

Conditional Waiver of Waste Discharge Requirements
For Discharges from Irrigated Lands

Revised Response to Comments

(This replaces Item 3, Attachment 6, Response to Comments, that was mailed out with the July 8, 2004, agenda)

A number of comment letters were received on both the draft Initial Study and Negative Declaration under the California Environmental Quality Act (CEQA) and the draft Conditional Waiver and Monitoring and Reporting Program. Comments received by staff on or before June 4, 2004, are included below. Comments received after that date will be included in a Supplemental Sheet to the Board.

Comment letters received on the draft Waiver and Monitoring and Reporting Program prepared for the February 5 Board workshop:

1. Morro Creek Ranch, January 16, 2004
2. San Luis Obispo County Agricultural Task Force, January 25, 2004
3. Coastal Berry Company, February 2, 2004
4. White Ranch Company, February 4, 2004
5. Mr. Gene Mehlschau and Mr. Robert Mehlschau, February 4, 2004
6. Rancho Buena de Esperanza Inc., February 4, 2004
7. Ms. Kaitilin Gaffney, February 5, 2004
8. Environmental Center of San Luis Obispo County, February 5, 2004
9. University of California Cooperative Extension, February 5, 2004
10. Mr. Michael Broadhurst, February 5, 2004
11. Mr. Bud Sarmiento, February 6, 2004
12. Crown Packing Company, Inc., February 23, 2004
13. California Avocado Commission, February 27, 2004

Comment letters received on the March 22, 2004 draft Initial Study and Negative Declaration and the draft Conditional Waiver Order and draft Monitoring and Reporting Program:

14. Coalition of Central Coast County Farm Bureaus, April 7, 2004
15. San Luis Obispo County Farm Bureau, April 27, 2004
16. Grower-Shipper Association of Central California, April 30, 2004
17. Environmental Defense Center (CEQA), April 28, 2004
18. Environmental Defense Center (Waiver and MRP), May 27, 2004
19. Santa Cruz County Farm Bureau, April 30, 2004
20. Monterey County Farm Bureau, April 30, 2004
21. California Farm Bureau Federation, April 30, 2004
22. Jensen Family Farms, April 30, 2004
23. Salinas Valley Water Coalition, April 30, 2004
24. Environmental Center of San Luis Obispo, April 30, 2004
25. Southern San Luis Obispo and Santa Barbara Counties Agricultural Watershed Coalition, April 30, 2004
26. Friends of the Sea Otter, May 17, 2004
27. Morro Creek Ranch, May 18, 2004
28. Ms. Amy Anderson, May 29, 2004
29. Sierra Club, May 21, 2004
30. The Otter Project, May 21, 2004

31. Department of Pesticide Regulation, May 24, 2004
32. The Ocean Conservancy (CEQA), April 30, 2004
33. The Ocean Conservancy (Waiver and MRP), May 28, 2004
34. Tanimura and Antle (by Ellison, Schneider & Harris), June 4, 2004
35. Central Coast Region Monitoring Proposal, presented to the Regional Board March 19, 2004
36. Ms. Sandra Martin, March 16, 2004

Comments have been summarized and organized into three sections:

- Section 1: Comments on the Initial Study and Negative Declaration
- Section 2: Comments on the Proposed Conditional Waiver Program
- Section 3: Comments on the Proposed Monitoring and Reporting Program

Following each comment are the numbers of all letters that submitted similar comments. Many CEQA comment letters also contained comments that pertained directly to the Conditional Waiver or the Monitoring and Reporting Program. Such comments were placed in Sections 2 and 3.

Section 1: Comments on the Initial Study and Negative Declaration

A. Economic impacts/conversion of farmland

Comment: The currently proposed Agricultural Waiver program will reduce the economic viability of not only marginal farmland, but also lands classified as prime, unique and farmland of statewide significance, due to the unknown and ongoing costs, resulting in conversion of land to non-agricultural uses, which is a significant impact according to CEQA. The Regional Board has not adequately addressed the overall and cumulative economic impacts of the agricultural waiver regulation on the agricultural industry, including costs of short courses, practices implementation, monitoring, paperwork, etc., on small, medium and large operations. (15.23, 16.1, 19.2, 20.2, 20.3)

Comment: The Board should explain in greater detail its determination that Prime Farmland will not be subject to conversion. Prime Farmland is not defined in terms of economic profitability, so it is unclear how the Board can conclude that it is unlikely to be converted. (21.2)

Comment: The Initial Study and Negative Declaration failed to analyze the loss of prime ag land if operations cannot meet the proposed standards and can no longer farm. (22.4)

Comment: The Initial Study recognizes that approximately 1666 growers in the region operate less than 50 acres. Limited resources to implement the program and unknown costs has a significant potential to cause conversion of prime, unique and farmland of statewide significance. (15.5)

Comment: Where agricultural operations are abandoned, unmanaged lands may have adverse impacts, including harboring pest species, health hazards and diminishing air and water quality. (20.2)

Response: *Compliance with water quality protection is already required under current law; therefore, speculation about conversion of prime, unique and farmland of statewide significance is not supported as a significant impact under CEQA. The Regional Board is aware of the concern within the agricultural community regarding costs associated with the waiver program. The program is designed to allow maximum flexibility to growers in choosing the most appropriate combination of management practices, and time to phase in implementation. Considerable time will be allowed before waterbodies are expected to fully meet standards.*

Growers will be allowed up to three years to complete education and plan development requirements, and the Board will consider extenuating circumstances before enforcement action is considered. Compliance assessment will initially be based on performance such as enrollment and reporting. In addition, the Regional Board is prioritizing implementation of agricultural management practices for upcoming grants and other assistance funding. The monitoring requirements have been designed to be as cost-effective as possible and still satisfy the legal requirements for monitoring programs for waivers. Dischargers can decrease monitoring costs by developing a cooperative monitoring program and seeking available grant funding.

Comment: The overall economic impacts with respect to Sections 13000 and 13141 have not been adequately assessed, including costs of courses, etc. (14.12)

Response: *CWC Section 13141 only applies to Basin Plan amendments, and an economic analysis is not required for adopting or waiving Waste Discharge Requirements. Nevertheless, Regional Board staff has provided as much information as possible about anticipated costs. Even where Section 13141 applies, it does not require a cost-benefit analysis; it only requires the Regional Board to consider costs. Section 13000 does not require a cost-benefit analysis either. That section mandates the Regional Board to attain the highest water quality that is reasonable. The proposed waiver is reasonable in light of the Regional Board's obligation to regulate nonpoint source discharges, the known impacts that irrigated agriculture has on water quality, the economic and societal importance of California agriculture, and the cost-effectiveness of the proposed waiver program. In Order WQO 2004-0003, the State Board upheld a similar agricultural waiver adopted by the Central Valley Regional Water Quality Control Board. The SWRCB specifically approved the monitoring program, which was more extensive and costly than the proposed requirements here.*

Comment: The Initial Study (IS) and Negative Declaration (ND) do not consider the potentially significant impacts from the proposed Monitoring and Reporting program, including the potential to result in conversion of prime farmland. (22.5, 23.2). The Board lacks authority to require formation of a non-profit entity to implement a cooperative program and thus will necessitate costly individual monitoring. (22.5) The IS and ND do not consider the region-wide impact if a majority of landowners/operators fail to participate in cooperative monitoring and therefore are required to do individual monitoring. (23.3, 14.13)

Response: *CEQA does not require Monitoring and Reporting Program evaluation, except for review of social and economic impacts that cause a physical change to the environment. Staff agrees that the Board does not have the authority to require formation of a non-profit entity to implement a cooperative monitoring program, but is allowing the agricultural community to do so in order to cost-effectively meet its monitoring obligation. The Regional Board is committed to working closely with the agricultural community once the waiver is adopted to identify appropriate entities and sources of funding to defray the start up costs and initial expenses of a cooperative monitoring program.*

Comment: Conversion of 100 acres of prime farmland is typically considered a significant impact under CEQA. Tailwater collection ponds for 320,000 acres of prime farmland will take much more than 100 acres out of production, as will installation of buffers on a large scale. The Board needs to take a closer look at the question of whether the proposed regulation will have a significant impact on agricultural resources. (21.3, 21.4, 21.5, 14.3) Erosion control practices will result in loss of productivity on prime farmlands, a significant adverse impact. (23.5)

Response: *CEQA only addresses conversion to non-agricultural use of farmland that is prime, unique or of statewide significance. These terms are defined by the Williamson Act, California Government Code Section 51200 et seq. The Regional Board does not disagree with the Farm Bureau's statistics on the acreage within the Region that fits within these definitions or that*

California has experienced a loss of farmland. However, BMPs do not constitute a non-agricultural use. Rather, these terms contemplate development of farmland. Discharges that violate water quality objectives are illegal under existing law. Regulation through waste discharge requirements would result in far greater costs than the waiver. Also, as explained below, the proposed waiver does not require sedimentation basins or other measures that eliminate all runoff in a 25-year storm event.

Comment: How does the Regional Board define the term “marginal farmland”? The Board needs to address how much “marginal farmland” it expects will be converted and how it concludes that such level of conversion will not result in a significant impact to the Region’s agricultural resources. (21.1, 14.3)

Response: *Staff’s use of the term “marginal farmland” in the Initial Study was in reference to land that is difficult to farm because of limitations such as steep slopes, poor drainage, soil texture and/or lack of fertility, on the assumption that such lands might have thin or negligible profit margins and therefore are more likely to be taken out of production if costs increased even slightly. However, staff recognizes that “marginal” does not actually refer to economic viability, and that in many cases, land that is not considered prime may be economically viable for high value crops. The reference to marginal lands will be deleted, since it is confusing and does not alter the conclusion that the waiver is not expected to result in the conversion of prime farmland*

Comment: The financial burden of constructing basins to contain a 25-year rain event would have a significant effect and farms would lose 10% of available land in some cases. The proposed 25-year standard is in conflict with Santa Cruz County codes. (19.3)

Comment: Designing to a 25-year storm is very expensive and will result in a large amount of land taken out of production (14.4). The following language is suggested: “For each storm, the goal of these combined practices should be to minimize storm water runoff for the first half inch of rain and to reduce runoff for the first two inches of rain. There is no requirement to reduced storm water runoff that enters the farm from off site, but this does not change the requirement for runoff generated on site.” (20.10)

Comment: The requirement to contain a 25-year storm is not limited to on-site runoff, and therefore would require significantly more land and entail high costs. (15.22) Permits required for such structures would have a cost impact and could cause conversion (15.24) Detention structures may expose people or structures to risk, and require insurance coverage, which was not addressed. (15.28)

Comment: Structural practices to detain 25-year storm events will have significant aesthetic impacts. (15.24)

Response: *The Regional Board is not proposing to mandate any specific stormwater management practice. The proposed waiver included the following finding: “Although there is no requirement to contain all stormwater on site, all farm plans must identify practices to reduce discharges during storm events. Structural practices such as grassed waterways and sediment detention basins must be designed to withstand and/or detain rainfall produced during a 25-year storm event. Operations should choose the best combination of practices to detain runoff, reduce erosion and the discharge of sediment, nutrients and pesticides during storms. Conservation practices that could be a threat to public safety, for example, sediment detention basins that involve earthen embankments, should be able to withstand a 100-year storm. Other management practices such as cover crops, filter strips, or furrow alignment, should aim to reduce runoff velocity, hold fine particles (silt and clay) in place, and increase infiltration to minimize impacts to stormwater quality.” The waiver requirements do not mandate sedimentation basins to contain runoff in a 25-year storm. The intent of the finding was to clarify that, if a discharger elects to install structural practices, the construction must be properly designed and adequate to ensure that the practices do not fail during storm events and cause water quality impacts that are worse*

than having no management measures in place at all. The proposed finding has been revised to clarify that there is no requirement to contain all stormwater up to a 25-year storm event.

Comment: Stormwater requirements trigger a fair argument that the conditional waiver will result in a significant effect on the environment. (34.1)

Response: *The Conditional Waiver does not require that any specific management practices be constructed in order to contain storm water. The Conditional Waiver requires that all farm plans must identify practices to reduce discharges during storm events. Should the discharger elect to install storm water detention structures, CEQA must be complied with as part of project construction. We anticipate that construction of management practices can be facilitated through streamlined permitting programs, such as are available in the Elkhorn Slough area.*

Comment: Request the Regional Board to conduct a more thorough review before adopting the program (20.11)

Response: *Comment noted.*

Comment: The Regional Board should obtain an independent financial analysis of the impact of the new regulations on the agricultural industry before implementing the waiver and monitoring process. (16.4, 19.7)

Comment: The Initial Study and Negative Declaration has not analyzed the impact of cost increases on competition with other areas. (15.6)

Comment: The costs of the program will affect economic competition among farmers. The Negative Declaration does not adequately address the uncertainty of how long and at what cost will farmers pay into the program in comparison to farmers who have not implemented practices. (20.4)

Response: *Farmers who do not comply with the waiver requirements will be subject to waste discharge requirements and/or enforcement action, which will be considerably more costly than compliance with the waiver. Several aspects of the program have been explicitly designed to address cost concerns: low-cost education requirements, flexibility in management practices, ability to phase-in practices over time, limited reporting requirements, option to participate in lower cost cooperative monitoring. As the environmental community points out, discharges must be regulated under the law and a conditional waiver is a less onerous form of regulation than permits.*

Comment: The allocation of costs for the monitoring program assumes a high level of participation and is without foundation. Those who enroll risk being penalized by having to pay for the entire program. The Negative Declaration does not adequately consider the alternatives associated with varying levels of enrollment and distribution of costs. (16.3, 20.6)

Response: *The cooperative monitoring program is an option to allow dischargers to satisfy monitoring requirements at a lower cost. The program may set up a dues structure that is based on a number of factors, including acreage, management practices in place, and threat to water quality. If sufficient funds are not generated to conduct the program, all dischargers will revert to individual monitoring, rather than a few bearing the cost for all. In addition, it is highly likely that grant funds will be available to initiate and complete one or two years of cooperative monitoring, if a suitable non-profit entity can be designated by the agricultural community in time for the fall 2004 release of the Agricultural Water Quality Grants Program's Request for Proposals. The Regional Board strongly encourages the agricultural community to apply for funding through this program, which will have approximately \$26 million available specifically for irrigated agriculture, for monitoring and implementation projects. In this way, growers may satisfy their monitoring obligation at a very nominal cost during the start-up period. Regional*

Board staff will also endeavor to fund a portion of the start-up for cooperative monitoring costs through settlement funds, to further reduce the initial financial impacts to growers.

Comment: The Initial Study and Negative Declaration do not address farms that have both irrigated and non-irrigated land. Monitoring costs will be significantly higher if all land is included. This is potentially significant and may result in conversion of agricultural lands. (15.12, 15.13)

Response: *Monitoring costs are intended to be allocated according to acres of irrigated land only; however, the Regional Board does not have authority to allocate costs, which will be the responsibility of the members of the agricultural community who choose the cooperative monitoring option, but staff strongly suggests that only irrigated lands be assessed dues for water quality monitoring.*

B. Biological resources, water quality and hydrology impacts

Comment: The Negative Declaration should identify impacts to biological resources, water quality and hydrology as potentially significant and identify appropriate mitigation measures. (32.4)

Response: *The Negative Declaration determined that impacts to biological resources, water quality and hydrology as a result of adopting the Conditional Waiver would not be significant, because the baseline is existing, unregulated discharges rather than no discharges. For a more detailed discussion, see SWRCB Orders WQO 2004-003 (Central Valley Region agricultural waiver) and WQO 2004-002 (Central Valley Region timber waiver). Failure of the waiver would not result in more impacts to these resources, but rather in increased enforcement and/or issuance of Waste Discharge Requirements. CEQA requires a lead agency to identify mitigation measures when a proposed project will have significant environmental impacts that can be mitigated to a level of insignificance. Here, measures such as water quality education requirements, farm water quality planning and implementation of management practices are already incorporated into the program. CEQA does not require these to be treated as mitigation measures. The Regional Board has not identified unmitigated adverse impacts of the waiver.*

Comment: Management practices implemented to comply with the waiver will result in changes to the amount and timing of tailwater discharges to riparian corridors and isolated wetlands, resulting in biological impacts (21.6, 22.1, 15.25, 14.5). The ND improperly assumes a natural condition, rather than the existing environmental baseline. Hydrological effects from practices to control storm water should be analyzed. (21.7, 15.26)

Response: *Many of the waterways in the Central Coast Region that are dominated by agricultural tail water have very little riparian vegetation. Even in undisturbed creeks, riparian vegetation can routinely survive periods of intermittent or no surface flow because of underflow and shallow groundwater in channel. In areas where underflow or surface flow is diverted for irrigation purposes, management practices which reduce irrigation runoff usually reduce water use as well, retaining more natural flow in-stream or in shallow creek underflow areas. Irrigation tail water is known to carry high levels of chemicals, including pesticides, herbicides and salts, to creeks and rivers in our Region. At high concentrations, even nutrients can be toxic to some species. None of these chemicals are beneficial to riparian corridors or the aquatic and terrestrial life they support. Unless tail water is free of these chemicals, it is unlikely that benefits gained from quantity of discharge outweigh impacts resulting from chemicals carried by the discharge. Staff does not agree that reduction in quantity of tail water is a potentially significant impact, and in fact regards it as one of the key management practices for achieving water quality improvement. Because specific management practices are not being mandated by this program, it*

is not possible to predict what hydrologic effects might take place. Any specific project that causes significant hydrologic impacts must address those impacts as part of project CEQA compliance.

Comment: The Initial Study and Negative Declaration failed to analyze potential salt-build up because of lack of drainage, a potentially significant impact to prime farmland. (22.2)

Response: *The waiver is not designed to prohibit all drainage and discharges, but rather to ensure that best management practices are being implemented to reduce discharges of pollutants so that water quality standards are achieved and maintained in the State's waters. Where tile drains are necessary to remove high salt content groundwater, dischargers will not be held liable for existing problems, such as seawater intrusion, that they did not cause. Where irrigation practices result in salt build-up in soil, discharges are allowed as long as they do not exceed water quality standards.*

Comment: The Initial Study and Negative Declaration do not identify the beneficial uses of groundwater and do not address monitoring of percolated groundwater, therefore the impacts of this condition are unclear. (22.7, 22.8,15.14) The potential impacts of Waiver condition #5 regarding wastes discharged to groundwater on prime farmland are not clearly evaluated. (23.6) Did staff consider Bulletin 118, which reviewed more than 700 public supply wells and noted that nitrates were detected above the MCL in less than 10% of tests? Request that groundwater be removed or further defined such that the Board's intentions and goals are clear. (14.16)

Response: *Water Code Section 13269 requires waivers to be consistent with the Basin Plan. The waiver's groundwater requirements are contained in the Basin Plan. However, a nonpoint source program may recognize that compliance must occur over a period of years. The Regional Board's intent in including groundwater is to protect the beneficial uses of groundwater over the long term. At this point, the focus of the groundwater requirements is to develop management practices that reduce and ultimately eliminate impacts from irrigated agriculture on groundwater. Beneficial uses of groundwater are identified in the Basin Plan and include municipal and domestic drinking water supply, agricultural water supply and industrial water supply. The Regional Board has obtained groundwater data from a number of entities and will continue to build a complete database; however, data from most of the region's groundwater basins shows high nitrates in the shallower aquifers below agricultural areas; growers need to consider impacts to both surface and groundwater when choosing management practices.*

C. General CEQA Comments

Comment: A key component of the program is a regionwide monitoring program, which is legally required and the only way to accurately assess agriculture's impact to waters of the State. Any changes that weaken the monitoring program would require recirculation of the draft Negative Declaration or preparation of an Environmental Impact Report. (17.1, 24.3, 18.2)

Response: *Comment noted.*

Comment: The Negative Declaration has no discussion of what would trigger Waste Discharge Requirements (for example, if operations do not fulfill the program's tiered requirements). The Negative Declaration should be revised to clarify how the program will work and to ensure enforceability. (17.2 18.9,32.2, 24.3, 24.5) Request that concerns be incorporated in the final CEQA documents. (3.4)

Response: *Operations that do not meet conditions of the waiver will be subject to enforcement action. The waiver is designed to provide an appropriate means to regulate most irrigated agricultural operations. Regional Board staff believes that enforcement tools can be more*

effectively utilized to obtain compliance with the waiver requirements than to issue individual requirements. We do not anticipate that a discharger who fails to comply with waiver requirements would be any more likely to comply with waste discharge requirements, and since enforcement under the waiver is available, in some cases issuing WDRs would just be an exercise in generating more paper. For example, once a particular discharger obtains waiver coverage, it would be more effective to issue an administrative civil liability complaint under Water Code section 13350 for violation of the waiver conditions, than to issue WDRs that are largely duplicative of the waiver. WDRs are simply another regulatory option, not an enforcement action for operations that fail to comply with the waiver. As described in the staff report's discussion of enforcement strategy, the Regional Board lacks the authority to require a discharger to enroll in the waiver. Thus, dischargers that fail to enroll will be required to submit reports of waste discharge and obtain WDRs. Such dischargers might seek to settle enforcement actions by agreeing to enroll under and comply with the waiver instead. There may also be some operations that are more suited to individual WDRs than coverage under the waiver. Progress toward meeting requirements will also be considered in selecting the appropriate enforcement action and/or regulatory tool. Staff has outlined targets, milestones and enforcement strategy in the staff report.

Comment: The project description should include specific enrollment milestones and an enrollment contingency plan. (32.3, 24.4)

Response: *The staff report includes information to clarify program implementation and enforcement strategy.*

Comment: The CEQA documents should be revised to include the details of the Conditional Waiver Program and the specifics of the proposed Monitoring and Reporting Program to avoid a temporal decoupling of public review of the CEQA documents from review of the program itself. (32.5)

Comment: Details of the draft Order and draft MRP should be incorporated into the CEQA documents. Any substantive changes to the elements of the program may trigger revision of the CEQA documents and recirculation. (32.4)

Response: *The draft order and monitoring program have been widely available since December 2003. The Regional Board held public workshops on the waiver in January and February 2004, and made the revised drafts available at that time. The current drafts of the waiver and monitoring program have been posted on the Regional Board's website since March 2004. In addition to the detailed discussion of the waiver in the CEQA documents, the draft waiver and monitoring plan themselves were circulated with the CEQA documents and were available for review and easily accessible. Therefore, staff disagrees that the CEQA review and program review were not contemporaneous. Staff also disagrees that monitoring requirements have to be circulated at all. (See, Christward Ministry v. County of San Diego (1993) 13 Cal.App.4th 31, 49; Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal.App.4th 351, 380.) Staff has not proposed substantive changes requiring recirculation.*

Comment: The Initial Study and Negative Declaration failed to analyze the state and county's contribution to runoff and whether their monitoring efforts are effective. (22.3)

Response: *Both monitoring data and management practice implementation will be considered in watersheds where mixed land use makes identifying discharges problematic. The Regional Board will incorporate monitoring data from other entities in determining impacts from agriculture and the success of the waiver program.*

Comment: The Negative Declaration fails to analyze the potential for the monitoring fee process to be found illegal and the consequences to the program and the environment. (20.7)

Response: *When the Regional Board adopts Waste Discharge Requirements and associated Monitoring and Reporting Program, it is the discharger's responsibility to pay for the monitoring. Group monitoring is unusual, but not unprecedented. In some areas, such as around Monterey Bay, several dischargers pool resources to perform monitoring. The SWRCB recently upheld the Central Valley Region's agricultural waiver, which allows participants to elect group (coalition) monitoring in lieu of individual monitoring. This approach not only reduces costs to individual dischargers, but provides better information on cumulative impacts of several discharges on beneficial uses and overall water quality. The Regional Board will not assess fees for monitoring; rather, the agricultural community has the opportunity to pool resources to reduce individual costs and meet their statutory monitoring requirements.*

Comment: All fees must be proportionate to benefit received as required pursuant to Proposition 218, which requires a majority vote of the landowners. The Board's analysis fails to consider the impact if such a vote fails. (22.6). The fees to support the monitoring and reporting program must be based on benefit conferred; it is difficult to understand how the Regional Board can require a non-profit entity to assess the individual landowners. (23.7)

Response: *Proposition 218 applies only to local governments and special districts formed by the State, and not to voluntary, non-profit entities. Since establishing and participating in a cooperative monitoring entity is voluntary, there is no basis for legal challenge. The waiver does not establish fees. Participation in the cooperative monitoring entity is voluntary and costs are set by the entity.*

Comment: The Initial Study does not address funding to enable UC Cooperative Extension to continue the mandated 15-hour short courses or identify a mechanism to certify additional entities. (15.1, 15.2)

Comment: The Initial Study does not address lack of staff to implement the required program, thus jeopardizing the agricultural community's ability to comply with the 3-year completion requirement. Lack of Regional Board infrastructure will have a significant impact on agriculture and result in significant potential for conversion of agricultural lands. (15.1, 15.2, 15.3, 15.4, 15.15)

Response: *The Regional Board is committed to supporting the implementation of the waiver through settlement and grant funds wherever possible. In addition, some commodity groups have begun contracting with UCCE to provide short courses, and the Regional Board will be able to fund others through settlement funds within the next several months. The Regional Board has also reached agreement with the Central Coast Vineyard Team to make additions to the Positive Point System that will allow it to be used as a farm plan that satisfies the waiver's education requirement. Regional Board has already certified three additional classes and will continue to certify others. We do not anticipate that lack of educational opportunities will be a significant problem. Regional Board staffing, while always a challenge, appears to be less severe than originally thought, and staff anticipates that there will be four staff people devoted to program implementation by the enrollment deadline. In addition, resources are being provided by USEPA and the State Water Resources Control Board to assist with the development of a web-based enrollment and reporting system (see Staff Report for further details).*

Comment: The Initial Study and Negative Declaration ignores the efforts of individuals to address conservation, and may discourage producers who face more costs to prove that they are already meeting the required water quality standards. (15.7)

Response: *The Regional Board recognizes that many agricultural producers have made significant efforts to protect water quality. They will certainly be credited for the practices they have implemented when they identify such practices on their checklist.*

Comment: The Initial Study only addresses costs in generalities, and is inadequate. The proposed fee of \$2 per acre was never presented to the Panel. (15.10) The fact that not all growers will enroll was not factored into the increased costs to those who do. (15.11) The proposed fee does not consider type and quantity of discharge, and therefore the Initial Study and monitoring program are in conflict. The cost of monitoring needs to be clearly addressed. (15.19)

Comment: The monitoring program, fee structure, monitoring subcommittee and all other processes, including environmental review, must be approved at a full public hearing. The draft monitoring program is incomplete without a fee structure and requirements for the monitoring protocol (14.1,15.20) The formation of a committee to advise staff on the monitoring program is encouraged, but should be done prior to adoption of the program. The program is incomplete and cannot be adopted at this time. (14.2)

Response: *The Regional Board cannot assess fees for monitoring. The \$2/acre cost was merely an estimate provided as an example. More detailed information is provided in Attachment 5 of the Staff Report, which gives estimated costs for various monitoring scenarios. The cooperative program may significantly reduce these estimated costs by obtaining upcoming grants which are specifically targeted for agricultural monitoring and implementation, through bulk discounts with analytical laboratories, through collaboration with other monitoring programs, and other means. Language regarding “fees” and “dues” in the Initial Study and program has been revised for consistency. The responsibility for implementing the monitoring program rests with the dischargers. The Regional Board does not approve a fee structure for monitoring.*

Comment: Request the Board to answer questions raised and further review the effects associated with implementing this program. (14.18)

Response: *Staff is meeting with interested parties to further discuss questions raised regarding the program, and is addressing concerns and comments in the staff report and in the draft Order. Stormwater language has been revised to clarify that the requirement to address stormwater quality does not mandate stormwater containment.*

Comment: The Initial Study and Negative Declaration are inadequate and a full EIR must be completed to adequately analyze the impacts to the agricultural community. (23.8) An EIR should be completed and the proposed monitoring and reporting program submitted to the Board on March 19, 2004, should be evaluated as an alternative. (22.9, 23.1, 23.4) Because of the many concerns and inadequacies in the Initial Study and Negative Declaration, there are findings of significance that require a more thorough review. (15.29)

Comment: An EIR should be prepared to evaluate the extent to which land use changes as a result of stormwater containment requirements, compliance with MCLs for discharges to groundwater and compliance with TMDLs will result in substantial modifications to existing land use and management practices (34.1)

Response: *Staff believes that an EIR is not required. A fair argument cannot be made that costs associated with compliance would result in conversion of prime agricultural lands. Costs that do not result in environmental impacts need not be part of a CEQA review. Many dischargers have already met at least some waiver conditions, often because improved irrigation and nutrient efficiency, soil protection efforts and other water quality protection practices result in cost savings and are implemented for economic reasons rather than solely for water quality protection. Where increased costs are incurred, these may be spread over several years and may be at least partially offset by Federal cost share programs, State grant funds and regional settlement funds. State and regional funds will be made available as part of the Regional Board’s commitment to assisting agriculture in compliance. In considering alternative monitoring approaches, Staff has reviewed and responded to the March 19, 2004 monitoring proposal as part of this response, and has met with the proponents to discuss aspects of the proposal. Although certain portions of the proposal can be incorporated into the monitoring program, in*

and of itself the proposal does not meet the requirements of CWC Section 13269. See Attachment 5 for monitoring cost projections. Costs for monitoring may be offset in the short term through State Agricultural Water Quality grants.

Comment: The program and attendant CEQA documents should incorporate specific milestones and benchmarks for measuring the effectiveness of program implementation, such as level of enrollment, and what action will be taken if the target is not met. (32.3)

Response: *The staff report includes milestones, benchmarks and enforcement strategies.*

Comment: The CEQA documents should prove a more detailed discussion of how monitoring results will be evaluated, when “follow-up” monitoring will be employed, and what such an investigation would entail. (32.5)

Response: *CEQA documents need not study the monitoring plan, which the lead agency can adopt at the time of project approval. However, the staff report includes greater description of follow-up monitoring and investigation. Additional detail about follow-up monitoring is also found in Section 3b. Follow-up monitoring will be employed when data at long-term trend monitoring sites indicate persistent impairment, either through water quality testing or beneficial use assessments. The investigations will depend on the nature of the problem, and an effort will be made to characterize the problem in enough detail to better understand sources, the extent of the problem area, and what actions will be most appropriate to take to solve the problem.*

Comment: The CEQA documents should be revised to incorporate use of Central Coast Ambient Monitoring Program data into the monitoring program and discuss how the program will ensure compliance with the State’s antidegradation policy. (32.6)

Response: *See the previous response. CCAMP data has been incorporated into the design of the cooperative program from the beginning, because assessment of outlying areas relies upon this data, as well as data from other sources. CCAMP assessment in areas not covered by the cooperative monitoring network ensures that the program characterizes other outlying agricultural areas. CCAMP data will be important for understanding status of higher quality waters and hence for evaluating these waters for antidegradation. The cooperative monitoring network will monitor more intensively in areas with known problems.*

Comment: CEQA documents should be revised to clarify that agricultural dischargers that do not comply with Section 13269 will be issued Waste Discharge Requirements. (32.1)

Response: *Enforcement is part of the monitoring program under CEQA, and need not be considered in the CEQA documents. The staff report, and the response to comments 17.2, 32.2, 24.3, 24.5 and 32, includes a description of enforcement strategies.*

Section 2: Comments on the Draft Waiver Program

Comment: The program call for reduction of fertilizer and pesticide use. How will this be calculated? (2.1)

Response: *It is expected that all growers will endeavor to be as efficient in their use of pesticides and fertilizer as possible. In some cases, growers are already implementing practices to increase irrigation efficiency, and are maintaining nutrient budgets. They would acknowledge that on their checklist. Records should also be maintained on site.*

Comment: The diversity of farming in this region requires any regional program to be flexible. Farmers should be able to undertake practices which are most suited to their location, crop and climate; mandated practices will not improve water quality. (19.1, 19.4)

Response: *Staff fully agrees. The program is designed to be as flexible as possible. Stormwater language in the Order findings has been revised to clarify that no specific practice is being mandated.*

Comment: There appears to be no difference between the Tier 1 and “low-threat” discharge categories. (20.5)

Response: *Tier 1 was created to reduce reporting requirements for those growers who had already met the conditions of education and plan development and were in the process of implementing management practices. “Low-threat” refers to an operation that has already implemented management practices to reduce its impacts to water quality and is suggested as an approach to allocating costs of cooperative monitoring, based on a discharger having specific practices already in place to reduce total discharge and reduce potential for nutrients, pesticides and sediments to be discharged. Staff considered developing an additional tier under the waiver, but determined that the low-threat category was more appropriate for monitoring cost allocation than for the tiered structure of the waiver, which already allows reduced reporting for meeting education and plan development requirements under Tier 1.*

Comment: Growers should be recognized as “low threat” if they use micro-irrigation, have met the 15-hour educational requirement and can show that they qualify based on practices implemented (13.3)

Response: *The cooperative monitoring program could designate a low-threat category that would qualify for reduced monitoring costs based on such factors. Such growers would likely also qualify for a Tier 1 waiver with reduced reporting requirements.*

Comment: The terms of many leases are fixed, so farmers will face default under the lease or non-compliance with mandated requirements. (19.5)

Response: *Under the Porter-Cologne Water Quality Control Act, both landowners and operators are responsible for discharges of waste that could affect water quality. These requirements have been part of the law for years; the prior waiver of waste discharge requirements for irrigation return waters was adopted in 1983 and expired on January 1, 2003. Individual owners and operators must agree how to allocate this responsibility between themselves. In addition, many leases include requirements to comply with all laws, so the farmers are already obligated to comply with Porter-Cologne and the Basin Plan requirements.*

Comment: The checklist of practices establishes an unrealistic expectation that growers must implement an unending stream of practices, rather than finding the best combination of practices and maintaining them. (20.8)

Comment: The panel did not reach consensus on the checklist format or the contents of the checklist. (15.8) The checklist that has been available requires a continually increasing number of conservation practices, and may penalize those who are doing the best. This could lead to a decrease in conservation practices. (15.17) The checklist is an ineffective tool in assessing the effectiveness of the waiver program. (14.11)

Comment: There is a need for more clarity about record keeping and reporting. (13.7)

Response: *The practice checklist is a recommendation of the Agricultural Advisory Panel. Although the panel did not have time to develop a recommended checklist format, Regional Board staff is committed to working closely with the agricultural community and technical service providers such as UC Cooperative Extension, RCDs and NRCS to develop a usable tool.*

The intent of the checklist is to provide accountability without excessive reporting, not to dictate an unending list of practices that must be implemented. The draft checklist of practices produced by a Technical Advisory Committee working on implementing the Monterey Bay National Marine Sanctuary's Plan for Agriculture was intended to provide a starting point for further review and discussion. The checklist allows farmers to demonstrate that they are implementing management practices, even if water quality in their watershed is not meeting water quality standards. The Regional Board recognizes that full compliance with all waiver conditions will take time; however, the checklist provides a way for the Regional Board to assess compliance in the interim and to determine where problems are occurring. Although the checklist is part of the waiver order, the checklist contents are not specified and may be modified by the Executive Officer as the program evolves.

Comment: There is a conflict with existing regulations regarding public health and food safety. Farmers must have flexibility in choosing practices that suit the operation and do not compromise food safety. (14.6, 14.14, 20.9) There may be conflicts with county grading ordinances and Coastal Commission Policy. (15.27)

Response: *A distinction needs to be made between requirements and recommendations. The Regional Board is not mandating specific practices. Where other agency regulations prohibit a certain practice or require expensive permitting, growers may choose alternative practices that protect water quality. However, recommendations of third party auditors and buyers may be economic in nature and not based on sound science. The Regional Board is participating in statewide efforts to clarify such issues so that growers do not need to choose between selling a crop and protecting water quality.*

Comment: ECOSLO supports the conditions of the waiver but urges the Board to take steps to assure that growers completely understand what is expected of them. (24.1, 24.2)

Response: *Outreach to the agricultural community is, and will continue to be, a high priority for Regional Board staff. Once the waiver is adopted, staff effort will be focused on ensuring that all affected parties are made aware of the requirements. The Regional Board welcomes any assistance ECOSLO or other entities could provide in advancing our outreach efforts.*

Comment: Critical components of the program did not reflect consensus among the Agricultural Advisory Panel members. (25.1)

Response: *Although the Agricultural Advisory Panel did not develop recommendations for all parts of the proposed waiver program, staff has made every effort to incorporate all recommendations where the panel had full consensus. However, the Regional Board has the ultimate responsibility to adopt an agricultural program and may exercise its discretion in a manner other than what the Panel recommends, even where consensus is reached.*

Comment: The waiver plan does not take into account the growers who are not in the Pesticide Use Reporting data, and therefore there may be many growers who are not aware of the requirements. (15.16)

Response: *Regional Board staff is also acquiring County assessors' information which will be integrated with Pesticide Use Reporting. Outreach will focus on contacting as many agricultural organizations as possible in order to ensure that growers know what is expected.*

Comment: Page 15, Section 8 removes the caveat that extenuating circumstances, such as lack of sufficient available classes, will be considered in compliance review. This could result in loss of farmland as the landowner stops production rather than be out of compliance. (15.18)

Response: *The language has been changed to clarify that extenuating circumstances will be considered. In fact, the Board is required by statute to consider certain extenuating*

circumstances in assessing civil liability. (See Water Code section 13327.) The factors the Board must consider are described in the staff report discussion of enforcement strategy.

Comment: Concern that there may not be enough education classes before the three-year deadline expires. (2.7)

Comment: The program must be coupled with educational and outreach programs to be effective, through technical expertise and financial resources. (35.11)

Response: *Comment addressed in Section 1C above.*

Comment: Concern about lack of notification of workshops. (1.2)

Response: *Staff compiled a mailing list of 2300 individuals and is continuing to expand interested parties lists, both electronic and regular mail. Sign-up for electronic mail is available on the Regional Board website (www.swrcb.ca.gov/rwqcb3). Notice is also posted on the Regional Board's website and provided to local governments and representatives of agricultural interests, such as the Farm Bureaus.*

Comment: Concern about unlimited access to private property (2.2, 13.6)

Response: *Site visits and inspections will be coordinated with owners and/or operators, to ensure that concerns about disease and equipment are addressed.*

Comment: Request that the program be phased in (3.1, 4.3, 12.1)

Response: *Although a complete program must be adopted which includes conditions for the waiver and the monitoring requirement, growers have a three-year time period in which to complete education and plan development requirements and begin implementing practices. Funding will be available in many cases to assist with meeting these requirements and staff urges the agricultural community to apply for funds being made available through the Agricultural Water Quality Grants program. These funds are a unique opportunity to receive assistance with meeting monitoring and implementation requirements that will likely not be available in the future.*

Comment: The program should ensure education before stringent enforcement. (5.2)

Response: *The Regional Board's approach to enforcement is described in the staff report. Emphasis during the first five years will be on ensuring that growers are enrolling and obtaining education. The Regional Board will direct settlement funds and grant funds to support education.*

Comment: Concern that regulation will force family farms out of production (5.1)

Response: *The Regional Board is acutely aware of these concerns and has worked to structure the program in a way that allows maximum flexibility and keeps costs as low as possible.*

Comment: Program must include benchmarks for measuring success and a plan for program adaptation if compliance is not achieved (7.3, 8.1, 30.2, 33.5)

Response: *Comment addressed in Section 1.C above*

Comment: Program should have a strong statement of prompt and strict enforcement, clear enforcement guidelines (30.1, 33.13)

Comment: It is critical that the program contain a clear and rigorous enforcement element. (33.12)

Comment: The Regional Board must develop and implement a clear and effective enforcement plan to address noncompliant operations and landowners. (35.12)

Response: *Enforcement strategy and guidelines are addressed in the staff report.*

Comment: Program should include best management practices, farm plans and education (8.5, 18.6, 18.7, 26.1, 28.1)

Response: *These are conditions of the waiver.*

Comment: Agricultural waste discharges should be free of toxic substances in excess of maximum contaminant levels and not cause or contribute to conditions of pollution or nuisance (29)

Response: *This is a condition of the waiver.*

Comment: The program should pay for itself through fees (8.4, 18.8, 26.4, 33.11)

Response: *Although the Regional Board does not have authority to adopt a fee schedule, staff will provide input and comment if and when State Board develops such a schedule.*

Comment: Irrigation efficiency is a critical component and is missing (9.1)

Response: *Staff fully agrees that irrigation efficiency is critical to improving water quality. Irrigation efficiency is assumed to be an important component of irrigation management, but staff will review the conditional waiver program language to make that more explicit. In addition, irrigation efficiency will be included in the checklist of management practices.*

Comment: Requirements for the checklist and farm plan need to be more explicit so that growers know what information is needed, in what form it is to be submitted, where the information is to be kept and who will have access to the information. (13.7)

Response: *The Order contains a list of required submittals. Forms will be available on-line and in hard copy. Farm plans must, at a minimum, identify practices to address erosion control, and irrigation, nutrient and pesticide management. Acceptable farm plan templates are available from University of California Cooperative Extension and through the Central Coast Vineyard Team's Positive Point System. Farm plans must be kept on-site or at the farm office. The checklist will be a short list of management practices for erosion control, irrigation management, nutrient management and pesticide management to allow growers to identify practices being implemented. A template for the checklist is being developed. All information submitted becomes part of Regional Board records.*

Comment: Discrepancy between statements that the Board cannot charge fees until the State Board adopts a fee schedule, and references to fees or dues associated with monitoring. Please clarify (34.4)

Response: *The Board cannot set a fee schedule nor charge fees or dues. Under the cooperative monitoring option, a separate entity may collect dues from dischargers who wish to satisfy their monitoring obligations through the cooperative program. The language has been clarified.*

Comment: Urge Board to develop Waste Discharge Requirements for those dischargers that do not comply with all of the requirements of the conditional waiver program (33.1)

Response: *Comment noted. See Staff report and the response to comments 17.2, 32.2, 24.3, 24.5 and 32 for description of enforcement strategy.*

Comment: The program must comply with the law and ensure that the five key structural elements of the States NPS Implementation and Enforcement Policy be incorporated. (33.2)

Comment: The program must include a description of management practices that will be implemented and the process used to ensure and verify implementation. (33.5)

Response: *The NPS Implementation and Enforcement Policy will not take effect until it is approved by the Office of Administrative Law. However, staff has attempted to comply with the five key elements. The five elements are addressed in the Staff report.*

Comment: The Board should take prompt action and avoid further delays. (33.3)

Response: *Comment noted.*

Comment: Identify compliance with water quality objectives as the program’s fundamental goal (33.4)

Response: *This has been done in both the staff report and the waiver findings.*

Comment: The Central Coast Regional Board should take a proactive approach to seeking fee authority and provision of additional staff positions to administer the program (33.11)

Response: *Comment noted. Regional Board staff has identified tasks and personnel needs to implement the waiver program and is redirecting existing staff resources and identifying opportunities to obtain additional staff resources. Staff is also communicating with the State Water Resources Control Board to ensure that additional resources and grant funds will be made available to this region.*

Comment: The proposed waiver needs to expressly protect irrigators from exposure to liability for degradation of groundwater that they did not cause. (34.2, 3.2)

Comment: In areas where irrigation supply water is already affected by high levels of sodium and chloride, irrigators must install subsurface drainage, and such discharges cannot meet secondary drinking water standards for these constituents or primary standards for nitrate. The waiver needs to protect irrigators from liability where they are not the cause of the degradation. (34.3)

Response: *Comment is addressed in Section 1C above and in the enforcement strategy description in the staff report. In areas where groundwater is already degraded by nitrates, growers need to show that their nutrient budgeting takes that into account, and that they have made reasonable efforts to prevent further degradation. They will not be held liable for conditions such as historic contamination or seawater intrusion that are beyond their control.*

Comment: Industry groups, agencies, nonprofits, and technical assistance providers should not be held liable for regulatory requirements. (35.4)

Response: *Landowners and operators are responsible for compliance with the conditional waiver. Existing water quality programs, which are acknowledged as a valuable contribution to water quality protection, are not responsible for compliance with the conditions of the waiver. It is hoped that these organizations will continue in their leadership role and assist growers throughout the Region through assistance with education and management practice implementation.*

Comment: The Board is urged to act on the recommendations of the Agricultural Advisory Panel (7.1, 28.1)

Response: *Comment noted.*

Comment: Suggested language to address privacy issues, “to the extent that information requested or required pursuant to the waiver contains trade secrets, that information may be withheld upon the election of the Discharger. Such information shall be made available for review by the Regional Board but shall not be made public unless authorized by the discharger.” (35.13)

Response: *The State Water Resources Control Board addressed this claim in Order No. WQO 2004-0003 (January 22, 2004). In response to the Central Valley Region’s requirement that*

agricultural dischargers provide information on monitoring and best management practices, the State Board ruled:

The claim that Individual Dischargers and Participants could be required to disclose trade secrets is also without merit. The Waiver requires submission of relevant and appropriate documents. The procedure for protecting trade secrets is set forth in Water Code section 13267(b)(2). The requirements in the Waiver do not change or diminish the protection of trade secrets. Should an Individual Discharger or Participant include a legitimate trade secret in a submission, it must follow the procedure set forth in the statute to protect that trade secret.

Section 13267(b)(2) provides:

When requested by the person furnishing a report, the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies. However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report.

The California Public Records Act also includes a process to protect trade secrets. The Public Records Act does not require disclosure of “geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.” (Gov. Code §6254(e).)¹ Records that are exempt from disclosure under other law, including the law of privilege, are also exempt from Public Records Act disclosure. (Gov. Code §6254(k), Evid. Code §1060.) Information may be a trade secret if disclosure of the information would cause a competitive disadvantage. (Uribe v. Howie (1971) 19 Cal.App.3d 194.)

The Regional Board has the obligation to determine whether information is exempt from disclosure as a trade secret. (Gov. Code §6255(a).) The suggested language would prohibit disclosure of any information a discharger designated as confidential, whether or not the Regional Board agrees that the information is a trade secret. This is contrary to the Public Records Act, and subjects the Regional Board to potential litigation and liability for attorneys’ fees if a discharger incorrectly claimed that information is a trade secret. (Gov. Code §6259(d).)

At the March 19, 2004 Regional Board meeting, agricultural representatives stated that a local ordinance included similar language to protect private well log data. However, such information is already exempt from disclosure under state law. (Wat. Code §13752.) The suggested confidentiality language appears to be based on Water Code section 13752, which does not apply to monitoring and BMP data.

Comment: Requiring compliance with a TMDL that has no effective date raises complicated implementation and legal issues. (34.8)

Response: *Staff disagrees. Among other things, TMDLs that are adopted to address water quality impairments caused in whole or in part by agricultural discharges are likely to rely on the waiver as part of the TMDL implementation plan. This provision eliminates the need to*

¹ “Crop reports” are “reports specifying the nature, extent, type or magnitude of crops being grown. The statute does not define the term, but the purpose of the exemption would seem to be to protect the financial confidentiality of growers' enterprises.” (Uribe v. Howie (1971) 19 Cal.App.3d 194.)

undertake the formality of revising the waiver each time a new TMDL is adopted. Concerns regarding any specific requirements imposed by a TMDL can be addressed at the time the TMDL is adopted. In cases where the cited language in the waiver is not sufficiently clear to implement a TMDL, the Regional Board is free to revise the waiver at any time.

Section 3: Comments on the Draft Monitoring and Reporting Program

A. Monitoring Program Structure

Comment: The Regional Board should consider the monitoring proposal submitted at the March 19, 2004, Board meeting by the agricultural industry. (20.1, 15.8)

Comment: Panel members recommended a pilot monitoring program, which is crucial to the success of the program. The pilot monitoring program has been incorporated into the proposal submitted to the Board on March 19, 2004 and should be included in the proposed monitoring and reporting program. (25.2)

Comment: Two pilot programs should be established in areas of known water quality impairment using settlement funds. (35.6)

Comment: The pilot programs should allow participation on a rotational basis, where monitoring sites rotate over a period of time. (35.9)

Comment: Although members of the panel agreed a cooperative monitoring structure appeared more economically feasible, the agricultural members asked that a pilot project demonstrate actual monitoring needs before requiring monitoring in areas where there are no known discharges. (15.9)

Comment: The monitoring program should be phased in and rely on existing water quality monitoring. (3.1)

Response: *The concept of a pilot program was discussed during Advisory Panel meetings, and while strongly supported by several members of the Panel, did not finally receive support from all panel members. Legal concerns about instituting a limited monitoring program in only two areas of the region and concerns about a two to three year delay in implementing a full monitoring program for the region convinced staff that developing the full program was the best approach. A geographically limited pilot program does not meet the requirement of Water Code section 13269 that monitoring must be able to verify the adequacy and effectiveness of waiver conditions. A delayed monitoring program raises similar concerns, in part because baseline information is critical to determine the success of management practices. Staff strongly supports the concept of seeking funds from external sources to initiate the cooperative monitoring program, but guarantee of such funds cannot be specified in the MRP. Staff will continue to work with the agricultural community to develop the infrastructure and find funding to institute a cooperative monitoring program and urges the agricultural community to take advantage of the unique opportunity afforded by the Agricultural Water Quality Grants Program to obtain funding for monitoring. Staff is committed to working with the agricultural community to obtain such funding to initiate the monitoring program, which could potentially offset all or most monitoring costs for the first two years of the program. Regional Board staff has reviewed the monitoring proposal and met with the proponents. Proponents have been advised that data from other monitoring programs may be submitted by the cooperative program in lieu of new information, if that data is of adequate data quality and fulfills program requirements. Waterbodies proposed for monitoring through the cooperative program all show evidence of impact from pollutants typically associated with agricultural activities.*

Comment: The monitoring and reporting program was not developed with input from the Panel (14.7)

Response: *Staff initially developed the cooperative monitoring program concept internally, and then met with a subcommittee of the panel on 8/20/03 for input and discussion. At that meeting the subcommittee recommended that several technical experts review program details. Staff met with researchers specifically recommended by members of the subcommittee, as well as several others on 9/10/04; the subcommittee was also represented at that meeting. Several recommendations were incorporated into the monitoring proposal based on comments received at that meeting. At subsequent Advisory Panel meetings details of the monitoring proposal were discussed. A number of consensus items were identified. The panel provided input regarding the focus on currently applied agricultural constituents, which has been incorporated into the proposed monitoring program. Where additional constituents are included, they provide important information to aid in interpretation of the data or are intended to provide information on waterbody health in lieu of extensive pesticide testing.*

Comment: It is not clear whether the Regional Board is relying on Section 13267 of the California Water Code for monitoring or on Section 13269. As drafted, the monitoring requirements conflict with statutory provisions regarding inspections and access. (14.9)

Response: *Requirements of both 13267 and 13269 must be fulfilled. Section 13267 provides the general requirements for a monitoring program. Section 13269 makes monitoring mandatory for waivers, and imposes minimum requirements and factors for the Board to consider. Section 13269 requires a monitoring program to evaluate the effectiveness of the waiver program. The cooperative monitoring program is to be implemented by an organization designated by the industry; a number of waterbodies are required to be monitored at locations suitable to detect impacts from agricultural activities, but site locations have not been specified in the Monitoring and Reporting Program. We recommend the designated cooperative monitoring organization work with local landowners to identify suitable site locations for monitoring access. If the option of individual monitoring is selected by an owner or operator, monitoring is the responsibility of that individual. The waiver includes standard inspection language from permits and waste discharge requirements statewide. This provision limits Regional Board access to “reasonable” access upon request, and the discharger consents to this access by seeking coverage under the waiver.*

Comment: The industry has requested a process to be certified as a non-discharger. How will operations become recognized as “clean”? We request a box on the Notice of Intent saying “The operation does not have storm or irrigation water runoff that deleteriously impacts water quality.” (14.10)

Response: *The waiver is intended to provide coverage for all discharges, including groundwater discharges. If an operation can demonstrate that it does not discharge waste that could affect water quality, then it does not need coverage under the waiver. For example, a registered engineer can certify that the operation does not discharge to surface water or groundwater, and that no sediment or chemicals will be discharged through stormwater. However, in the absence of waiver coverage, the operation cannot legally discharge any material but clean water to waters of the State, including groundwater. If an operation has met all conditions of the waiver, it will remain in Tier 1 and could be exempted from some or all monitoring costs if the cooperative monitoring program chooses to identify a “low-threat” category.*

Comment: Monitoring should be frequent and tied to the crop production of the area. Testing in must be widespread and comprehensive. (24.7, 24.8)

Response: *The Monitoring and Reporting Program is designed to assess current water quality and detect change over time. Waterbodies designated for most intensive, frequent monitoring*

through the cooperative program are in areas where agricultural activities appear to have resulted in water quality impacts. Outside of these areas of intensive crop production, monitoring will rely on other sources of information, particularly findings of the Central Coast Ambient Monitoring Program. Testing uses evidence of beneficial use impairment to determine whether follow-up monitoring is required. Follow-up will be conducted to the extent necessary to characterize sources of toxicity and nutrient overenrichment and to initiate action on the part of responsible parties.

Comment: Monitoring program is bare minimum (7.2, 8.3)

Response: *We concur that monitoring requirements are not excessive. We have attempted to provide a lower cost option for growers through the cooperative monitoring program approach. This program has far fewer sites overall than would result from individual monitoring. The tradeoff that makes this program desirable is that it allows for increased frequency of monitoring (monthly) for better trend detection, and for assessment of in-stream aquatic life beneficial use protection.*

Comment: Monitoring costs should be based on size, management practices, and/or nature of inputs. Costs should be reduced in areas that consistently come up clean. (18.4, 18.5)

Response: *Staff has developed cost scenarios (see Attachment 5) that take into account size, management practices, and threat to water quality. The cooperative monitoring program will have the ability to adjust costs to participants based on these or similar factors, and may consider water quality improvement or existing water quality as a factor.*

Comment: Monitoring program should provide immediate feedback to growers (8.2)

Response: *We concur that rapid feedback should be an important element of the cooperative monitoring program. We will work with the designated cooperative organization to share our data management tools that allow for rapid turn-around of electronic data to a web-available format. We are currently working with Tetrattech to develop electronic reporting tools that will help facilitate file uploads from laboratories.*

Comment: Monitoring should be conducted only in problem areas. (2.6, 13.2)

Response: *The cooperative monitoring program requires monitoring in waterbodies which are known to be impaired either in groundwater or surface water by pollutants typically associated with agricultural activities (nutrients and pesticides). Monitoring outside of these areas will rely on other monitoring data, such as that collected by the Central Coast Ambient Monitoring Program. It should be noted that it is probable that not all problems related to agricultural discharge have been documented through past monitoring activities.*

Comment: Question of whether the cooperative monitoring approach is feasible, since farmers are unlikely to organize (27.1)

Response: *If farmers choose not to organize to form a cooperative program, they may conduct individual monitoring. The cooperative program is being allowed as an alternative to help reduce costs.*

Comment: Management practice monitoring should be a required component of the program (33.6)

Response: *Staff agrees that it is desirable for growers to monitor the effectiveness of their practices. Self-monitoring techniques are an important component of farm water quality training and encouraged as another way for growers to demonstrate their compliance, but we are not requiring submittal of data. Such information should be kept on site as part of the farm plan, and*

used as further demonstration of compliance in the event that follow-up monitoring is necessary in a watershed.

Comment: The Regional Board should administer the monitoring program (33.7)

Response: *At this time, the State Board has not chosen to set fees to pay for the costs of the State's agricultural waiver programs. If the State Board elects to consider fees, we will evaluate how effectively agricultural waiver monitoring is proceeding through industry efforts. If we feel that it can be done more effectively through a fee-based program, we will make that recommendation to the State Board. However, it should be noted that permit programs typically require either self-monitoring, or in the case of several regionalized programs, monitoring by a non-profit or other entity funded by dischargers (e.g. San Francisco Estuary Institute, Central Coast Long-term Environmental Assessment Network, Southern California Coastal Water Research Program). There is little precedent for the Regional Board to administer the program. It should also be noted that the industry can request that the Regional Board conduct the monitoring, if it finds that to be the most cost-effective approach. Funds for hiring sampling staff and conducting analytical work would still need to be generated by the industry, but the Regional Board's CCAMP program could organize the sampling, and handle data management and quality assurance issues, which could potentially result in some cost-savings to the industry.*

Comment: The monitoring program must be sufficient to demonstrate compliance with the State's antidegradation policy and this should be described in the MRP. (33.10)

Response: *Monthly monitoring for a suite of parameters including basic conventional constituents is an important component of the monitoring program because it allows for more rapid detection of long-term trends than would less frequent monitoring. This is important for understanding whether waters are slowly being degraded. In areas outside of intensive agricultural activity, where other sources of data, particularly CCAMP, are being relied upon, monitoring may be less frequent. CCAMP data is collected monthly at the same sites once every five years, and will be analyzed for change detection to enable assessment of compliance with the State's antidegradation policy.*

Comment: Growers who rely on degraded groundwater as their primary source of irrigation water should not be subject to liability for degradation they did not cause. (34.2)

Comment: In many areas of the region, irrigation supplies are already affected with high levels of sodium and chloride, requiring use of subsurface drainage to remove these constituents from the soil, and discharging water that may not meet nitrate and other standards. Irrigators should not be subject to liability for degradation they did not cause. (34.3)

Comment: The Regional Board should take into account background levels of pollution and other sources, so that agriculture is not held responsible for impairments in excess of their contribution. (10.2, 12.2, 35.2)

Comment: How can agriculture avoid being out of compliance, when groundwater nitrate levels may already exceed standards? (13.4, 34.2)

Response: *The Regional Board recognizes that in some parts of the Region, excessively high nitrate or salts have been a problem in groundwater for many years, and implementation of appropriate practices will not reduce these levels for a number of years to come. As part of the farm plan implementation growers are encouraged to monitor nitrate concentrations in irrigation well water and consider that information in calculating applications. That information will also enable the grower to document preexisting problems. We have not required submittal of this specific information. We will be looking more broadly at groundwater data to ensure that we understand where problems areas are located and communicate that information to growers in those areas. It will be the responsibility of the growers to ensure that management measures are implemented which prevent exacerbation of these known problems.*

Comment: There appears to be a discrepancy between statements about fee schedules and dues associated with the MRP (Findings 26, 31, 32 and 36). This needs to be clarified. (34.4)

Response: *Currently, there is no fee schedule associated with the Conditional Waiver or monitoring program. “Dues” refers to cost allocation to be developed by the agricultural community if it wishes to implement a cooperative monitoring program. Although staff has developed monitoring scenarios and suggested cost allocation schemes, ultimately the decision of how to allocate costs will rest with the members of the cooperative monitoring program.*

Comment: The scope of the monitoring program should be no more onerous or costly than those imposed on other industries with non-point source discharges. (35.3)

Response: *In offering a cooperative program approach we have greatly reduced the cost and difficulty of implementing monitoring to individual growers. Most other industry monitoring requirements have been placed on individual dischargers with no alternative group program approach. In addition, our data indicates a correlation between water quality problems and agricultural activities. Based on our own monitoring results we believe irrigated agriculture to be the source of a large amount of the nutrient and pesticide pollution in our Region. Monitoring requirements are appropriate given the scale of the problem. Where we determine other industries are responsible for water quality problems, we will increase monitoring requirements on those industries.*

Comment: The Regional Board should prepare a complete analysis of all existing monitoring programs and establish regionwide and watershed wide water quality databases, to evaluate existing monitoring and identify data gaps. (35.5)

Response: *The Central Coast Ambient Monitoring Program has reviewed many of the existing monitoring programs and has or will obtain water quality databases from these programs as part of CCAMP’s ongoing program. Staff does not believe that existing efforts can satisfy the legal requirements of CWC Section 13269, particularly with regard to assessment of impacts from pesticides, which require either toxicity monitoring or chemical monitoring. Existing and future monitoring data can be used by the cooperative monitoring program or by individuals to satisfy some of the monitoring requirements of the proposed Monitoring and Reporting Program, as long as the data meets the necessary quality assurance criteria. We encourage the cooperative program to collaborate with other local monitoring efforts to find ways to make most efficient use of monitoring resources.*

B. Monitoring Program Constituents and Frequency

Comment: The monitoring program should include only those measures necessary to detect noncompliance with the conditions of the Conditional Waiver program. (35.1)

Response: *The monitoring program must be designed to assess the adequacy and effectiveness of the conditional waiver program, not just detect non-compliance by individual dischargers.*

Comment: Monitoring frequency should be limited to one storm event and one irrigation event per year (35.7)

Response: *Staff does not believe this frequency would allow assessment of the effectiveness of the program, nor detect improvements in an adequate time frame.*

Comment: Monitoring constituents should be limited to nutrient pollutants that are likely to be applied by farming operations near the site and should not include toxicity, which are costly and are difficult to pinpoint in mixed use areas. (35.8)

Response: *Although staff recognizes that causes of toxicity may be difficult to pinpoint in some cases, toxicity testing combined with benthic invertebrate analysis and follow-up monitoring, review of management practices and plan implementation, will all be used in the analysis of problem areas. Nutrient monitoring alone does not allow assessment of the effectiveness of the waiver. The CCAMP program has evaluated its own nutrient and toxicity data, and though in many locations nutrient problems co-occur with toxicity problems, this is not always the case. Without toxicity sampling or chemical sampling it is not possible to assess impact from agricultural chemicals.*

Comment: Monitoring stormwater will be hugely expensive and will result in little useful knowledge (11.1)

Response: *The cooperative program is required to monitor toxicity in-stream during high flow events. It is not required to monitor stormwater runoff per se. Individual monitoring does require stormwater monitoring, because the individual program is focused on sampling of discharge quality as opposed to in-stream quality. Many pollutants move into waterways during storm events, so characterizing water quality during these events is important. The cost of monitoring during storm events should not be significantly more expensive than dry season monitoring, as the same tests and frequency of monitoring are required.*

Comment: The 1 mg/l threshold for nitrogen is too low (13.4)

Response: *This threshold is advisory only, and is not intended to trigger enforcement actions. Nitrate levels that impact aquatic life are known to be much lower than the drinking water standard of 10 mg/l as N, however, and in the future the Regional Board may adopt new numeric nitrate standards. 1 mg/L is the level at which U.S. Environmental Protection Agency Region 9 has recommended that waters be proposed for listing on the 303(d) list as impaired for aquatic life.*

Comment: The proposed monitoring frequencies and site locations are reasonable for pesticides, but follow-up monitoring should consider costs and should explicitly elaborate procedures to be followed. (31.1, 31.2)

Response: *Staff recommends that a maximum of 25% of the budget of the cooperative monitoring program be allocated to follow-up monitoring. Follow-up monitoring has not been explicitly described because we believe that specific details of each problem area will need to be taken into consideration in order to develop the best, most cost-efficient follow-up monitoring. For example, in some locations there may be only one landowner involved in chemical applications; in this circumstance, working with that landowner directly might be a more efficient approach than pursuing expensive Toxicity Identification Evaluations. In other circumstances, evaluation of chemical applications through the Department of Pesticide Regulation's Pesticide Use database might provide initial information related to the nature of the problem that can narrow the scope of follow-up monitoring.*

Comment: The monitoring program should be expanded. (30.3)

Comment: Toxicity monitoring should be monthly (33.8)

Comment: Pesticide monitoring should be required in areas with existing evidence of pesticide impairment. (18.3, 33.9)

Response: *Staff believes the proposed program is a reasonable approach and will meet the requirements of CWC Section 13269. Pesticide monitoring may be required as part of follow-up monitoring requirements in areas that are shown to be persistently toxic. If individual landowners are shown to be chronically discharging toxic levels of pesticides, additional monitoring requirements may be placed on those individuals.*

Comment: Some of the proposed parameters are not typically associated with agricultural discharges, such as flow (34.5).

Response: *Several parameters are measured in order to provide a framework for evaluation. For example, in the case of flow, when considering the magnitude of a problem, a small volume of contaminated water is of less overall concern than a large volume. In terms of prioritizing problem areas, it will be important to understand how much contamination is at issue.*

Comment: Benthic invertebrate monitoring does not take into account other factors having nothing to do with agricultural discharges, including impacts from urban storm water, point source discharges, loss of riparian vegetation, hydrology, etc. (34.6)

Response: *Benthic invertebrate monitoring is an important tool for several reasons. Toxicity events can be episodic. Toxicity sampling is currently required only four times per year. Sampling of benthic assemblages will provide information on whether creek systems have long-term chronic effects or acute episodic impacts which have gone undetected by relatively infrequent toxicity monitoring. Additionally, a healthy benthic community can provide evidence that some toxicity events may not be representative of actual stream health and should be interpreted with caution. Along with toxicity monitoring, benthic invertebrate monitoring provides a direct assessment of aquatic life beneficial use support. As with other types of data, interpretation must always consider the potential for impacts from other sources, and sites should be chosen carefully to best isolate potential impacts from agricultural activities.*

Comment: Water quality analysis for pesticides is difficult and may be inaccurate. (10.1)

Response: *The monitoring program uses toxicity testing rather than individual pesticide monitoring for a number of reasons, including the difficulty and expense of testing for individual pesticides. When pesticide testing is required, analyses will be performed by certified laboratories.*

C. Monitoring Program Costs and Cost Allocations

Comment: Monitoring costs should be proportional to a discharger's contribution to water quality impairment and should include off-sets or credits for those who contribute to water quality improvements as a result of practices. (35.10)

Comment: Small farms in areas with no water quality impairment should not be required to contribute to a system that minimizes the costs to others (10.3)

Response: *The agricultural community, if developing a cooperative monitoring program, can set up a cost allocation structure that includes credits, off-sets, or "low-threat" categories in allocating costs. An example of cost scenarios is included in Attachment 5. Since the Regional Board must ensure that existing high water quality is not degraded, areas that either have not been shown to be impaired or have not yet been monitored need to have some level of monitoring. For that reason, the Central Coast Ambient Monitoring Program, which is a Regional Board program that performs regionwide monitoring on a rotational basis, will be used to augment information developed by the cooperative monitoring program, thus providing monitoring in*

other areas at no cost to the agricultural community. This program, which is primarily funded through permit holder surcharges, will offset some monitoring costs to agricultural dischargers. This can be passed on to small farms through the cost allocation structure that is ultimately adopted by the cooperative program.

Comment: It is not reasonable for the agricultural industry to bear a disproportionate cost of ensuring that watersheds meet water quality standards, especially in watersheds with mixed land uses. The Regional Board assumes that if there is impairment and agriculture is present, then the impairment is partially or fully the result of agricultural activity. (14.17, 2.5)

Comment: Concern about being responsible for pollutants from other sources (1.1, 2.5, 12.2)

Response: *Staff agrees that in many watersheds there are discharges besides agriculture. The waiver focuses most monitoring in areas of concentrated irrigated agriculture where impacts from nutrients and pesticides have already been identified, and careful site selection can help isolate assessment to areas of agricultural inputs. In areas of mixed land uses, the Regional Board will use its regulatory authority to require additional monitoring from other dischargers if needed. The Regional Board is looking at ways to reorganize stormwater monitoring requirements for the City of Salinas to be consistent with the cooperative agricultural monitoring program. This will allow impacts of the City to be assessed apart from those of agriculture. We will continue to seek to incorporate similarly coordinated monitoring into other industry program requirements as they develop.*

Comment: Concern about cost of toxicity testing being more than \$10,000 per year. (2.3, 13.1)

Comment: Concern about what the costs of monitoring will do to farmers' overhead in light of foreign competition (6.1)

Comment: Two independent cost estimates put the cost of individual monitoring at more than \$15,000 per year. Suggests exploring the possibility of having the Upper Salinas-Las Tablas RCD perform monitoring (27.2, 27.3)

Response: *Staff recognizes that testing for pesticides and/or toxicity can be very expensive. For that reason, as well as for data management and quality assurance considerations, the Regional Board developed a cooperative monitoring program option which allows growers to meet their monitoring obligations at a much lower cost. We recommend that the agricultural industry pursue this approach rather than costly individual monitoring. See Attachment 5 for examples of estimated costs. Staff also proposes to work with the agricultural community to obtain funding through the Agricultural Water Quality Grants program to aid in initiating the cooperative monitoring program. At the end of two years of monitoring, the data and the Monitoring and Reporting Program will be evaluated for effectiveness. Other funds under this grant program may provide an opportunity to do additional monitoring in watersheds with known pesticide impairment and to perform additional toxicity evaluations and may also offer an opportunity to evaluate lesser known areas. If the agricultural industry would like to partner with Resource Conservation Districts or other entities to perform monitoring, that is an option they can pursue.*

Comment: Regional Board should pay for monitoring and education (4.1, 4.2)

Response: *Unfortunately, the Regional Board does not have resources to do so. Monitoring and Reporting Programs associated with permits and waivers must be funded by the permittee. However, the Regional Board is committed to using newly available grant and settlement funds to assist with initiation of the monitoring program and to provide education and technical services to aid in implementation.*

Comment: The Regional Board should consider assessing a fee to all property owners in a watershed to pay for monitoring, not just agriculture, since water quality is important to everyone and there are many sources of nonpoint source pollution (36.1)

Response: *Staff agrees that this would be a sensible approach to developing a monitoring strategy that supports watershed management and long-term protection of water quality and beneficial uses. Such an approach is not within the scope of Regional Boards, but would have to come through legislation or local ordinance. Citizens are paying for water quality monitoring through other programs. For example, all cities are now required to implement stormwater pollution prevention plans; in larger cities, such as Salinas, these plans include a monitoring component. Costs associated with plan development and implementation are passed on to residents. Similarly, costs associated with the monitoring surcharge recently added to permitted discharges are ultimately paid by residents of that municipality. So, though fees are not being assessed by the Regional Board, they are collected in other venues to pay for costs associated with monitoring. There may be ways to begin incorporating other monitoring efforts like these into a single comprehensive program. Regional Board staff will continue to look for such opportunities, as we are doing with the Salinas stormwater permit.*