward with a new regulatory approach in the future, we expect to do so only after convening an expert panel that can help evaluate and consider the appropriate use of the acceptable ranges for multi-year A/R ratio target values in irrigated lands regulatory programs statewide." (*Id.* at p. 74.)

Third, use of a nitrogen discharge limit goes beyond what the experts who testified before the State Water Board thought was scientifically supportable. For example, during the ESJ Order proceedings, Dr. Thomas Harter from the University of California, Davis stated that "the A over R ratio is completely sufficient to do an assessment of how much crops contribute relative to each other, to nitrate and groundwater, how farmers are doing relative to each other, and to give us a tool to do trend assessment and larger regional establishments." (Exhibit 8, ESJ Proceedings Transcript at SWBESJ005206.) Other experts opining on the A/R ratio acknowledged its limitations, particularly that insufficient information regarding A/R ratios in California crops currently exist and such ratios and targets must be developed and refined as data is gathered. (ESJ Proceedings Transcript, at SWBESJ005238-5242.)

Fourth, in the ESJ Order the State Water Board refers to A-R difference data as being informative to focus on follow-up management practice implementation as well as research and modeling on groundwater loading. (ESJ Order, *supra*, p. 39.) Nowhere in the ESJ Order, or during the State Water Board's proceedings, did the State Water Board or its staff suggest, recommend, or advocate for use of A-R as a numeric discharge limit. Accordingly, use of A-R as a discharge limit would completely take out of context the State Water Board's reasons for referencing the difference value between A-R.

Finally, use of a discharge limit based on A-R for an amount that is designed to ensure that no residual nitrogen is available for potential leaching to groundwater would surely cripple the economic sustainability of Central Coast agriculture. (See Exhibit 6, ERA TM 2.) The Central Coast region is unique in that it has weather and topography to support specialty crops, which rely on multi-cropping cycles to maintain the economics of farming. This is due to a combination of factors, including high land values, high labor costs, labor-intensive crops, and costs related to food safety, in addition to a plethora of other regulatory restraints put on Central Coast farming. Applying a nitrate discharge limit that essentially limits the number of pounds of nitrate that can be applied per acre per ranch per year would more than likely eliminate multi-cropping cycles, which would in return eliminate the economic viability of many crops along the Central Coast. (See Exhibits 5 & 6, ERA TMs 1 and 2.) As discussed previously, consequences such as this run afoul of the Legislature's directives with respect to implementation of Porter-Cologne, which is to regulate to the highest level that is reasonable – considering all the demands placed on the waters.

3. The Draft Order Improperly Prohibits Discharges in Excess of Nitrogen Discharge Limits

The Draft Order would prohibit discharges of nitrogen in excess of the nitrogen discharge limits contained in Table C.1-2. As discussed in greater detail below, the Draft Order seeks to

expand discharge prohibition authority improperly. In all other traditional point source programs, dischargers are not typically prohibited from discharging in excess of limits but rather are subject to enforcement actions if discharges exceed applicable limits. Moreover, in traditional point source permits, discharge prohibitions usually apply to hazardous substances or materials that are otherwise not authorized to be discharged in the permit at issue. Creating a discharge prohibition as proposed in the Draft Order is problematic for several reasons.

First, as indicated, such a provision goes well beyond what is normally contained in permits, and misuses statutory discharge prohibition authority. Second, for irrigated agriculture, such prohibitions could potential result in creating a prohibition on use of materials that are necessary and beneficial for crop production. The ESJ Order properly points out how irrigated lands regulatory programs are distinguishable from most other programs because "… the production of crops typically requires the beneficial application of nutrients and pesticides to land, …." (ESJ Order, page 47.) Stringent pollution controls, and even pollutant specific discharge prohibitions, in other traditional programs "does not directly interfere with the underlying regulated Activity." (ESJ Order, page 48.) Here, the proposed prohibit very well could impact the viability of the irrigated agricultural activity if it prevents growers from using the amount of nitrogen necessary to grow the crop in question.

Accordingly, the nitrogen discharge prohibition is improper and must be removed.

4. It is Inappropriate to Require Ranch-Level Groundwater Discharge Monitoring and Reporting

Besides the discharge limit and use restrictions, the Draft Order suggests that individuals may be required to conduct ranch level groundwater discharge monitoring and reporting. (Draft Order, page 29.) This approach is inappropriate because the effort associated with this monitoring would exceed the usefulness of the information gathered.

Notably, the use of irrigation water on agricultural fields is not a discharge of a waste. In fact, regulations state that no discharger "shall be required to file a report of waste discharge pursuant to section 13260 of the Water Code for percolation to the groundwater of water resulting from the irrigation of crops." (Cal. Code Regs., tit. 23, § 783.) On this basis, the Central Coast Water Board has no authority to regulate the amount of irrigation water that percolates to groundwater, because this percolation is not a discharge of a waste. Attempting to combine monitoring of the volume of water with nitrate concentrations in the water does not eviscerate this requirement.

The Draft MRP sets forth minimum criteria for a work plan for ranch-level groundwater discharge monitoring. (Draft MRP, page 21.) The requirements are significant and not easily applied to irrigated agriculture. The State Water Board recognized this limitation in the ESJ Order. (ESJ Order, page 18, ["…, in a landscape-based, nonpoint source program such as the irrigated lands regulatory program, monitoring the numerous and sometimes indeterminate set of all farm discharge points to surface water and groundwater is an impractical, prohibitively costly, and often ineffective method for compliance determination and the Nonpoint Source Policy accordingly does not mandate such monitoring."].) In sum, monitoring the amount of nitrate in

irrigation water that goes beyond the root zone would be impractical, and the burden of monitoring such discharges would come at a cost that is well beyond the usefulness of the information. This, in turn, would violate Water Code section 13267, which places reasonableness and practical constraints on the regional board's authority to require technical reports and monitoring. (See Wat. Code, §13267 ["The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."].)

For these reasons, the Ranch-level discharge monitoring requirement must be removed from the Draft Order and the Draft MRP.

III. Part 2, Sections C:2, C:3 and C:4 Surface Water Protection Requirements

The Draft Order includes three separate sections for requirements that generally pertain to Surface Water Protection (putting aside the riparian requirements into a separate category). Although the sections each address a different category of pollutants, the approach in all three sections is almost identical in that they start with a planning element, then impose receiving water limits, potential requirements for ranch-level surface discharge monitoring, and a prohibition for discharges from a ranch in excess of the receiving water limits after the compliance date. The discharge prohibitions in these three sections are akin to "end-of-pipe" limits that would be applied at the edge-of-operation, and ranch-level surface discharge monitoring would be used to determine compliance with such limits. These two provisions combined result in the Draft Order imposing (improperly) a traditional, point source regulatory program onto nonpoint source discharges.

The Ag Partners retained expert consultants at Exponent to evaluate the surface water provisions contained in the Draft Order. (Exhibit 7, Exponent TM.) Exponent reviewed the surface water and riparian area requirements in the Draft Order, including the scientific basis for the requirements, whether implementation could reasonably be expected to lead to achieving the Draft Order's stated goals and objectives, and whether the Draft Order could be modified to improve water quality and beneficial use outcomes. (Exponent TM, Section 1.0, Executive Summary.) Key findings in the Exponent TM include, but are not limited to, the following: it is not currently not possible to calculate numeric limits for agricultural discharges, and even more inappropriate to apply such limits at the edge-of-field (Exponent TM, Section 3.1.3); the numeric limits in the Draft Order are scientifically unsupported and inappropriate (Exponent TM, Section 3.1.5); water quality concerns need to be addressed holistically on a watershed level (Exponent TM, Section 3.2); requirements for field-level monitoring will not provide data and information necessary to advance the purposes of the program (Exponent TM, Section 3.6); and, the Draft Order needs to be modified to better incorporate a watershed-based approach (Exponent TM, Section 3.7).

The Exponent TM also points out that when the Central Coast Water Board adopted the Water Quality Control Plan for the Central Coast Region (Basin Plan), it did not anticipate or consider applying water quality objectives at the edge-of-field like an effluent limitation. Rather, the Central Coast Water Board limited its discussion of agricultural controls to improvements in

management practices – pesticide use and limits on fertilizer applications were not considered. (Exponent TM, Section 3.1.2.) Thus, when water quality objectives were adopted into the Basin Plan, the Central Coast Water Board did not contemplate that they would be used to calculate effluent limits from nonpoint source discharges. This means that the Porter-Cologne factors pursuant to Water Code section 13241 were not considered as related to the application of water quality objectives to discharges from agricultural operations. (Exponent TM, Section 3.1.2.)

Consequently, the Draft Order's approach of imposing edge-of-field limits through the discharge prohibition is inconsistent with the Basin Plan and must be rejected. Moreover, the overall approach in the Draft Order as it relates to field-level monitoring must be rejected as it is not scientifically or technically supportable. Water quality concerns in the Central Coast are better addressed holistically on a watershed level.

A. The Central Coast Water Board Cannot Legally Impose Prohibitions on the Discharge of Pollutants Generally

The Draft Order would prohibit the discharge of pollutants in excess of applicable limits after the compliance dates in all three surface water related sections. (Draft Order, pages 31, 34 37.) As discussed above, the use of discharge prohibitions in this manner is improper and well exceeds regulatory and statutory authority as it pertains to discharge prohibitions. Nutrients and pesticides are legal materials that are applied legally and beneficially to crops. Prohibiting the discharge of such materials, even if aligned with proposed limits, may result in prohibiting the use of the material altogether. Such a result is problematic.

Specific to pesticides, the Central Coast Water Board has no authority to legally impose prohibitions on the use of pesticides. Although the Water Board has the statutory authority to reasonably regulate and protect water quality, that authority is not without limitations. (See Wat. Code, § 13243; compare to Wat. Code, § 13263 which does not allow blanket prohibitions of discharges as part of waste discharge requirements or conditional waivers.) As such, the Water Board cannot prohibit the manner of use or amount of certain pesticides. Further, the Water Board has no authority to regulate pesticides. Rather, the California Legislature has established a comprehensive body of law to control every aspect of pesticide sales and use and has deemed the Department of Pesticide Regulations (DPR) to be the entity with authority protect the public health and environment by regulating pesticide sales and use and by fostering reduced-risk pest management. (Food & Agr. Code, §§ 11454, 11454.1, 12981.**)**

Further, the use of pesticides to assist in agricultural production is a legal use explicitly recognized by the Legislature. (Food & Agr. Code, §§ 822; 11501; 12786; Cal. Code Regs., tit. 3, § 6100 (quoting the findings of the Legislature in Section 1, Chapter 308, Statutes 1978), [The Legislature has repeatedly voiced its desire for a healthy and robust agricultural industry, recognizing the essential role that pesticides perform in supporting that industry.].) The Legislature has continually declared that agriculture is a major and essential component of California's economy and continued viability of the agricultural economy is of paramount importance to the people of California; as such, the continued and "proper, safe and efficient use of pesticides is essential for the protection and production of agricultural commodities and for health protection." (Cal. Code Regs., tit. 3, § 6100(a)(1)-(2); Food & Agr. Code, § 12786.)

Therefore, prohibitions that may result in prohibiting the use of pesticides are unlawful and exceed the Central Coast Water Board's authority.

Moreover, as discussed in the Exponent TM, the Basin Plan does not contemplate imposing "effluent" limits on agricultural discharges. (Exponent TM, Section 3.1.2.) However, the discharge prohibitions are just that thus are inconsistent with the Basin Plan.

B. Pesticide Water Quality Objectives Have Not Been Properly Adopted

The Draft Order proposes to impose specific surface water receiving water limits on dischargers for a number of pesticides that are listed in Table C.3-2. (Draft Order, page 33.) For most, if not all, of the pesticides listed in Table C.3-2, these are improper limits, as the Central Coast Water Board has not adopted *any* numeric pesticide water quality objectives (WQOs) for these listed pesticides pursuant to law. (See Wat. Code, § 13241.)

Porter-Cologne requires WQOs to ensure reasonable protection of beneficial uses. (Wat. Code, § 13241.) As outlined in Water Code section 13241, "each regional board shall establish water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." Within its Basin Plan, the Central Coast Water Board has established numerous general narrative and numeric WQOs, including a narrative WQO for pesticides. (Central Coast Basin Plan, pp. 29-31.) However, there are not specific WQOs for the 35 pesticides listed in Table C.3-2. Thus, the Central Coast Water Board has not considered or applied section 13241 to the limits expressed in Table C.3-2, and therefore has no way of knowing if compliance with such limits is reasonable to achieve considering all controllable factors. (Wat. Code, § 13241(c).)

Before being used as a numeric limit, a pesticide WQO must be adopted properly, pursuant to Water Code sections 13240 et seq., and must be based on proper evidence. (See, Exponent TM, Section 3.1.2The Central Coast Water Board cannot incorporate by reference or rely on analytical numeric values to interpret and apply the narrative pesticide WQOs within its Basin Plan, without at least having an adopted policy for such interpretations. No such policy exists in the Basin Plan.

IV. Riparian Habitat Management for Water Quality Protection

A. The Central Coast Water Board Does Not Have Legal Authority to Impose Riparian and Operational Setbacks and Require Certain Percentages of Native Vegetative Cover

The Draft Order contains prescriptive requirements that mandate riparian and operational setbacks of various sizes and prohibits all agricultural activities within these mandated setbacks. Such requirements exceed the Central Coast Water Board's legal authority when issuing waste discharge requirements under Porter-Cologne. A fundamental limitation to the Water Board's authority is that an activity must result in a "discharge of waste" that impacts water quality in order for that activity to be subject to regulation. (Wat. Code, §§ 13260(a); 13263; 13267;

13269.) Riparian habitat, setbacks, and native vegetative cover are not discharges of waste. Further, riparian habitat, setbacks, and native vegetative cover are not WQOs. Accordingly, the Central Coast Water Board cannot regulate riparian habitat and native vegetative cover under the guise of water quality protection. Moreover, regulating land use is not within the purview of the Regional Board.

1. The Draft Order Misuses Central Coast Water Board Discharge Prohibition Authority To Justify Riparian and Operational Setbacks

In an unprecedented move, the Draft Order attempts to use discharge prohibition authority to provide legal justification for the riparian and operational setback requirements. (Attachment A, page 184.) The Draft Order's reliance on Water Code section 13243 misconstrues the application of this statutory provision. The statute states in its entirety as follows: "A regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted." (Wat. Code, § 13243.) When applied in the issuance of a waste discharge requirements, this provision must be read in context with, and is otherwise limited by, authority associated with the adoption of waste discharge requirements in general.

Key to waste discharge requirements are that they are requirements that pertain to the nature of any proposed discharges that are related to "…the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed." (Wat. Code § 13263(a).) In other words, they are restrictions related to the discharge and its impact on receiving waters. The Draft Order ignores the necessary fundamental connection between the discharge and potential impacts on receiving waters. Instead, the Draft Order mandates that Dischargers establish riparian and operational setbacks, and then prohibits the discharge of waste within the setback area. "The operational and riparian setbacks established through this Order prohibit the discharge of agricultural waste within the setback area." (Attachment A, page 184.) So, in other words, the Draft Order creates setback areas and then says that discharges of waste are not allowed in the areas, and it prohibits virtually all economic activities from occurring within this artificially created setback area.

This concept is problematic. First, setback areas established in the Draft Order are not waters of the state. Yet, the Draft Order treats the setback areas like they are waters of the state and then looks to prohibit activities within them. Second, the Draft Order's use of Water Code section 13243 in this manner is not supported by any legal authority and is an example of overreaching efforts to expand discharge prohibition authority. For example, soon after submittal of these comments, the Central Coast Water Board will consider amendments to the Basin Plan that would amend, and improperly expand, discharge prohibition provisions. (See *Amending the Water Quality Control Plan for the Central Coastal Basin to Improve and Clarify Waste Discharge Prohibition Language*, Project Report, (draft January 16, 2020).) The Project Report proposes to amend the Basin Plan to prohibit all discharges of waste to land or waters of the

state, unless authorized by waste discharge requirements. This broad prohibition contradicts the express language of Water Code section 13243 as well as the implied intent.[3]

Additionally, setback width and percentages of native vegetative cover requirements dictate the manner of compliance contrary to Water Code section 13360. The Water Board cannot prescribe how a discharger will comply with discharge requirements. Although regional boards may impose waste discharge requirements (or conditions in waivers) on dischargers, including irrigated agriculture, such conditions cannot specifically dictate the manner of compliance. (Wat. Code, § 13360(a).) Water Code section 13360(a) provides in pertinent part that:

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.

In other words, section 13360 allows the Central Coast Water Board to identify the "disease and command that it be cured," but prohibits the Water Board from dictating the cure. (See *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1438.) Limiting agricultural activities in setback areas is dictating the cure, which is specifically prohibited by section 13360. Dictating setbacks and mandating vegetative cover also dictates the cure and is prohibited by section 13360.

B. The Draft Order's Riparian and Operational Setback Requirements Will Result in Takings of Private Property Requiring Just Compensation Be Paid to Impacted Landowners

The Takings Clause of the Fifth Amendment prohibits states from taking property for public use without compensation. (U.S. Const. Amend. 5.) Takings involve direct appropriations or physical invasions of property or its functional equivalent. Regulatory restrictions may also be so onerous that its effect is tantamount to a physical appropriation or invasion ousting the owner's possession. (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537.)

The Draft Order will severely limit if not destroy agricultural landowners' ability to beneficially use their land within the setbacks. Growers must cease all commercial crop production and related activities (Draft Order, page 41-42), which will result in taking farmland completely out of production. (DEIR, page 3.1-22.) According to estimates in the Draft Order, the setbacks may cover 554 miles of streams (Attachment A, page 226) and result in taking 4,064 acres out of production. (DEIR, page 3.1-23.) Farmland taken out of production "would [then] be converted to riparian or other vegetation." (DEIR, page 3.1-24.) This will require removal of

[3] Not addressed in this document is the fact that the proposed discharge prohibitions directly undermine the intent and purposes of Porter-Cologne's notice requirements associated with the issuance of waste discharge requirements. The proposed amendments to the Basin Plan would give the Central Coast Water Board direct authority to bring an enforcement action against *any* individual for discharging without a permit. This circumvents Porter-Cologne's express requirement that a violation for discharging waste without authorization does not occur until the violation has been called to attention in writing by the regional board. (Wat. Code, § 13265(a).)

crops, light disking, and the seeding or planting of riparian vegetation. (DEIR, pages 2-36, 3.5-34.) Requiring landowners to destroy their crops and physically covert their lands to riparian habitat is functionally equivalent to a physical appropriation of land for a conservation easement. (See *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, 128 [state actions "that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions" constitute takings]; see also *United States v. Causby* (1946) 328 U.S. 256, 265 [if by reason of government action owners could not beneficially use their land, their loss "would be complete *as if* the government had entered . . . the land and taken exclusive possession of it."] (emphasis added); see e.g. *Tulare Lake Basin v. U.S.* (2001) 49 Fed. Cl. 313, 319 [State Water Board's redirection of water through the Sacramento-San Joaquin Delta to protect fish that would otherwise be available for water users mirrored a physical invasion of their water rights requiring compensation].)

The Draft Order on its face results in a taking of property in that it requires growers with waterbodies on or adjacent to their farms to establish setbacks from those waterbodies and prohibits agricultural production therein. "Riparian setbacks," depending on the classification of the waterbody, are set anywhere from 50 to 250 feet. "Operational setbacks" must be either 1.5 times the width of the active channel or 35 feet for other waterbodies that are not streams such as wetlands or lakes. (Draft Order, page 41-42.) These setbacks result in the physical conversion of agricultural land to riparian habitat. (DEIR, page 3.1-22.) (See *Causby*, 328 U.S. at 262 [just compensation must be provided for interfering with landowner's exclusive control over some part of the property and destroying a beneficial use therein].)

The setbacks here are strikingly similar to conservation easements. California law recognizes conservation easements as a real property interest in the form of an easement or restriction for the purpose of "retain[ing] land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition." (Code Civ. Proc. §§ 815.2(a), 815.1.) The state may only acquire title to conservation easements if they are voluntarily conveyed by the owner. (Code Civ. Proc. § 815.3(b); *Building Industry Assn. of Central California v. County of Stanislaus* (2010) 190 Cal.App.4th 582, 601 [this "prevents the state from requiring an involuntary conveyance of a conservation easement and thus, protects the landowner from an unreasonable taking of property rights."].) Similar to an acquisition of land for conservation easements, the Draft Order seeks to protect and restore riparian and wetland habitat by prohibiting essentially all activities within the setbacks except control of invasive species, and emergency work necessary for public safety. (Draft Order, page 41-42.) However, in this case, the easement is not being voluntarily conveyed but is being mandated through the Draft Order. By prohibiting all economic activities and requiring the conversion of crops to riparian habitat, the Central Coast Water Board is appropriating an interest in property for the purpose of establishing conservation easements. Although the state may not be acquiring title to the easement, they are locking up the land for an indefinite number of years. (*Lingle*, 544 U.S. at 547 [such dedications of property would be so onerous that they would be deemed *per se* physical takings].) Thus, the setbacks constitute a taking of conservations easement involuntarily and without compensation.

Further, the destruction and conversion of agriculture may directly conflict with county land use policies. As noted in the DEIR, the conversion of cropland would conflict with county

land use policies and Williamson Act Contracts that require minimum agricultural acres and prohibit conversion. (DEIR, pages 3.1-27, 3.1-28.) For example: Monterey County prohibits land uses that interfere with existing agriculture and the subdivision of farmland except for exclusively agricultural purposes (Monterey County Agricultural Element, Policy AG-1.1, AG-1.3); Santa Barbara County prohibits land uses incompatible with agriculture, prohibits the conversion of agricultural lands that interfere with other agricultural operations (Santa Barbara Agricultural Element, Goal I, A, Goal III, A), and reserves land with prime and non-prime soils exclusively for agriculture (Santa Barbara County Land Use Element, Goals & Policies); Santa Cruz County maintains for exclusive agricultural use lands best suited for commercial agriculture, prevents conversion of agriculture (Santa Cruz County Conservation Element, Objective 5.13), maintains existing parcel sizes of viable agricultural lands, and only allows conversion for exclusively agricultural purposes (Santa Cruz County Conservation Element, Objective 5.13.14.) Prohibiting agriculture within the setbacks effectively eliminates all beneficial use of land as a matter of law where the setbacks overlap with county agricultural zones. (See *Bridge Aina Le'a, LLC v. Land Use Commission* (2020) 950 F.3d 610, 629 [the existence of permissible, local land uses "determines whether a [regulatory] restriction denies a property owner economically viable use of his property."].) Thus, the setbacks will result in takings where the only permitted land use by the county is commercial agriculture. This is functionally equivalent to a practical ouster of landowners in those areas, regardless of the size of the area to be taken out of production and converted. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 414 ["To make it commercially impractical to [exercise a property right] has very nearly the same effect for constitutional purposes as appropriating or destroying it."].)

1. The Setbacks Will Result in Regulatory Takings Because the Economic Impacts and Interference with Investment-backed Expectations are High, and the Mandated Conversion of Cropland to Riparian Habitat is Tantamount to a Physical Appropriation

Regulatory takings depend on three factors. "Primary among [them] are the economic impact of the regulation and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The character of the government action is also relevant. (*Lingle*, *supra*, 544 U.S. at 538-539.) Applying these factors to the Draft Order's setback requirements demonstrates that regulatory takings will likely result in some areas.

(a) Economic Impact

The economic impact from the setbacks will be extraordinarily high if not fatal to some agricultural operations. Landowners and growers will be required to take prime farmland out of production and plant riparian vegetation in its place. (DEIR, pages 3.5-34, 3.1-22.) This will result in removing all economical beneficial uses from the property in question. The diminution in value from irrigated agriculture, particularly prime farmland, will be high. (See *Bridge Aina Le'a*, *supra*, 950 F.3d at 631 [diminution in value indicates whether the regulation is functionally equivalent to an appropriation of property].) Not only is the diminution in value to the land high, landowners must also bear "the cost of removing and disposing existing crops/ vegetation in the area to be converted to [the] riparian setback . . . [and] establish[ing] riparian vegetation in the area." (DEIR, page 3.5-34.) The conversion of farmland to riparian habitat is estimated to range

from $800 to $2,150 per acre. (Attachment A, page 25.) While this alone is tantamount to state appropriation of property—in that it reduces economic usefulness and value of land to nothing and then adds costs to the landowner—some agricultural operations may be forced to go out of business entirely. (DEIR, page 3.1-26.)

(b) Investment-Backed Expectations

The setbacks and resulting conversion of agriculture clearly interfere with landowners' investment-backed expectations when they purchased farmland in areas dedicated exclusively for agriculture. (See *Bridge Aina Le'a, supra*, 950 F.3d at 633-634 [this depends on landowners' reasonable expectations when the land was purchased in light of the regulatory environment at that time].) The setback requirements were not a foreseeable regulatory development until they were made available for public comment on February 21, 2020. County land use policies seeking to preserve and expand agriculture have been in place for a number of years, and certainly were in place before the Central Coast Water Board issued its first Agricultural Order in 2004. For example, County land use policies in three of the counties were adopted as follows: 1984 in Monterey County (*see* Monterey County 1984 General Plan, p. 120); 1991 in Santa Barbara County (*see* Santa Barbara County Comprehensive Plan Agricultural Element, p. 6); and 1994 in Santa Cruz County (*see* Santa Cruz County General Plan, p. 5-44).

The setbacks are also not a foreseeable outgrowth of Agricultural Order 3.0 (2017), which included Water Quality Buffer Plans for some Tier 3 Dischargers. Setbacks have never been mandated by the Central Coast Water Board in a general manner to "all Dischargers with waterbodies within or bordering their ranch" as opposed to individual dischargers with individual plans. (Draft Order, page 41.) Indeed, "[c]ompared to Agricultural Order 3.0, Agricultural Order 4.0 would differ primarily in that it would outline specific quantifiable milestones" that establish setbacks for the first time. (DEIR, page 2-12; Draft Order, page 41.) Additionally, no previous order or other regional board orders have required agricultural landowners to convert their farmland to riparian habitat. If the setbacks were actually foreseeable, it is highly unlikely any grower would want to buy land in those areas given the economic impacts discussed above.

Because the economic impact and interference with investment-backed expectations "are the primary factors" in this analysis (*Bridge Aina Le'a, supra*, 950 F.3d at 630), it is clear that the setback and conversion requirements under the Draft Order would likely result in regulatory takings requiring just compensation.

(c) Character of Government Action

The setback requirements to physically remove crops and convert land to riparian habitat is functionally equivalent to an appropriation of a conservation easement, the most intrusive form of government action. (See *Lingle*, 544 U.S. at 539 [the character of the action may turn on "whether it amounts to a physical invasion or merely affects property interests . . . [by] adjusting the benefits and burdens of economic life to promote the common good."]; See e.g. *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 485 U.S. 419, 426 [when the character of the action constitutes a physical appropriation, it is a taking].)

Even if there is no physical appropriation, "the government cannot force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Bridge Aina Le'a, supra,* 950 F.3d at 636.) The setbacks require that landowners destroy their crops, plant riparian habitat, and cover the costs regardless of their individual impacts to water quality, if any. This places an extremely unfair burden on landowners who have to finance the conversion of farmland (at least 4,064 acres) to riparian habitat while the public reaps the benefits. While the Central Coast Water Board has authority to regulate discharges to waters of the state, it does not have the authority to require landowners to remove crops from their land and plant riparian habitat in its place. If the Central Coast Water Board desires to establish riparian habitat to "adjust the benefits and burdens of economic life to promote the common good," it alone must bear those costs.

2. The Setbacks Constitute Unconstitutional Permit Conditions Requiring Just Compensation as Physical Takings

Requiring landowners to relinquish private property in exchange for a permit is a taking. Imposing setbacks on individual landowners therefore requires just compensation unless there is an essential nexus and rough proportionality between the setbacks and the impact of an individual landowner's agricultural operation on water quality. (See *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 599; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 375 [rough proportionality requires "some sort of individualized determination that the required dedication is related both in nature and extent to the [impacts of the proposed land use."].) All growers must comply with setback distances, depending on the classification of the waterbody. (Draft Order, page 41.) This broad requirement is not based on an individualized determination of any particular grower's impacts on water quality. Rather, it simply assumes that all growers cause the same impacts to water quality, regardless of geography, hydrology, farming practices, or any other relevant physical characteristics that may impact water quality. The Central Coast Water Board may not leverage its power to regulate waters of the state by requiring that all growers establish setback widths bearing no reasonable relationship to actual water quality impacts.

C. There Are No Properly Adopted WQOs for Riparian Habitat Within the Basin Plan

The riparian habitat management requirements proposed in the Draft Order are improper because there are no properly-adopted WQOs for riparian habitat. Porter-Cologne defines "water quality objectives" as the allowable "limits or levels of water quality constituents or characteristics that are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (Wat. Code, § 13050(i).) Riparian habitat is not a limit or level on water quality constituents or characteristics under Porter-Cologne. Further, it is not a "waste" that can be discharged, and thus regulated, under Porter-Cologne. (Wat. Code, § 13050(d).)

As specifically stated in the Central Coast Water Board's Basin Plan, "[i]n setting waste discharge requirements, the Regional Board will consider the potential impact on beneficial uses within the area of influence of the discharge, the existing quality of receiving waters, and the

appropriate water quality objectives. The Regional Board will make a finding of beneficial uses to be protected and establish waste discharge requirements to protect those uses and to meet water quality objectives." (Basin Plan, p. 29.) Thus, waste discharge requirements (or conditional waivers of waste discharge requirements) protect beneficial uses and "meet water quality objectives." Riparian habitat management, native vegetative cover, and setbacks are not water quality constituents. Further, riparian habitat management, native vegetative cover, and setbacks are not adopted WQOs and the Water Board cannot legally prescribe allowable limits or levels of riparian habitat, or prohibit their removal. (See Wat. Code, § 13050(h); see also Wat. Code, § 13240 et seq. regarding establishment of WQOs.)

D. Riparian Setbacks May Conflict with Food Safety Requirements Imposed by Buyers and Food Safety Programs and Threaten Public Health

In addition to the problems addressed above, the requirements to impose riparian setbacks in the Draft Order may conflict with food safety requirements imposed by buyers and others.[4] Regulating land use is not within the purview of the Regional Board. The Water Code and the Basin Plan focus on water quality and discharges which may impair water quality. As discussed within, while the Regional Board has authority to regulate a discharge of waste, the Board does not have authority to require or regulate an act which is unrelated to discharges to waters of the state. (Wat. Code, §§ 13260(a); 13263; 13267; 13269; 13360.) In addition to exceeding its jurisdiction, riparian setbacks may deprive farmers from the economic benefit and use of their private property by prohibiting growers from complying with buyer specifications that may be necessary for food safety reasons.

V. Part 2, Section D. Additional Requirements and Prohibitions

A. Access Road Requirements from the Forest Practice Regulations Are Not Applicable and Need to Be Deleted

Paragraphs 15-19 require that access roads be constructed and maintained in compliance with certain requirements from the California Code of Regulations. (Draft Order, page 50.) These requirements, however, are inappropriate as they apply to logging roads under the Forest Practices Act – not roads subject to waste discharge requirements. The Draft Order's citation to Title 14 is relatively incomplete as there are many Divisions within Title 14 that then have Chapter 4s. However, based on the subject at hand, we presume that the Draft Order is referring

[4] "In early 2007, with oversight by the California Department of Food and Agriculture (CDFA), produce industry representatives developed the California Leafy Green Products Handler Marketing Agreement (see www.caleafygreens.ca.gov). More than 100 handlers (companies that move fresh produce products from growers to retail and food-service buyers) are signatories. Representing more than 99% of the leafy greens production in California, they are obligated to handle leafy green produce only from growers who adhere to the best management practices detailed in the Commodity Specific Food Safety Guidelines for the Production and Harvest of Lettuce and Leafy Greens, known as the "Metrics" (see www.caleafygreens.ca.gov). The Metrics were developed and continue to be updated through a process involving the produce industry, government agencies, natural resource organizations and scientists." (Beretti et al., *Food safety and environmental quality impose conflicting demands on Central Coast growers* (April-June 2008) California Agriculture at p. 69.)

to Title 14, Division 1.5 Department of Forestry and Fire Protection, Chapter 4 Forest Practices. More specifically, within Chapter 4 of the Forest Practices regulations, Subchapter 4, Article 12 applies to Logging Roads, Landing and Logging Road Watercourse Crossings. The provisions of Article 12 relate directly to "logging roads, landings, and/or watercourse crossings." Nothing within Article 12 suggests or implies that the provisions are appropriate to apply to farm roads.

Farming and logging are distinctively different industries, with different regulatory requirements. It is inappropriate for the Draft Order to take logging road regulations (developed for that specific purpose) and generically apply them to farm roads that may exist in irrigated agricultural areas. As a practical matter, logging typically occurs on rugged terrain in mountainous areas while irrigated agriculture is more likely to be found in valleys and across relatively flat terrain. As a legal matter, logging is regulated by the Department of Forestry and Fire Protection, and the Department of Forestry's regulations have undergone years of scrutiny by logging practitioners and professionals. No scrutiny has been applied to these regulations as they would apply to farming roads for irrigated agriculture in the Central Coast region.

The Draft Order would take these timberland regulations and make them a requirement for all access roads on properties that otherwise fall under this general order. This is improper.

VI. Definitions

- **Definition of Discharge is Overly Broad**

The Draft Order in Attachment C proposes to define discharge to include stormwater runoff conveyed in channels or canals resulting from the discharge from irrigated lands. Stormwater conveyed in a channel is neither a pollutant nor a discharge of a waste under state or federal law.[5] (See Wat. Code, § 13050.)

Porter-Cologne focuses on receiving waters – such that runoff is rendered a discharge of "waste" only if it contains harmful concentrations of pollutants. (See State Water Resources Control Board, Order WQ 2001-15, p. 12, [concluding that stormwater is not waste *per se*; rather, it is the pollutants in runoff that are waste].) The State Board clearly concluded that "it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself." (*Ibid*.)

[5] Porter-Cologne defines "waste" and "pollution" as follows:
"'Waste' includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal." (Wat. Code, § 13050(d).)
"'Pollution' means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
(A) The waters for beneficial uses.
(B) Facilities which serve these beneficial uses.
(2) 'Pollution' may include "contamination.'" (Wat. Code, § 13050(*l*)(1).)

Additionally, in the 1977 amendments to the Clean Water Act, Congress expressly reversed a court decision which would have required NPDES permits for return flows from irrigated agriculture. Congress accomplished this through amendments to the CWA: (1) exempting irrigation return flows from permitting (33 U.S.C. § 1342(l)(1)), and (2) excluding return flows from the definition of point source (33 U.S.C. § 1362(14). The legislative history of the amendments demonstrates that Congress had assumed that such discharges from irrigated agriculture would be nonpoint source discharges. (3 Legislative History of the Clean Water Act, 1978 at 527.) Case law has further reiterated that agricultural stormwater runoff is not a discharge of pollutants from a point source under the federal CWA: "We believe it reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather – even when those discharges came from what would otherwise be point sources. There is no authoritative legislative history to the contrary." (*Waterkeeper Alliance, Inc. v. U.S. E.P.A.* (2d Cir. 2005) 399 F.3d 486, 507.)

Given that rainwater itself is not a "waste" or "pollution" as defined within Porter-Cologne and that agricultural stormwater runoff is not a discharge of pollutants from a point source under the federal CWA, the inclusion of stormwater into the definition of discharge is improper. The definition of discharges of waste from irrigated lands suffers from the same infirmity and must also be revised.

- **Definition of Enhancement, Establishment, Reestablishment and Rehabilitation Are Unnecessary**

Attachment C attempts to take everyday terms such as enhancement and establishment redefine them for purposes of the Draft Order. Creating new definitions for such standard terms is inappropriate and unnecessary. These definitions need to be removed.

- **Definition of Nonpoint Source Pollution**

Attachment C incorrectly states that diffuse pollution sources are not generally subject to NPDES permitting. In fact, the nonpoint source pollution is not subject to NPDES permitting.

- **Definition of Waters of the State**

Attachment C improperly broadens the definition of water of the state. The proposed definition is inconsistent with Water Code section 13050(e), and would claim that, among other things, water in an irrigation system is a water of the state. Such an expansive definition is not supported by law or policy. The definition of water of the state needs to be limited to that as contained in statute.

- **Definition of Waterbody**

Like with the definition of waters of the state, the definition provided in Attachment C is overly broad. Drainages, canals and artificial bodies of water are not waterbodies subject to the requirements of the Draft Order and should not be included in the definition here.

VII. CONCLUSION

For the reasons provided above, the Draft Order is legally deficient in many ways and cannot be adopted as proposed. Substantial revision is necessary before the Draft Order can be considered by the Central Coast Water Board. Considering the level of deficiency, and necessary level of revision, a revised version of the Draft Order will need to be circulated of additional public review and comment. Thank you for the opportunity to provide comments.