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By Hand Delivery

January 3, 2011

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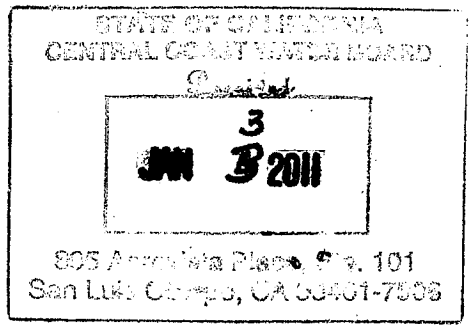

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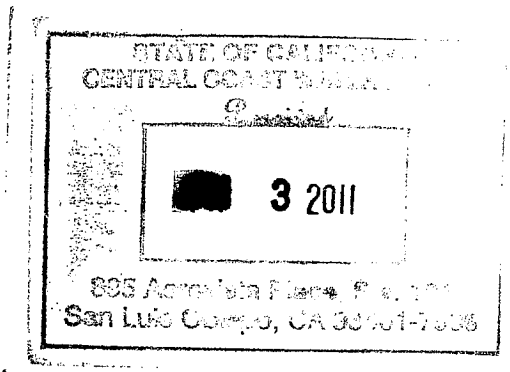

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Re. Comments Of Jensen Family Farms, Inc. to Draft Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, Order No. R3-2011-0006

Dear Gentlepersons:

This letter provides you with the views and comments of Jensen Family Farms, Inc. ("Jensen") concerning the Board's Preliminary Draft Report and Staff Recommendation for the Draft Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, Oder No. R3-2011-006 ("Proposal").

As an introductory matter, we are a family-owned farming corporation that owns and/or operates six (6) separate farms in the Salinas Valley located between Chualar and Salinas (as well as between Salinas and Marina) which total approximately 1140 acres currently in production. Those farms are located on (1) Spence Road (which farm abuts Highway 101 as well as the Salinas River for over one mile and, in fact, straddles both sides of the River; (2) Somavia Road (which abuts Highway 101 as well as the Salinas River); (3) a farm on Old Stage Road; (4) Esperanza/Old Stage Road (which abuts Highway 101); (5) Potter Road (which abuts Highway 101); and (6) Blanco Road. It irrigates those farms from well water pumped to the surface. Various row crops consisting of iceberg lettuce, romaine lettuce, red leaf lettuce, broccoli and asparagus are grown, as discussed below, on the respective farms. Jensen is the present corporate manifestation of what is a fourth-generation family farming operation in the Salinas Valley that dates back more than 100 years. It is among the leaders of "new" farming practices, having been among the first farming entity to engage in large-scale organic farming in the Salinas Valley, growing as it does organic asparagus on over 100 acres of its primary farming property located at the intersection of Old Stage and Esperanza Roads. As a non-multinational non-vertical agribusiness it thus has close ties to the Salinas Valley and, in fact, is preparing for the next generation to carry on family traditions of nurturing the land. Owned, in great part, by hunters, fishermen, and life-long farmers, it is dedicated to not only maintaining economically viable farming in the Salinas Valley but also in taking actions consistent with necessary reasonable environmental concerns about air, water, and the human environment. Unfortunately, the actions of the Proposal do not even come close to meeting this goal.

A review of the voluminous Proposal (with attachments) reveals a number of major flaws, weaknesses, and inconsistencies. Alone or cumulatively these matters, in the final analysis, lead inexorably to the conclusion that the Proposal has not been fully thought out or developed by the Staff. As a result, adoption of the Proposal would be an abuse of governmental authority for a variety of reasons and on a variety of bases including, but not necessarily limited

to, the following:

1. The 3-tier system, as applied to Jensen, is overbroad and overinclusive and thus violates Jensen's constitutional rights to due process and equal protection in that, for instance, a substantial portion of the Esperanza ranch referenced above falls within Tier 1 as defined (due to the certification of approximately 100 acres as "organic" and the growing of organic asparagus thereon and if it were not located within 1000 feet of Esperanza Creek which is listed on the Section 303 list of impaired waters)) while portions of the remainder may be classifiable as Tier 2/3 but, according to the Proposal, the entire ranch is deemed to be Tier 2/3. It is further overbroad and overinclusive since it fails to consider the types of soil and geology of the various farms falling within the tiers (since that is an important factor in determining whether, if, and how much water leaves the land or is reabsorbed into the aquifer and, additionally, in its definition of what waters (groundwater or tailwater) fall within the purview of the Regional Board for purposes of regulation.

2. The Three-tier approach is based on an unjustifiable and illegal expansion of the Regional Board's authority.

3. The Proposal And Staff's Recommendations fail to comply with California Water Code § 13240 which requires that "[d]uring the process of formulating [water quality control] plans the regional boards shall consult with and consider the recommendations of affected state and local agencies..." by failing to consult any affected agency such as the California Coastal Commission, California Air Resources Board, the Monterey Bay Unified Air Quality Control Board, the federal Environmental Protection Agency, California's Department of Agriculture, ad infinitum. Indeed, the reason for such failure to consult is clear: had Staff consulted with these affected agencies, it would have been advised of the Proposal's myriad of significant negative impacts on literally every aspect of the environment, which impacts are not mitigatable and would preclude adoption of the Proposal.

4. The Proposal and Staff's Recommendations fail to comply with the Porter-Cologne Water Quality Control Act, Cal.Water Code § 13000 et seq, and particularly Section 13241 thereof that specifically requires this Board, in establishing water quality objectives such as those contained in the Proposal, must specifically consider "economic considerations" and "the need for developing housing within the region." That failure is an abuse of discretion that renders the Proposal arbitrary, unreasonable, and capricious.

5. The parameters of the CEQA analysis are too narrow and are intentionally designed to produce a negative declaration rather than a realistic identification and assessment of the significant environmental impacts of the Proposal. Rather than, as it should have and as CEQA demands, consider the impacts on the environment that would be created by use of the two or three specific

technologies available by which compliance with such guidelines may be accomplished, the Staff reasoned that the proscription of Water Code § 13360 which precludes the Board from specifying which technologies must be used created a purported lack of knowledge as to what those technologies are so that, in a syllogistically unsound conclusion, it "can only speculate with respect to the extent there could be adverse environmental effects because it is not known with specificity what actions dischargers may take to comply."[1] That is wrong for numerous reasons and, in fact, creates a Catch-22 for the Board: since technological feasibility (the existence of technology by which compliance with the pollution guidelines can be accomplished) is a sine qua non requirement for the Proposal to not be arbitrary and unreasonable, either such technology exists and the Staff must set forth the foreseeable environmental impacts of its use) or no such technology exists in which case the Proposal may not be adopted.

6. The CEQA analysis of alternatives is facially inadequate in that it fails to include a discussion of the "no project alternative" option.

7. The CEQA analysis, including significant environmental effects of the application of the presently available technological means of obtaining compliance, requires the preparation of a full EIR prior to further consideration of the Proposal and ultimate rejection of the Proposal due to the significant negative impacts on the environment it would create.

8. The 30-foot buffer zone on farmland is so vague in terms of the point from which measurement begins that it violates the constitutional right to due process.

9. The 30-foot butter zone constitutes an unconstitutional regulatory taking of land and earnings in violation of the Fifth Amendment of the United States Constitution as well as of the California constitution.

10. The underpinning of the entirety of the Proposal's reporting and compliance regime is based on what is, in the view of Staff, "administratively convenient" even though "administrative convenience" is a State interest that is inadequate to support such a regime and, in any event, the California Environmental Quality Act, Cal.Pub.Res.Code § 21000 et seq. ("CEQA"), precludes the elevation of administrative convenience over environmental concerns and interests.

If Socrates was correct in saying that wisdom is the recognition of how much one does not know,[2] then the Proposal stands as a monument to thwarted wisdom. Peppered throughout with

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1 Draft Conditional Waiver of Water Discharge Requirements at p. 8.

2 Plato, Apology of Socrates § 57B.

blatant examples of how much the Staff does not know about agricultural practices and necessities, the geology of the subsoils of the region, the means by which water is returned to the earth after being used for irrigation, that California through its Department of Regulation has approved of various pesticides (including the amounts and methods of their use) about which the Staff finds to be unacceptable farming practices, wisdom mandates that the Proposal be rejected. Indeed, when these factors are fully considered, particularly in absence of a sufficient factual predicate for adopting the Proposal, rejection of the Proposal is the only acceptable choice available to the Board.

A. The 3-Tier System Created As A Part Of The Pollution Control Regime Is Overinclusive And Overboard, And Thus Violates Jensen's Constitutional Rights To Due Process and Equal Protection

The keystone of the Proposal is the creation of a 3-tier system by which all farms, wineries, and other agricultural./viticultural entities are categorized for purposes of providing reports, monitoring and information concerning compliance with pollution guidelines. Purportedly created from the Staff's wish to eschew a "one size fits all" reporting/monitoring regime due to the flaws and unfairness of that approach, all that the new tiering system does is to change a "one size fits all" paradigm into a "three sizes fit all" regime which mirrors the original's flaws and unfairness. That this is so is established by several separate considerations.

First, Jensen's Esperanza Road/Old Stage Road ranching acreage provides the paradigmatic situation establishing the tiering's overinclusiveness. That Ranch is approximately 395 net acres in size (excluding the owner's residence, the shop and storage areas, roads, and similar appurtenances). Approximately 100 of those acres is dedicated to exactly the type of agriculture that the Board would conceivably like all of the Region to be dedicated: i.e., organic farming. In this instance, organic asparagus is grown. Under the 3-Tier regime, those fields would be in Tier 1 (were it not for their proximity to Esperanza Creek, a Section 303 impaired waterway). Other portions of the Ranch, however, would be considered to be Tier 2/3 since non-organic crops are grown (including broccoli, leaf lettuce, and cauliflower). This is not an unusual situation throughout the Salinas Valley due to the increase in land dedicated to organic farming. However, since a portion of the Ranch is Tier 2/3, all of the Ranch is considered to be Tier 2/3. That is an overinclusive and overbroad classification in which the linkage between the Proposal's legitimate ends and chosen means to accomplish compliance reporting and provision of information to it is simply too attenuated. The application of that regime to Jensen thus offends and violates Jensen's constitutional rights to due process and equal protection. See, e.g., Newland v. Bd. Of Governors, 19 Cal.3d 705 (1977); City of Cleburne v. Cleburne Living Center, 473 U.S. 732 (1985).

Second, the tiering system does not take into consideration various important factors – including the geology of the soil and subsoil strata of individual farms within the Region as well as the mechanisms for return of water used for irrigation to the aquifer or surface bodies of water. The 3-tier regime fails to take into account the assimilative capacity of soil. There is considerable treatment of water that occurs as the water makes its way through the soil profile. In many areas it can be reasonably expected that there will be significant dilution and attenuation of constituents prior to reaching any groundwater extraction or egress point. In addition, the Proposal fails to consider that the assimilative capacities of lands covered under the Proposal vary greatly. Indiscriminately using first encountered zone measurements may produce

inconsistent and inaccurate results. Because there is a significant possibility that dilution of constituents will occur before discharge reaches the level at which it is put to beneficial use, and a substantial likelihood that groundwater data collected at the first encountered zone will bear little relationship to the actual impact on beneficial uses in that area, determining compliance with water quality objectives in the first encountered zone is inappropriate.

Moreover, crop, soil, vadose zone, and/or groundwater uptake of potential contaminants effectively mitigates pollution in many cases and are factors which the Tiering system does not take into account. Further, clay layers in many parts of the groundwater system in the Salinas Valley, for instance, prohibit or greatly inhibit the downward movement of water in many areas, and thus isolate deeper waters with beneficial uses from contamination by possible percolating water from irrigated lands. It cannot be – but was by Staff -- overlooked that water moves through soil due to two types of forces – gravity and capillary tension. Capillary forces pull water from wet areas into dry areas in any direction. Gravity pulls water downward. Capillary forces vary greatly in magnitude depending on the water content in a given soil and by soil texture. Capillary forces dominate flow conditions in unsaturated soils, while gravity only governs flow in saturated soil conditions. See Gardner, Dr. W.H., How Water Moves in Soil (University of Washington 1979). Thus,

1. Surface evaporation and transpiration can create extremely dry near-surface soil conditions in more arid areas, such as many areas within the Central Coast region;

2. Soil moisture content generally increases with depth, so capillary forces can tend to wick water from moist, deep percolation areas toward the adjacent near-surface dry soils rather than downward. This is more likely where more thickness of unsaturated sediments is present between the surface and deep groundwater.

3. Similarly, alternating layers of coarse- and fine-grained sediments can serve as capillary breaks that also act to retard downward movement of groundwater.

The Proposal does not factor in such differentials and treats all dirt the same for purposes of compliance and monitoring. That is an overwhelmingly flawed approach which renders adoption of the proposal an abuse of discretion.

B. The Three-Tier Approach Is Based On An Unjustiable And Illegal Expansion Of The Regional Board's Authority.

The Proposal's overinclusiveness and overbreadth also arises from Staff's attempt to unjustifiably and illegally expand the Regional Board's authority. A review of the Proposal reveals that it seeks to include not only the existing surface water waiver but also expands to include the complex area of groundwater. The Proposal wrongfully assumes that virtually all irrigated agricultural lands, including those that do not drain to surface waters of the State, must be considered as discharging to groundwater. That is simply a factually incorrect assumption. For example, lands that are farmed many hundreds of feet above groundwater and use drip irrigation constituting only a few inches of irrigation water during the summer months coupled with annual winter rainfall of less than ten inches have absolutely no percolation or discharge to groundwater whatsoever, and much less have the capability of carrying a contaminant from the surface many hundreds of feet to underlying underground water, which itself may be decades or hundreds of years old, and may have originated dozens of miles away.

This erroneous conclusion that all irrigated lands discharge to groundwater leads to the erroneous conclusion that the Regional Board even has jurisdiction over all lands and under that alleged jurisdiction the Regional Board has regulatory authority over all irrigators.[3] That assertion of jurisdiction and the requirement that all irrigators must comply with the Proposal's restrictions and mandates ignores the Regional Board limited authority relative to discharges that affect the water quality of waters of the state. See Water Code § 13000 et seq.. This assumption of discharge attempts also to shift the burden of proof from the Regional Board to the farm owner or land operator to disprove the erroneous postulation that all irrigated lands discharge water to groundwater. This is also inconsistent with the burden expressly outlined in Water Code § 13267(b)(1), which states that the Regional Board "shall provide a written explanation of the need for such reports and shall identify the evidence that support requiring reports."

A fundamental limitation of the Regional Board's authority to regulate irrigation practices is that the activity must result in a "discharge of waste" that impacts water quality. Simply because it would be "difficult" or would be "administratively inconvenient" to determine whether individual irrigated lands are creating a discharge of waste does not eliminate the Regional Board's statutory obligation to only regulate activities that actually create a discharge of waste. See Subsection J post. The general notion underlying the Proposal is of groundwater's vulnerability, and that notion is not a surrogate to establishing jurisdiction and cannot be used as the basis for (1) assuming discharge to groundwater aquifers or (2) placing virtually all parcels in

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[3] This is particularly so, for instance, with regard to cattle ranches which abound in number and acreage within this Region. These ranchers are faced with an economic burden to comply with the 2004 regime and the 2011 Proposal even though the Board (including the Proposal and its attachments) fails to demonstrate that their operations have any a significant effect on water quality. Despite this, the actions of the Regional Board staff in the past have presumed that the presence of cattle and grazing on irrigated pasture results in a discharge of water that affects water quality. Additionally, the idea that the natural flow of stormwater from non-irrigated land is presumed to constitute a discharge of waste to the waters of the State and that irrigation of any portion of a parcel has rendered entire parcels – including un-irrigated sections – subject to the Proposal's presumptions is without any factual support offered by either Staff or the Board itself. Thus, the Proposal should have – but did not – avoid the presumption that water running off of irrigated pasture inherently constitutes a discharge of pathogens or other constituents of concern. As stipulated by Porter-Cologne, only activities that discharge or propose to discharge wastes that affect water quality must be covered by regulatory regimes authorized by the Water Code.

Further, pursuing enforcement actions or sending Section 13267 letters based on the broad assertion that, by irrigating a landowner is also discharging and therefore is subject to restrictions and compliance under the Proposal is inconsistent with the law. Section 13267 of the Water Code specifically states that "in requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." Requiring all irrigators to comply with the Proposal without the Regional Board providing sufficient evidence inappropriately shifts the burden of proof to the farmer or rancher where state law indisputably requires the Regional Board to present evidence of a discharge prior to requiring compliance under the Proposal. The Proposal should – but does not – recognize that not all irrigators within the Region discharge and thus not all are subject to the regulation.

Tier 2 or 3. To do so would be unreasonable because landowners would be faced with the burden of trying to "prove" a negative, which if achievable at all, could only be done at unreasonably great expense.

C. The Proposal Fails To Comply With Water Code § 13240

The Staff's failure to comply with the requirements of Water Code § 13260 not only dooms the environmental analysis but, more tellingly, highlights the intrinsic weaknesses of the CEQA analysis and conclusions contained in the Proposal (which is a matter discussed below). Section 13240, of course, commands the Regional Board to

> "formulate and adopt water quality control plans[4] for all areas within the region. ... **During the process of formulating such plans the regional boards shall consult with and consider the recommendations of affected state and local agencies**...." (Emphasis supplied)

And yet no mention of compliance with this requirement appears in the Staff Report or other documents submitted relative to the proposal. Independent investigation reveals that the reason for this omission is that affected state and local agencies were not ever consulted by the Staff in preparing the Proposal involved here or, for that matter, its February 2011 predecessor. The "affected state and local agencies" include not only the agencies responsible for air pollution control (including the Air Resources Board and the Monterey Bay Unified Air Quality Control Board), for pollution in general (including the federal Environmental Protection Agency, including water pollution), for conditions along the California coast (including the California Coastal Commission), for the respective counties which make up the Region (Monterey, San Luis Obispo, Santa Barbara, Ventura, Santa Cruz, and San Benito), for agencies charged with oversight of pesticides (including California's Department of Pesticide Regulation which is responsible for the approval of the types and amounts of pesticides to be used in agriculture/viticulture), California's Department of Transportation ("Cal-Trans"), and, of course, the United States Departments of Justice (which has jurisdiction over the federal penitentiaries located in Lompoc wherein agricultural activities take place as well as other lands and facilities located in the Region) and Agriculture (which has jurisdiction over several facilities located in the Region which would be subject to the proposal), respectively. Had these affected agencies

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4 "Water quality control plans" is defined by Water Code § 13050(j) as meaning

> "a designation or establishment for the waters within a specified area of all of the following:
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> (1) Beneficial uses to be protected.
> (2) Water quality objectives.
> (3) A program of implementation needed for achieving water quality objectives [which, as defined in subsection (h) means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area]."

been consulted the inevitable conclusion is that they would have pointed out, as we have below, that the Proposal once implemented would have significant (and negative) impacts on most areas of the environment. That, most likely, is the reason that Staff did not consult with them.

While most of these agencies will be discussed below, special note should be taken of the Department of Pesticide Control and Cal-Trans as being indicative of the great importance consultation with other agencies must (but did not here) play in the formulation of policy. The Department of Pesticide Control ("DPR") has had a ground water protection program in place since the early 1980's, and is guided by the mandates of the Pesticide Contamination Prevention Act (PCPA) of 1985, Cal. Food & Agriculture Code § 11345 et seq.. . The PCPA requires a formal review of pesticides found in groundwater due to legal agricultural use to determine if continued use can be allowed. This formal review includes findings and recommendations made to the DPR by a subcommittee comprised of one member each from the State Water Resources Control Board, the Office of Environmental Health Hazard Assessment, and DPR. A formal review has been conducted for eight pesticides (ldicarb, atraine, bentazon, bromacil, diuron, norfluarazon, prometon, and simazine) which the DPR decided should be regulated to protect groundwater. Regulation of the parent active ingredient means detected degradation products of these active ingredients are also regulated to protect ground water. Aldicarb requires a permit issued by the county agricultural commissioner for all uses and is subject to use restrictions (management practices) designed to protect ground water statewide. The other seven pesticides require a permit for use in sensitive areas, where specified use restrictions apply, and are subject to additional use restrictions statewide to protect groundwater. The goal of these use restrictions is to reduce pesticide residues to concentrations in groundwater that are below the analytical method detection limit.

The PCPA also requires the DPR to establish the Groundwater Protection List of pesticides that have the potential to pollute groundwater and conduct well sampling to determine whether they have migrated to groundwater. DPR has monitored for approximately 40 pesticide active ingredients (and some of their degradation products) on this list in areas with high use and is developing analytical methods for additional pesticides on the list. Four of those 40 pesticides active ingredients (or their degradation products) have been found in ground water, but the frequency of those detections even in high use areas is extremely low. Of those four, only one appears to meet the conditions that will require a formal review. DPR has also adopted regulations to protect wellheads statewide from any pesticide "handled" near a well. Handling includes mixing, loading, transferring, and applying (including chemigation); and maintaining, servicing, repairing, cleaning or handling equipment used in these activities that may contain residues; and working with opened (including emptied but not rinsed) containers of pesticides. The wellhead protection regulations are also designed to protect wellheads from runoff water containing pesticide residues that may originate far from the wellhead. Backflow prevention regulations are also in place to prevent direct movement of pesticides to ground water that results from backsiphoning of pesticides in tank mixes to being chemigated when a well shuts off.

Thus, DPR's ground water protection program tracks results of well sampling conducted statewide for pesticides, samples for pesticide that have the potential to migrate to ground water, formally reviews detected pesticides and requires users of those pesticides to adopt use restrictions designed to reduce residues to blow the detection limit, requires property operators to take specific actions to protect wellheads from pesticides including from backflow, and reports

annually the results of well sampling for pesticides and all actions taken to protect ground water. And yet consultation with this important agency was not made in the formulation of the Proposal. The net effect of this is that the Proposal seeks, sub rosa, to change pesticide use and related agricultural management practices that have been approved by another state agency which is charged with water protection. The right hand and the left hand apparently act separately when they should, in fact, work together for the common good of the people of California.

Cal-Trans plays a much more limited – but nonetheless important in the overall scheme of things – role relative to matters contained in the Proposal. Cal-Trans, of course, has responsibility for the maintenance and operation of State and Interstate highways within California. Any proposals that would affect the State Highway System are of concern to it. Cal-Tran's office of Stormwater and Hydraulics also has concern about the effects of potential changes in regulation to irrigation runoff into State highway facilities. Cal-Trans is also the agency of concern relative to obtaining Encroachment Permits relative to activities that may occur within Cal-Trans rights of way. Projects impacting waste discharge often do require encroachment permits. In other words, aspects of the Proposal would, if adopted, require Encroachment Permits be obtained by individuals or coalitions.

The result of Staff's failure to consult other agencies charged with various aspects of pollution control is obvious: it causes an exclusive focus only on matters relating only to water quality and ignores, in their entirety, significant impacts created by the proposal on the air, view, and economic matters (just to name three). In that way, the Staff could, quite frankly, write a CEQA analysis recommending only a negative declaration be prepared and which excludes any and all consideration of realistic, foreseeable impacts on the environment as a whole occasioned by the implementation of the Proposal and the compliance therewith by the farming and viticulture industries. **Using the "butterfly effect"[5] analogy, any action taken by the Regional Board without consideration of the affects those actions will have on non-water aspects of the environment in this Region creates a movement of air that will result in significant damage to other aspects of the environment and economy within the Region and, due to the importance of agriculture to California's and the nation's economy as a whole, would have an effect outside the Region as well.** Such a myopic approach disserves the interests of the people of California in creating the Regional Board in the first place. It also affects an incalculable harm on the environment and the population that this Board and its Staff have sworn to protect.

D. The Proposal Fails to Comply with the Porter-Cologne Water Quality Control Act

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[5] See James Gleick, Chaos: Making a New Science 8 (1987) (discussing the parable of the flapping of a butterfly's wings that creates a minor air current in China, that adds to the accumulative effect in global wind systems, that ends with a hurricane in the Caribbean).

The Proposal also violates the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000, which is cited by the Staff as a basis of and for its Proposal.[6] Section 13241 is of great import since it defines the duties of the regional boards and provides, in pertinent part,

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

A review of the Staff's Proposal reveals that it does not adequately, if at all, address these two matters (a discussion that is necessarily separate and apart from any discussion of such factors under a CEQA analysis, particularly since economic considerations under CEQA are relevant only insofar as they have a direct relationship to environmental affects.) This sort of patent violation of the statutory basis for the Board taking any action at all not only affects a great embarrassment to the Board itself but, more importantly, also negatively impacts the legality of the Board's actions as a whole since it renders the Proposal categorically arbitrary, unreasonable, and capricious.

Before proceeding with the economic impact of the Proposal, it should be noted that a loss of production that would be associated with lands being set aside for the buffer zone

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[6] As is noted in City of Burbank v. State Water Resources Control Bd., 35 Cal.4th 613, 619 (2005)(fns. omitted):

> "In California, the controlling law is the Porter-Cologne Water Quality Control Act.... [Citation.] Its goal 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) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise 'the principal state agencies with primary responsibility for the coordination and control of water quality.' (§ 13001.) ... [¶] Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards 'formulate and adopt water quality control plans for all areas within [a] 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).)"

conflicts with the California Leafy Green Marketing Agreement (see www.ccof.org/leafygreens) and the "super metrics" adopted by the California food production industry to address food safety concerns. Neither of these matters were, of course, discussed in the Proposal or accompanying attachments.

That the Proposal will have an enormous impact on the agricultural economy of the Region – and, since it is by far the largest segment of the economy in the Region and a primary source of income – is obvious. The 30-foot buffer zone will cause literally thousands of acres of farmland now under cultivation to cease being cultivated. The direct economic impact of that is obvious: with fewer crops being grown, fewer crops will be sold and otherwise made available to the public, and lower profits that are used by the grower/owner/operator to grow the economy of the Region will result. The value of the land currently being cultivated but which will, under the Proposal, be forced to lay fallow will decrease, the direct result of which will be a significant decrease in property taxes paid which obviously impacts the amounts of money available to local, county, and state governmental units (including this Board) which they believe are necessary for them to function. Cutbacks in the number of laborers necessary to service the agricultural industry will occur: the results of that will be a reduction in the monies being spent in the Region's economy, an increase in governmental benefits being paid to the unemployed, a movement of individuals out of the region, increased foreclosures of homes now being purchased by unemployed laborers, and the resulting impact on the taxes that may be collected by the local and state governments. Indeed, a cascading detrimental economic effect will occur.

Other aspects of the Proposal (including the costs attendant to purchasing, maintaining, and operating the technologies necessary to comply with the pollution control guidelines) will have a similar economic impact: farmers will have to charge more for their products in order to maintain their presently slim profit margins, the cost of living and inflation will increase due to the rising cost of agricultural products, laborers will either not be hired or will be terminated as cost-savings measures necessary to maintain the economic integrity of the farms (the effect of which will be the same as that mentioned above). A variety of other dire economic results will also obtain as a result of the Proposal. In other words, the "butterfly effect" poses a serious economic result to the Region and, indeed, to the country's economy as a whole (noting that, for instance, the CPI increased approximately 1% in 1995 when, due to widespread flooding in the Salinas Valley, few crops were harvested and the costs of vegetables/lettuce/berries, both domestic and imported, increased).

E. The CEQA Analysis Is Insufficient And Fatally Flawed Due In That, Among Other Things, It Intentionally Fails to Include The Significant Negative Environmental Effects Of Reasonably Foreseeable Actions Necessary to Comply With Pollution Reduction Guidelines

Giving life to the unacceptable and ultimately self-defeating bureaucratic philosophy that "the ends justify the means," the Proposal is accompanied by an environmental quality analysis that flaunts both the purpose and requirements of the California Environmental Quality Act, Pub. Res. Code § 21000 et seq. It focuses entirely on only the purported "direct" impact of the proposal itself without factoring in the Proposal's implementation by the agricultural community in order to comply with the guidelines set by the Board relative to purification of irrigation water running off the land to drinking water purity. It thus creates its own little world where the water is purer but, in the cause of such purity, the remainder of the environment is left to go to hell.

The methodology chosen by the Staff is simply stated by it:

> "The Water Board staff has not received any specific evidence by commenters and has little evidence in the record to **demonstrate conclusively** that the proposed draft 2011 Agricultural Order **will result** in significant adverse environmental effects on agricultural or biological resources. The Water Board staff expects that compliance with the proposed draft 2011 Agricultural Order will result in significant beneficial impacts on the environment. The Water Board must require compliance with water quality standards and consistency with its water quality control plan (Basin Plan). The existing 2004 Agricultural Order and the proposed draft 2100 Agricultural Order set forth conditions to achieve compliance with the water quality standards and the Basin Plan. Compliance with the conditions will result in environmental benefits. As set forth in Water Code section 13360, the Water Board may not specify the manner of compliance with orders of the Board; the discharger may comply with the order in any lawful manner. **As a result, the Water Board can only speculate with respect to the extent there could be adverse environmental effects because it not known with specificity what actions discharger may take to comply.** There is not sufficient information to determine the scope of any changes in environmental effects and any potential impacts are very speculative."

Draft Order at p. 8. (emphasis supplied). That is sophistic and erroneous. **This is illustrated by the following example which presents a close analogy to the position taken by Staff: an applicant wants to build a large tallow/fertilizer/pesticide plant powered by an in-house nuclear reactor on the banks of the Salinas River. Under the Staff's analytical framework, as far as this Board is concerned only a negative declaration would be required since the construction of the plant would be beneficial to the environment since acres of farmland would be covered in concrete (and thus not leach nitrates or anything else into the soil and waters of the River), and it would be "speculative" to assume that the plant would be built and/or that it would, after being built, ever operate.** Can it reasonably be said that the Regional Board would approve such a project without a full EIR? If not (and the only reasonable answer is that it would not) then no reason exists why what is "good for the goose is not good for the gander" as well. The Board's status as a governmental agency does not place it in a different position than a private-sector entity when it comes to the responsibility and necessity of performing a full and accurate environmental analysis.

As discussed below, Staff's insistence that only concrete effects may be considered is without support in the law for the very simple reason that CEQA looks to the existence of "potential" effects and very much relies on foreseeability of effects rather than their concrete present existence. Further, the position taken by Staff essentially creates a Catch-22 in terms of determining whether the Proposal is arbitrary, unreasonable, and capricious which obtains to the detriment of the Proposal. The promulgation of a pollution regulatory regime requiring compliance (as the Proposal here does) must rest on the concept of "technological feasibility." That is, technology must exist or will exist in the timeframe set for compliance to begin by which compliance with the regulation's guidelines can be accomplished. See, e.g., Vigil v. Leavitt, 381 F.3d 826 (9th Cir. 2004); International Harvester Company v. Ruckelshaus, 478 F.2d 615 (D.C.Cir. 1974); In re. Operation of the Missouri River System, 363 F.Supp.2d 1145 (D.Minn.

2004); Kandra v. United States, 145 F.Supp.2d 1192 (D.Ore. 2001). If it does not then the regime is arbitrary, unreasonable, and capricious. Since Staff obviously would not want that to happen here, it is safe to say that the Staff is familiar with the 3 primary technological means by which compliance might be achieved (and this is particularly so since they were set out at length in our March 31, 2010 letter to the Board regarding its prior Proposal). Those 3 technologies are: (1) reverse osmosis, (2) reverse ion exchange, and (3) catchment basins located on each farm into which all water drains and from which no water is released that will flow into rivers and other bodies of water of concern to the Board.

It must be and is reasonably foreseeable or anticipated by the Board that the owners or operators of agricultural lands will use one or more of the just-delineated three technologies in order to comply with the Proposal guidelines for purifying water. That is all that is required for them to be included in the analysis of significant environmental impacts. It is obvious that the Staff chose to not consider them due to the realization of the immensely significant negative impacts on the environment that the use of one or more of these technologies create. That is not what CEQA permits or allows to be done.

"In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which **may be** caused by the project and **reasonably foreseeable indirect physical changes in the environment** which **may be** caused by the project." State CEQA Guidelines, § 15064(d) (emphasis supplied). "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. Id. § 15064(d)(2). Thus, the failure to analyze the foreseeable impacts of the three technologies dooms Staff's analysis and requires that it be rejected out of hand.

F. The Proposal Does Not Otherwise Comply With The Requirements \ Of California's Environmental Quality Act

The conclusion of the Staff's Initial Study and Environmental Checklist – if adopted – is inconsistent with and violates CEQA. That conclusion, of course, is that the Proposal is good for the environment and, in "fact" is so "good" that it will not have any negative impact. Ignoring the use of the only technologies by which compliance with the Board's guidelines can be conceivably met, Staff's conclusion is based on a determination, made with regard to the 79 (excluding subparts) sections appearing on the CEQA Environmental Checklist (which is composed of 17 separate categories), that the impact runs the gamut from "no impact" on 75 of them and "less than significant impact" on the remaining 4. Those four deal with the conversion of farmland to non-agricultural use and the effect on the riparian habitat or wetlands. As a result of that conclusion, no Environmental Impact Report ("EIR") on the proposal as it would be adopted, including actions necessary to comply with its terms, would be required in the opinion of the Board. Such a conclusion is both factually and legally incorrect. Indeed, it either fails to recognize or take into account the actual or potential significant environmental impacts on 11 of the 17 categories listed in the CEQA checklist including, notably the following numbered items:

(1) Aesthetics (impacts on scenic vistas and resources through, among other things, the

construction of numerous and sizeable water treatment facilities (such as large reverse osmosis equipment) on lands abutting or otherwise adjacent to major scenic thoroughfares such as Highway 101, Highway 1 (Pacific Coast Highway), Highway 46 (in San Luis Obispo County), River Road (in Monterey County), Halcyon Road (in San Luis Obispo County), Vineyard Drive (in San Luis Obispo County), and Highways 154 and 246 (in Santa Barbara County);

(2) Agricultural resources (the imposition of a 30 foot buffer zone replacing agricultural lands abutting such things as the Salinas River and all streams and sloughs discharging water into the river or Monterey Bay translates directly into the loss of literally thousands of acres of now-fertile and producing agricultural lands);

(3) Air quality (additional air pollution arising from the introduction of literally thousands of agricultural land-sited diesel-fueled water treatment facilities, as well as from additional vehicle traffic arising from the need to service such facilities (including the removal of the water purification chemical byproducts as well as the purified water [the latter being available for bottling and commercial sale as drinking water], pollution caused by the construction and working of local facilities to treat the chemical byproducts and to-be-bottled water);

(4) Biological resources (the potential loss of discharged water draining into the rivers and bodies of water in the Coastal Region due to the sale, by the farmers either independently or cooperatively, of the drinking-water pure water produced on their lands would directly impact the amounts of water in which protected or "of concern" species live);

(7) Hazards and Hazardous Materials (arising from the transport, use or disposal of chemicals and other by-products of the water purification process by famers either independently or cooperatively);

(8) Hydrology and Water Quality (including those items discussed with regard to biological resources ante, depletion of ground water resources or interference with ground water discharge, alteration of the existing drainage patters);

(11)Noise (the addition of noise from the operation of the treatment facilities, traffic-related-to the maintenance and care of those facilities as well as transportation of by-products);

(12)Population and Housing (including the loss of population that would result from the loss of land presently used for agricultural purposes from imposition of the various buffers and setbacks which would thus displace substantial numbers of people, necessitating the construction of replacement housing elsewhere);

(15) Transportation/Traffic (increase in the number and frequency of vehicle usage of the highways and roads due to the need for servicing of the treatment facilities,

construction of those facilities, the removal of by-products, and other related matters);

(16)Utilities and Service Systems (construction of numerous new water treatment facilities on each farm or tract of land within the Region that presently "discharges" water that will produce the significant environmental effects discussed herein); and,

(17)Mandatory findings of significance (cumulative considerable impacts on the environment which will cause substantial adverse effects in terms of income and other matters relating to the human environment).

Quite simply, the information upon which the proposed negative impact finding is based is woefully incomplete as to the scope of matters considered, and woefully in error regarding the matters it has interpreted and applied as have just been listed and which will be further discussed below. That insufficiency and incorrectness may, among other factors, be due to the apparent lack of coordination and consultation with other governmental agencies, including those involved in pollution-control matters, as to the actual or likely negative significant affects on the environment posed by the Proposal. As mentioned above, these agencies include the California Coastal Commission (which is charged with responsibility for matters occurring in the coastal zone, an area that is includes within its parameters much of the agricultural lands covered by the Proposal which are located on Monterey County's North Coast, San Luis Obispo County's South Coast), and Santa Barbara County's North Coast), the California Air Resources Board (that has issued regulations dealing with air pollution produced by diesel engines used in agricultural operations), the Monterey Bay Unified Air Pollution Control District (which has also issued Rules dealing with air pollution caused by diesel engines used in agricultural operations), Cal-Trans, California's Department of Pesticide Regulation, and the federal Environmental Protection Agency (due to the significant amounts of land owned by the federal government and its agencies, including the Department of Agriculture's Old Stage Road operation and Hartnell College's East Campus in Salinas, are of which are located in the Region and directly impacted by the Proposal.[7])

At the end of the day, it all comes down to this: consideration of the actual water purification equipment and infrastructure that the Proposal requires farmers to build and install on their lands (with all of the related activities arising from the operation and maintenance of that equipment combined with the need to make up, wherever possible, the significant loss in income occasioned by having to retire a hefty portion of their land due to the 30-foot setoff requirement) combined with just plain common sense clearly shows that the Proposal's impact on the environment would be, at a minimum, potentially significant (with or without any mitigation). There is, of course, more. All information leads to the conclusion that if this Proposal is adopted as proposed, the Board will violate CEQA by issuing what amounts to nothing more than a

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[7] The failure to coordinate with the Department of Agriculture is particularly inappropriate since it is charged, by 7 C.F.R. § 377.5(d) with the preparation of National Environmental Protect Act Environmental Impact Statements for its projects (the substance of which might of proved useful to the Board in preparation of the Proposal).

negative declaration (or, at the most, the "functional equivalent" of one) when a "full EIR" is required because "substantial evidence of a fair argument" exists that the Proposal and its implementation may result in "significant environmental impacts."

In order to make clear the requirements that are not being met by the Proposal's consideration of environmental impacts, Jensen's understanding of the requirements of CEQA should first be iterated. As the California Supreme Court noted in Sierra Club v. State Bd. Of Forestry, 7 Cal.4th 1215, 1233 (1994), "CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives." If a project – such as the Proposal and its implementation – does not have feasible alternatives or mitigation measures that can substantially lessen or avoid those effect, the project should not be approved. See Mountain Lion Foundation v. Fish & Game Com., 16 Cal.4th 105, 134 (1997). CEQA is implemented through initial studies, negative declarations and EIR's. It requires a governmental agency – such as the Board in its capacity as Lead Agency on his particular "project" -- to prepare an EIR whenever it considers approval of a proposed project that "may have a significant effect on the environment." Quail Botanical Gardens Foundation, Inc. v. City of Encinatas, 29 Cal.App.4th 1597, 1601 (1994); Cal. Pub.Res. Code § 21100. Thus, if there is no substantial evidence a project "may have a significant effect on the environment" or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no EIR is required. Cal.Pub.Res. Code §§ 21980(d), 21064. However, the Supreme Court has repeatedly recognized that an EIR must be prepared and a negative declaration cannot be certified :whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. No Oil Co. v. City of Los Angeles, 13 Cal.3d 68, 75 (1974).

What constitutes a "significant effect on the environment" is has a common regulatory definition:

> "Significant effect on the environment; means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant."

14 C.C.R. 15382.[8] A "significant effect on the environment' is thus "limited to substantial, or potentially substantial, adverse changes in physical conditions which exist within the area as defined in Cal. Pub.Res. Code § 21060.5. Pub.Res. Code § 21060.5 defines 'environment' as 'the physical conditions which exist within the area which will be affected by a proposed project,

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[8] The same is not necessarily true with regard when assessing a project under the National Environmental Protection Act ("NEPA) which requires a greater consideration be given to such factors affects on the human environment. See 40 C.F.R. § 1508.14.

including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.' See also Lighthouse Field Beach Rescue v. City of Santa Cruz, 131 Cal.App.4th 1170, 1180 (2005).

The Board must include a completed environmental checklist prescribed by the State, and a written report addressing reasonable alternatives to the proposed activity and mitigation measures to minimize any significant adverse environmental impacts. 23 C.C.R. § 3777(a). The governing regulations further provide that the "board shall consult with other public agencies having jurisdiction by law with respect to the proposed activity and should consult with persons having special expertise with regard to the environmental effects involved in the proposed activity." 23 C.C.R. § 3778. The Board must also "prepare written responses to the comments containing significant environmental points raised during the evaluation process." Id., at § 3779.

Assuming that the Proposal is certified as CEQA exempt, the preparation and approval process for basin plans is the "functional equivalent" of the preparation of an EIR contemplated by CEQA. It is as true in that instance, as it is where a noncertified program is involved, that in those instances where it is determined that a "negative declaration" is approved that such may nnot be based on a "bare bones" approach in a checklist. See Snarled Traffic Obstructs Progress v. City and County of San Francisco, 74 Cal.App.4th 793, 797 n. 4 (1998). In those instances, judicial review of the certified and nonceritifed project EIR or negative declaration mirror each other. See County of Santa Cruz v. State Bd. Of Forestry, 64 Cal.App.4th 826, 8309 (1998). As was noted in State Water Resources Control Bd. Cases, 136 Cal.App.4th 674, 723 (2006):

> "In a mandate proceeding to review an agency's decision for compliance with CEQA, we review the administrative record to determine whether the agency abused its discretion. '**Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence.**' 'When the informational requirements of CEQA are not complied with, an agency has failed to proceed in "a manner required by law" and has therefore abused its discretion.' Furthermore, 'when an agency fails to proceed as required by harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial.' (Internal citations omitted, emphasis supplied)

See also County of Amador v. El Dorado County Water Agency, 76 Cal.App.4th 931, 945-946 (1999).

A review of the environmental impact report presented to the Board reveals that it does not comply with the mandatory provisions for completion of an environmental checklist and report that describes the proposed activity, addresses reasonable alternatives, and sets forth mitigation measures to minimize any significant adverse environmental impacts. What exists is a situation where, if approved in its present form, the Board will merely offer a checklist that denied the project would have any environmental impact and obviously intended its documentation to be the functional equivalent of a negative declaration. Quite frankly, the Board

has not considered all significant implications on the environment. Moreover, it is obvious that the proffered checklist that specifies no significant effect on the environment is either the product of insufficient inquiry or is designed to mislead the public in its considerations.

The incepting point in discussing the significant impact on the environment that the Proposal will have upon its implementation is to describe the type of equipment or machinery that the Proposal requires the owners and operators of agricultural land to install on their land and operate in order to comply with the no-discharge requirements imposed by the Proposal. At no point was this done in the Proposal or related documents, indicating that the size, energy source, and other matters relating to those machines (including removal of the extracted chemicals and residues) was not factored into the environmental impact analysis. That, without more, is a fatal flaw. Current technology in these regards appears to present two different types of equipment: a reverse osmosis unit or a reverse ion exchange unit. Siemans Water Technology Corp. ("Siemans") is one of the prominent manufacturers and distributors of that type of equipment. A review of the various reverse osmosis equipment sold by it – all of which can be located at its official Internet webstite at www.Siemans.com/water – reveals that the units necessary to do that which the Proposal requires to be done (and, particularly in view of the need under the Proposal for the farmer to err on the side of having equipment that has too large a volume than that which has a smaller volume in terms of the amount of water purified per minute) are diesel-fuel powered and quite sizeable.

One of the Siemans unit models that appear to be a prime candidate for agricultural use (since it has a flow rate of 25 to 150 gallons per hour, respectively) is described as having the overall dimensions (width x depth x height in inches) as follows:

168 x 40 x 78
201 x 41 x 78
196 x 56 x 90
277 x 56 x 91
277 x 58 x 91

In other words, these units generally are at least 14 (and as large as 23) feet wide, 3.5 feet to 5.75 feet deep and 6.33 (to 7.6) fee high. That is "one big honking machine." Since such a unit would be needed at each discharge point (and since there are multiple discharge points per field), it can be easily comprehended (but certainly was not by the Proposal) that literally tens of thousands of these units would be placed on farm land in the Region. In each instance, operation of the equipment would produce by-products consisting of chemicals, salts, minerals, and other substances extracted from the water (which would likely have to be stored at least temporarily on site either in large metal storage containers or in lined open air pits in order to avoid leeching into the soil).

Of course, the number of units might be marginally reduced by the construction of infrastructure on each farm (such as above-ground pipes) that would more centralize the discharge points. The purified water produced in the process could also be allowed to run off the land or could be retained and stored for sale as bottled water. (A review of bottled water sold in stores and markets in California reveals that a large amount of it, according to the mandated label

notation, is the product of reverse osmosis. A trip to Costco and inspection of the Kirkland brand bottled water reveals this to be so.) Since each is a relatively sophisticated piece of equipment, each would require on-site maintenance (on both a routine and special-needs basis) which would increase vehicle traffic. That increase in traffic would, of course, be made manifold by the increase in traffic occasioned by vehicles removing all of the by-products and sludge produced in the purification process (a particular need in order to avoid any untoward leakage back into the soil or discharge water). The cascading significant environmental impact caused by each unit – and, of course, the cumulative thousands of such units spread all over the 400,000 acres presently in production (although such acreage will be markedly reduced by the 30 foot set off) – was simply overlooked by the Board in its environmental analysis.

So too was it overlooked that the Board is not the only body charged with being an environmental watchdog in the Coastal Counties. Surprisingly overlooked and apparently (if the Staff Report is to be believed) not included was the California Coastal Commission which is charged with implementation and enforcement of the California Coastal Act of 1976. Cal.Pub.Res. Code § 30000 et seq.. Pursuant to that Act, and specifically Pub.Res.Code § 30214, the Commission is charged with the following matter which most assuredly is impacted by the Proposal:"

> "The maximum amount of prime agricultural land shall be maintained in agricultural production to assure the protection of the areas' agricultural economy. ..."

The Commission's jurisdiction includes the Coastal Zone. As defined in Cal. Pub.Res. Code § 30103(a), the coastal zone consists

> "that land ... of the State of California from the Oregon border to the border of the Republic of Mexico .... Extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas [such as Monterey County, San Luis Obispo County, and Santa Barbara County] it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less ..."

Thus, areas of the Monterey County North Coast – e.g., from Marina to and past Castroville (that represents more than 80% of the artichokes grown in the world), including the areas around Elkhorn Slough and northward -- subject to the Proposal are all located in the Coastal Zone and thus are also subject to Coastal Commission determinations, particularly regarding the scenic viewshed.

The Commission is, in fact, infamous for the zealousness with which it protects scenic views and viewshed of the California coast falling within its jurisdiction. It is difficult to believe that the Commission would not consider the placement of hundreds (and likely thousands) of large Siemans reverse osmosis units on farmland abutting the Pacific Coast Highway to not have a significant impact on that viewshed. Indeed, a coastal development permit is likely required for a farmer to even build such a facility on his land at all. See Cal.Pub.Res. Code § 30106, which defines a "development" subject to that permit to include

> "... on land ... the placement or erection of any solid material or structure; discharge or disposal of any .... gaseous, liquid, solid... waste; .... change in the intensity of use of water or of access thereto; construction, reconstruction ... of ... any structure, including any facility of any private, public, or municipal utility ...."

The Commission, which is also well known for rejecting projects because the EIR's or negative declarations submitted to it were deemed insufficient (although in comparison to the one done by the Board here such would be considered to the product of placing all considerations under a microscope and producing a tome on environmental impacts), would take great exception to a finding of "no impact" in terms of the traffic and vehicle air pollution that would accompany the installation, maintenance, and off-site removal of byproducts.

Concern with the scenic views along, for instance, the Highway 101 corridor from Buellton to Prunedale that would be significantly impacted by the placement of purification units all over the highway-adjacent fields was also overlooked by the Board. That such a scenic view exists is undeniable: it strikes something akin to awe to look on either side of Highway One at the long rows of green crops, the grape vineyards, the careful placement of walnut trees. The same is true when driving along Highway 46 surrounded on both sides by what seems to be miles of vineyards, or while driving to the top of Halcyon Road in Arroyo Grande (where it meets the Nipomo Mesa) and looking out at farm land stretching from the ocean to the bluffs and Highway 101.

Even more troubling than the failure to consult with the Coastal Commission is the failure to consult with or obtain air pollution information from the California Air Resources Board ("CARB") or the Monterey Bay Unified Air Pollution Control District. Concerned with the amount of emissions being released into the atmosphere by diesel-fueled engines used in agricultural operations throughout California (including the Salinas Valley), CARB issued regulations limiting such emissions. As set forth in CARB Resolution 3-30 (February 26, 2004, CARB had studied the effect of such emission and found:

> "Excessive diesel exhaust particulate matter emissions for stationary compression-ignition engines, most of which are diesel-fueled, are a significant source of toxic air contaminates which contribute significantly to serious air pollution in communities and across the State."

This and other documents providing studies and the views of CARB concerning pollution caused by diesel-fueled engines used in agricultural operations may be found at the CARB's official Internet website at www.arb.ca.gov. Issued pursuant to Cal. Health & Safety Code § 39666,[9] 17 C.C.R. § 93115 sets fuel and emissions standards for and applies to "any person who owns or operates" "stationary CI engine in California with a rated brake horsepower greater than 50 (>50 bhp)." Section 93115.2(b). The Monterey Bay Unified Air Pollution Control District, acting

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[9] H & S Code §39666, in pertinent part, provides: **"(a)** Following a noticed public hearing, the state board [CARB] shall adopt airborne toxic control measures to reduce emissions of toxic air contaminants from nonvehicular sources. ...."

pursuant this authority, adopted and issued Rule 1010 which is entitled "Air Toxic Control Measure for Stationary Compression Engines," has as its stated purpose:

> "to reduce diesel particulate matter (PM) from stationary diesel-fueled compression ignition (CI) engines and consistent with California Health and Safety Code Section 39666(d) is a replacement rule for 17 California Code of Regulations Section 93116 [sic], Airborne Toxic Control Measure for Stationary Compression Ignition Engines."

Rule 1010.1.1. It applies to, among others, "any person who owns or operates a stationary CI engine in the District with a rated brake horsepower greater than 50 (> 50 bhp)." While Rule 1010, subpart 1.3, specifically exempts agricultural CI engines from the operation of certain emission and fuel requirements and standards (including those for emergency standby diesel-fueled CI engines (> 50 bhp), [subpart 3.2], stationary prime diesel-fueled CI engines (>50 bhp), [subpart 3.3], and certain record-keeping, reporting and monitoring requirements, [Subpart 4.1.1]), it specifically imposes fuel and emission standards on diesel engines used in agricultural operations. I.e. :

> "No person shall sell, purchase, or lease for use in the District any new stationary diesel-fueled engine to be used in agricultural operations that has a rated brake horsepower greater than 50, or operate any new stationary diesel-fueled engine to be used in agricultural operations that has a rated brake horsepower greater than 50, unless the engine meets all of the follow emission performance standards..."

Rule 1010.3.4.1. Serious penalties attach for the failure to register such engines and to otherwise comply with the emission standard. In other words, CARB and the Monterey Bay Unified Air Quality etc. Board have found and taken action pertaining to diesel-fueled engines used in agricultural operations throughout all, or most, of this Region.

These regulations and rules were issued due to documented concerns with the air pollution particularly caused by diesel-fueled engines used in agricultural operations (which will now, if the Proposal is adopted, include water purification technologies). While those engines were traditionally used solely for purposes of pumping irrigation water (and were generally limited to a centralized engine per farm), the water purification reverse osmosis engines which each farmer must now install in multiple numbers on his farmland (and which are, in fact, of greater horsepower than generally exists with regard to pump engines) exacerbates the air pollution problem the CARB and Monterey Bay Unified etc. Board believed it necessary to limit by means of their respective regulations and rules. In light of this already patent concern by the California agencies charged with controlling air pollution and the significant impacts thereon of diesel-fueled engines used in agricultural operations, it defies both common sense and belief that the Proposal found no significant impact. That simply is unsupported and unsupportable. It, however, was ignored by the Staff in making its cavalier and unsupported statement, quoted above, that

> "The Water Board staff has not received any specific evidence by commenters and has little evidence in the record to **demonstrate conclusively** that the proposed draft 2011 Agricultural Order **will result** in significant adverse environmental effects on agricultural or biological resources."

Draft Order at p. 8.

This same point needs to be appreciated in terms of the failure to consult with the federal Environmental Protection Agency ("EPA"). In this instance, however, the failure is even more profound. Like CARB, the EPA has done numerous studies on the environmental impact of diesel-engine emissions used in stationary positions (in which presumably the purification units could be included). See, e.g., 40 C.F.R. Part 68 (listing stationary non-vehicular engines with emissions standards and referencing supporting environmental studies). Further, since vehicular traffic will no doubt increase in the Coast Counties due to the need for the construction and maintenance of the purification units (including the removal of the chemical, mineral, and other by-products, including purified water suitable for drinking), the EPA should have been consulted as well as to the significant environmental impacts such would have on the air and other areas of pollution concern (including water and the human environment). Indeed, CEQA even contemplates that joint CEQA and NEPA (National Environmental Protection Act) EIR/EIS will be done when appropriate. See 42 U.S.C. § 4321 et seq.; 14 C.C.R. §§ 15170, 15222, 15226 (requiring or encouraging preparation of joint CEQA/NEPA documents). The propriety and need to do so is borne out by reference to significant agricultural activities in, for instance, the Salinas Valley undertaken by the Department of Agriculture: not only does it have an agricultural facility at Hartnell College's East Campus in Salinas but it also has a significant row-crop operation (which includes a pesticide permit) at its facility on Spence Road/Old Stage Road to the south of Salinas.

The loss of agricultural land occasioned by implementation of the Proposal is patent and will have a significant environmental impact not only to agricultural resources (as set forth on the CEQA checklist) but on the human environment (in terms of lost agriculture jobs and the attendant affects such will have on the movement of large numbers of persons out of the Salinas Valley). At least in significant part (excluding, of course, the loss in land available to crop growth due to the installation of the water purification units and accompanying infrastructure), the various buffers and setbacks (including primarily the 30-foot set-off due to the presence of impaired surface water body in which no agricultural pursuit may occur) is the source of such impact. It is beyond belief that the impact of that set-off could be treated as negligible when the areas affected by it in, for instance, the Salinas Valley alone is considered.

The Salinas River is approximately 85 miles long. It has a number of tributaries including

1. the Estrella River from the Carisa Plain (in San Luis Obispo County) that intersects the Salinas River near San Miguel;
2. the Nacimiento River;
3. the San Antonio River;
4. Poncho Rico Creek at San Ardo;
5. the San Lorenzo River which intersects it near King City;
6. the Bitterwater Creek which intersects it east of Greenfield;
7. the Arroyo Seco which intersects it west of Soledad;
8. the Johnson Creek drainage north of Gonzales;
9. the Old Stage Road drainage west of Chualar;
10. the Goat drainage west of Chualar;
11. the Quail Creek drainage west of Spence Road;

12. the Army Corps of Engineers Reclamation Ditch which interests with the Natividad and Gabilan Creeks when then bisects the City of Salinas and empties into the old Salinas River Channel west of Castroville;
13. the Blanco Drain which carries water moved by tile drainage from approximately 10,000 fertile acres west of Salinas and empties into the Salinas River southwest of Castroville;
14. Alisal Slough which carries water removed by tile drainage from approximately 8,000 acres of fertile farmland within the boundaries of the Castroville Irrigation project (which uses reclaimed treated water from the Monterey County Pollution Control Agency);
15. Santa Rita Creek which empties into the Reclamation Ditch;
16. Merit Lake drainage which also empties into the Reclamation Ditch.

There are, in addition, literally hundreds of small drainages which, when combined, accounts for thousands of additional miles of water-adjacent land. Esperanza Creek (which is really nothing more than a drainage ditch) in fact runs through Jensen's Esperanza Road ranch and abuts approximately 0.75 miles of land on both sides of the Creek upon which organic asparagus is grown, and is on the list of impaired waters. It is not difficult to imagine the impact of that being done. Literally tens of thousands of acres of now-producing farm land would no longer exist for that purpose. The workers who earn their livings from tending that land would be accordingly terminated. Those workers, particularly in the present economic climate, would have no other employment available to them in the agriculture-centered Salinas Valley. In addition to defaulting on home loans or just walking away from those houses, these displaced workers would be forced to move to other regions of the California (or, for that matter, elsewhere in the United States) and find not only new jobs but new homes (thereby requiring expansion of housing and infrastructure in those areas). The cascading affects of such a situation can hardly be overstated but were, incomprehensively, overlooked and completely discounted by the Board in its environmental analysis.

A partial answer to the enormous economic impact that would occur from adoption and implementation of the Proposal, however, itself poses significant impact on the water resources of the Coast Counties. The goal of the Proposal is to assure that all discharge water would be purified to the purity level of drinking water (including the removal of all sediments). That, of course, assumes that the purified water would be discharged from the agricultural land into, among other places, the Salinas River. There really is no sound basis underlying that assumption. Americans, to our national shame, are addicted to bottled water (the bottles being a great source of pollution to the oceans and rivers as well as the side-of-the-road).[10] As the New York Times reported on March 19, 2008 in an article entitled "Rising sale of bottled water triggers strong reaction from US conservationists," bottled water sales in the United States in 2007 were 8.82 billion gallons (having a value of $11,700,000,000). See www.NYTimes.com. So then why would the farmers of the Central Coast counties – who would have spent large

[10] By the same means, the production of the bottles themselves used up hundreds of millions of barrels of oil, cause air pollution, and have other significant impacts on the environment. An increase in the number of bottles of water being marketed – as, for instance, "Steinbeck Water from the Salinas Valley" – would necessarily increase such pollution.

amounts of money on the water purification units and otherwise suffered egregious reductions in their profitability due to the loss of land they could actually farm – not, either individually or on a cooperative basis, seek to store and sell (for human consumption) the water they have purified? That would quite obviously reduce the amounts of water going in to, for instance, the Salinas River. That would lower the water levels and just generally have deleterious effects that make the Proposal's concerns with pollution by discharge water pale in comparison. But that too was ignored or overlooked by the Board.

G. The CEQA Analysis Of Alternative Is Facially Inadequate In That It Fails To Include A "No Project Alternative" Option

In spite of attempts to portray Alternative 1 – simply extending the present waiver program – as the "no project alternative," the Staff's efforts are inaccurate and misleading. In actuality, Alternative 1 is not the "no additional regulation alternative." A "No Project" alternative is intended to reflect what would happen absent any Regional Board action. In this case, no action results in no waiver program whatsoever since the 2004 waiver will lapse on its own terms in March 2011.

"The no project analysis shall discuss the existing conditions at the time the notice of preparation is published, ... as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." State CEQA Guidelines, § 15126(e)(2). When the existing conditions include implementation of a program or rule that will expire unless some affirmative action is taken, the "No Project" scenario must consider the expiration of that program or rule and its associated ramifications. See Sherwin-Williams Co. v. S. Coast Air Quality Management Dist., 86 Cal.App.4th 1258, 1280 (2001)(defendant had properly "defined the "No Project" scenario as "mot adopting the proposed amendments to Rule 1113, but instead allowing the expiration of the current product variances for some of the coating categories and maintaining the current version of Rule 1113 as amended by a 1990 court order"). In contrast, when a agency must act affirmatively to extend an existing program or rule, that itself is a project that must be analyzed under CEQA. See Sunset Sky Ranch Pilots Assn. v. County of Sacramento, 47 Cal.4th 902, 909 (2009)(country's decision to not renew a conditional use permit that was expiring is not a project under CEQA, but the renewal of the permit would be).

The lack of an accurate "No Project" alternative constitutes a fatal flaw. That alternative is a mandatory component of an EIR. The purpose of this requirement is "to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." State CEQA Guidelines, § 15126.6(e)(1). In this case, no such comparison is possible because the "No Project" alternative is fundamentally inaccurate.

H. The 30-Foot Buffer Requirement Is Vague And Overbroad

The Proposal requires that farmers create a 30-foot buffer on their farmland which abuts waters described in the preceding section. However, the Proposal does not specify whether measurement of that buffer begins at the bank (defining some definite bank as opposed to one that changes with the rate of flow of the water), in the middle of the body of water, or at the historic high or low water point. That makes it impossible for farmers such as the Jensen's to comply with the requirement since, frankly, they simply cannot know where the 30 feet begins.

That is the paradigm of a regulatory requirement that is so vague and ambiguous that it violates the landowner/operator's constitutional right to due process. Accordingly, that requirement cannot be adopted.

I. The Proposal, When Implemented, Will Result In The Regulatory Taking Of Agricultural Land

The Proposal, if adopted and implemented, will result in the regulatory takings of, among other things, the agricultural land contained in the 30-foot buffer zones.

The Fifth Amendment of the United States Constitution, made applicable to the States (and its political subdivisions such as the Board by the Fourteenth Amendment) specifically protects private property from governmental incursions by preventing "private property [from] be[ing] taken for public use without just compensation." U.S. Constitution, Amend. V.[11] The "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). Indeed, James Madison, often described as "the Father of the Constitution,"[12] explained that such protection is government's chief responsibility,[13] because, in the words of Arthur Lee, a Founding Father from Virginia, property is the "guardian of all rights."[14]

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[11] Yet, rather than the barrier of a property rule, the Constitution protects private property by placing in front of the government the hurdle of a liability rule. See Preseault v. I.C.C., 494 U.S. 1, 11 (1990)("[the Fifth Amendment] is designed 'to secure *compensation* in the event of otherwise proper interference amounting to a taking' " (emphasis in original)). See generally Guido Calabresi & Douglas A. Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral. 85 Harv.L.Rev. 1089 (1972)(discussing property rules and liability rules).

[12] See, e.g., Gonzales v. Raich, 545 U.S. 1, 57 (2005)()'Connor, J., dissenting); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n. 9 (1994); Nelson v. Carland, 42 U.S. 265, 273 (1843). See generally Irving Brant, James Madison: Father of the Constitution, 1787-1800 (1950).

[13] Thus, in a 1792 essay on property published in the National Gazette, James Madison contended that because private property is the foundation of a civil society, property, "being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, Property, in James Madison: Writings 515 (Jack Rakove ed.1999).

[14] Indeed, Arthur Lee, a Virginia delegate to the Continental Congress, observed that "the right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." James W. Ely, Jr., The Guardian Of Every Other Right: A Constitutional History Of Property Rights 26 (2d ed.1998) (quoting Arthur Lee).

Over the years, the law has distinguished three broad categories of takings: those defined by the governments' powers of eminent domain,[15] those resulting from a "physical invasion" by the government without bringing an eminent domain proceeding,[16] and those resulting from the impact of regulation.[17] The first two, having an older lineage, could be referred to as "traditional takings," and the latter two require a landowner to file an "inverse condemnation" suit seeking just compensation. "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987).. Traditionally, all three categories covered interference with private property "to an extent that, as between private parties, a servitude is taken." United States v. Dickson, 331 U.S. 745, 748 (1947).

Of application here, of course, is regulatory takings. Although subject to a long period of evolutionary growth which may prove important in litigation (rather than here), such takings does apply to Jensen. It is settled now that Government regulation goes "too far," and effects a total or "categorical" taking, when it deprives a landowner of all economically viable use of his "parcel as a whole." See Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1259-1360 (Fed.Cir. 2000) (differentiating categorical takings from partial ones). If the taking is not of the entire parcel as a whole, either temporally or by its metes and bounds, government regulation can still effect a partial taking pursuant to the fact-intensive Penn Central balancing test: i.e.,

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[15] "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property," in exchange for payment of just compensation to the landowner. Agins v. City of Tiburon, 447 U.S. 255, 258 n. 2 (1980). "At the time of the writing of the Constitution and for many years thereafter a government taking meant exactly that-the Government would physically occupy the land." Hendler v. United States, 952 F.2d 1364, 1371 (Fed.Cir. 1991). Before the Civil War, most constitutional issues concerning private property and economic rights and liberties arose under the Commerce Clause and the Contracts Clause. The federal government "undertook relatively few projects"; accordingly, it did not make much use of eminent domain. Due to its relative rarity, "the use of eminent domain to take private property did not receive much attention from the federal courts" during this period. Yet when the government did use eminent domain, it was clear that the Constitution required the government to pay the landowner just compensation. See Calder v. Bull, 3 U.S. (Dall.) 386, 400 (1798)(concluding that when landowners must give up their land for public use, "justice is done by allowing them a reasonable equivalent"). In fact, "[m]uch of the law of eminent domain-both statutory and case-developed for the purpose of providing the procedural structure for government takings; the main issue in the cases was what compensation was just." Hendler, 952 F.2d at 1371.

[16] See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). The aftermath of the Civil War, coupled with industrialization and the growth of corporate enterprise, transformed economic life in America. Land became more valuable as the country became more prosperous and more settled; the states began to take a much more active role in regulating economic affairs and uses of property.

[17] See, e.g., Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978).

> "a court determines when regulation goes "too far" and effects a taking by balancing: (1) the "economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment backed expectations"; and (3) "the character of the governmental action."

Penn Central Transportation Co. v. New York, 438 U.S. at 124. And, once an uncompensated taking has occurred, the remedy is for government to provide just compensation for what it has taken, even if the government action causing the taking is later rescinded, discontinued, or abrogated. Further, for a court to find an unconstitutional taking by applying either the per se rule or the Penn Central balancing test, the property owner must establish a legitimate property interest that is detrimentally affected by the governmental action. See, e.g., Air Pegasus of D.C., Inc. v. United States, 434 F.3d 1206, 1212 (Fed.Cir. 2005)(observing that only those with a valid property interest are entitled to just compensation).

Applying these factors, Jensen possesses the requisite property interest protected by the Fifth Amendment: a fee simple in agricultural lands subject to the Proposal. So the inquiry then moves on to whether the Board's action constituted a taking" of that interest. The so-called "categorical test" – which applies only in those instances where government action has eliminated "all value" from the land does not apply here since some vestigial value remains (as, for instance, very large parking lots in the middle of the Salinas Valley). The Board's action does, however, deprive the Jensen's of the "highest and best use" of all the property (highly producing agricultural farm land). The takings still occurs and the only affected thing is the amount of compensation that needs to be paid. The regulatory character of the Board's action – based as it allegedly is a myopically narrow concern only with water pollution (even though, as noted, more significant negative impacts arise from the implementation of the Proposal than are affected by the Proposal) – does serve as an adequate excuse or preventative measure that overcomes the partial takings that is affected by the Proposal. See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 301 (2002).

.The takings here extends to the width and breadth of the Coast Counties and implicates some of the most valuable farmland in the United States, having values from approximately $20,000 an acre to $50,000 per acre (even in these times of depressed real estate prices). With the legal sufficiency of the Proposal being as tenuous as it is due to the un- and non-considered significant environmental impacts that may be affected by the Proposal, the additional risk that a takings – even if temporary and lasting only one growing season – will occur should cause the Board to reject the Proposal and seek to find other ways to fulfill its statutory mandate.

J. Administrative Convenience Is Not A Basis By Which The Regional Board Msy Either Fashion Or Adopt The Proposal And Its Implementation

In reviewing and rejecting alternative proposals to the one recommended by the Staff, a constant basis for rejecting other proposals was that too much paperwork and too much work for the Staff would result: e.g., in rejecting Option 10 of the "Options Considered" Appendix D at p. 13, it is stated that individual farm reporting "would likely create a significant work load for Water Board staff ..." No offense, that is what the Staff was created for and that is for what they are paid. It is well-settled administrative convenience of this type is an inadequate State interest

to warrant being used to reject or formulate proposals such as this. See, e.g., Natural Resources Defense Council v. EPA, 526 F.3d 591 (9th Cir. 2008).

K. Conclusion

In the final analysis, the Proposal is a monument to overreaching by those charged with protecting the water resources of the Central Coast counties. In its attempt to comply with a mandate to control water pollution in the Central Coast, the Board has ignored common sense and, in order to protect the water from pollution, has myopically overlooked or ignored the significant impacts on the environment relative to other areas of concern such as air pollution and the human environment that attend having farmers install water purification units and infrastructure on the land they are left with after losing any ability to effectively or, for that matter, actually farm within buffer and set back areas of, for example, the Salinas River or its tributaries. A regulatory taking of land having sufficient value to bankrupt the most solvent of States will result from the adoption and implementation of the Proposal.

The bureaucratic zeal which informed the formulation of the Proposal must be tempered by the requirements of the law, by knowledge of how agriculture works and the geology in this Region, and by common sense. Indeed, the Proposal results only in the conclusion that Staff was activated more by bureaucratic zeal than by recommending actions which would affect protection of the environment as a whole and the continued success of literally the only part of California's economy that has not been totally destroyed by current economic conditions. The Proposal should be rejected and placed on the dust heap of badly thought-out concepts. While protection of California's waters is and remains a laudable goal, that protection can be afforded by other and more soundly thought out means.