



1 of 99 DOCUMENTS

In the Matter of the Petitions of OCEAN MIST FARMS AND RC FARMS; GROWER-SHIPPER ASSOCIATION OF CENTRAL CALIFORNIA, GROWER-SHIPPER ASSOCIATION OF SANTA BARBARA AND SAN LUIS OBISPO COUNTIES, AND WESTERN GROWERS For Review of Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 Discharges from Irrigated Lands, Monitoring and Reporting Program Order Nos. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03, and Resolution No. R3-2012-0012 Issued by the Central Coast Regional Water Quality Control Board

Order No. WQ 2012-0012

State of California  
State Water Resources Control Board

*2012 Cal. ENV LEXIS 67*

September 19, 2012

**BEFORE:** [\*1] Chairman Charles R. Hoppin, Vice Chair Frances Spivy-Weber, Board Member Steven Moo, Board Member Felicia Marcus, Board Member Tam M. Doduc

**OPINIONBY:** BY THE BOARD

**OPINION:**

*SWRCB/OCC FILE A-2209(c) -- (d)*

***ORDER ON REQUESTS FOR STAY***

On March 15, 2012, the Central Coast Regional Water Quality Control Board (Central Coast Water Board) adopted Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 for Discharges from Irrigated Lands, and associated Monitoring and Reporting Programs (MRPs) Order Nos. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03, and Resolution No. R3-2012-0012 (collectively referred to herein as the Agricultural Order n1). The State Water Resources Control Board (State Water Board) received timely petitions for review of the Agricultural Order from five groups of petitioners: Monterey Coastkeeper, Santa Barbara Channelkeeper, San Luis Obispo Coastkeeper (collectively, Keepers); Ocean Mist Farms and RC Farms (collectively, Ocean Mist); Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, and Western Growers (collectively, Grower-Shipper); California Farm Bureau Federation, Monterey [\*2] County Farm Bureau, San Benito County Farm Bureau, San Luis Obispo County Farm Bureau, San Mateo County Farm Bureau, Santa Barbara County Farm Bureau, Santa Clara County Farm Bureau, and Santa Cruz County Farm Bureau (collectively, Farm Bureau); and Jensen Family Farms, Inc., and William Elliott (collectively, Jensen).

n1 When referring to the Monitoring and Reporting Program Orders individually, this Order will use "Tier 1 MRP," "Tier 2 MRP," and "Tier 3 MRP," respectively.

Ocean Mist and Grower-Shipper submitted complete requests that the State Water Board stay certain provisions of the Agricultural Order pending our resolution of the petitions for review on the merits. n2 On August 30, 2012, we conducted an evidentiary hearing to consider the requests for stay. The parties to the hearing included the Central Coast Regional Board, all five of the petitioners, and Environmental Defense Center, the only non-petitioner that sought party status for the hearing, and evidence submitted by all parties was considered in [\*3] the Board's decision. For ease of reference in our discussion, we refer generally to Ocean Mist, Grower-Shipper, Farm Bureau, and Jensen as "the Agricultural Petitioners."

n2 Farm Bureau submitted a statement that it supported the stay request submitted by Grower-Shipper. Jensen requested a stay, but failed to support the request with any declarations, and as a result Jensen's stay request does not meet the minimum standards set by State Water Board regulations, as discussed in Section II of this Order, *infra*.

This Order addresses only the requests for stay submitted by Ocean Mist and Grower-Shipper. For the reasons set forth below, we grant the requests in part and deny the remainder of the stay requests.

## I. BACKGROUND

The Central Coast Region has approximately 435,000 acres of irrigated land. The Agricultural Order, adopted pursuant to Water Code section 13269, regulates the discharge of irrigation return flows and storm water from irrigated lands in the region and supersedes a conditional waiver of waste [\*4] discharge requirements in effect since 2004 (2004 Agricultural Order). n3 The provisions of the Agricultural Order address discharges to both surface water and groundwater.

n3 While the 2004 Agricultural Order expired in 2009, the Central Coast Water Board or its Executive Officer administratively extended it several times.

The Agricultural Order defines three tiers of agricultural dischargers based on the risk of water quality impacts. A number of criteria are considered in determining the appropriate tier for a discharger. These include the distance of the discharger's farm to a surface waterbody listed as impaired by toxicity, pesticides, nutrients, turbidity, or sediment; whether the discharger applies chlorpyrifos or diazinon; and whether the discharger grows crop types with high potential to discharge nitrogen to groundwater. The Agricultural Order categorizes dischargers that pose the highest threat to water quality as Tier 3 dischargers, and such dischargers face more requirements, including additional monitoring [\*5] requirements, compared to dischargers posing a lower threat to water quality in Tiers 1 and 2. The Central Coast Water Board testified that only 110 of the 3,680 dischargers that had submitted Notices of Intent for coverage under the Agricultural Order as of August 2012 are currently categorized as Tier 3 dischargers.

The Central Coast Water Board staggered compliance deadlines for various provisions of the Agricultural Order over the 5-year term of the Agricultural Order. Several provisions that Ocean Mist and Grower-Shipper requested be stayed, including installation of backflow prevention devices, reporting of methods and results for practice effectiveness verification, calculation of the nitrate loading risk, photo documentation of existing conditions of any impaired adjacent streams or wetlands, and submission of annual compliance information for Tier 2 and 3 dischargers, are due on October 1, 2012. Several other provisions of the Agricultural Order, including groundwater monitoring and reporting requirements, determination of typical nitrogen uptake for crop types, and initiation of individual surface water monitoring by Tier 3 dischargers, are due by October 1, 2013. Still [\*6] other provisions, including the requirement to manage, construct, and maintain containment structures to avoid percolation of waste to groundwater and to maintain riparian vegetative covers and riparian areas, are not qualified by any time schedule. In addition, the Agricultural Order requires the dischargers to comply with applicable TMDLs and to comply with all water quality standards and applicable water quality control plans.

## II. LEGAL STANDARD FOR STAY REQUESTS

Our regulations recognize the extraordinary nature of a stay remedy and place a heavy burden on any person requesting a stay of a regional water quality control board action. n4 California Code of Regulations, title 23, section 2053, subdivision (a), n5 provides that a stay shall be granted when petitioners allege facts and produce proof of all the following three elements:

- (1) substantial harm to petitioner or to the public interest if a stay is not granted,
- (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and
- (3) substantial questions of fact or law regarding the disputed action.

Failure to allege facts and produce proof of **each** of the foregoing [\*7] elements will result in a denial of the stay request. The regulations specifically require that a request for stay "shall be supported by a declaration under penalty of perjury of a person or persons having knowledge of the facts alleged." n6 In addition to considering requests for stays, however, the State Water Board may, upon its own motion, stay the effect of a regional board action. n7

n4 State Water Board Order WQ 97-05 (*Ventura County Citizens*), p.4.

n5 All future regulatory references herein are to California Code of Regulations, title 23, section 2053, unless otherwise noted.

n6 § 2053, subd. (a).

n7 *Id.* at subd. (c).

The issue of whether a stay is appropriate must be judged in the temporal sense -- a petitioner must prove there will be substantial harm if a stay is not granted for the period of time while the petitions for review are pending resolution by the State Water Board on the merits. n8 The issue before us is not whether the Agricultural Petitioners might eventually prevail [\*8] on the merits of their claims or whether they will suffer harm over the term of the Agricultural Order, but the narrower issue of whether the Agricultural Petitioners have carried their burden of proving all three elements during the period of time while the State Water Board is reviewing the petitions on the merits. n9

n8 Petitioners projected that the petitions for review may be pending before the State Water Board through December 2013. Due to the extremely important nature of the Agricultural Order, however, the State Water Board will give these petitions for review a high priority. The State Water Board expects that it will resolve these petitions for review in less than a year.

n9 State Water Board Order WQ 2006-0007 (*Boeing Company*), p.4.

In the last decade, we have issued a handful of decisions granting or denying a stay. Stay determinations are very fact-specific, and most decisions are designated as non-precedential. n10 Therefore the analysis in one decision may have limited applicability to [\*9] the analysis of another. One position from a non-precedential decision that has nevertheless been repeated in a few of our decisions is that the State Water Board "will not grant a stay merely because the party requesting it must incur some expense, even a substantial one." n11 We take this opportunity to disapprove that statement. A substantial cost alone may meet the first prong of a stay determination if the requesting party shows that it constitutes substantial harm. Such a conclusion is consistent with the language of our regulations, and the purposes of extraordinary, interim relief.

n10 Precedential decisions have included State Water Board Orders WQ 2006-0007, *supra*, and WQ 2001-09 (*Pacific Lumber Company*).

n11 State Water Board Order WQO 2003-0010 (*County of Sacramento*) (non-precedential order), at p. 4.

Another position consistently emphasized in our decisions is the extraordinary nature of a stay. n12 On this point, we re-affirm our position that a stay is indeed extraordinary relief that [\*10] is granted in few cases. The fact that we are staying some of the requested provisions in the Agricultural Order is in no way a departure from our long-stated position regarding the high bar for granting a stay, but rather an acknowledgment that this case is in fact extraordinary in some respects. Most stay requests filed with the State Water Board involve a single discharger with clearly defined obligations and clear costs. Here, many of the costs are to be incurred by a whole sector of the Central Coast economy. Further, we have heard genuine confusion from the dischargers as to what they must do to comply with some of the provisions. Our review of the Agricultural Order and the testimony during the hearing finds some of the confusion is warranted. Going forward, we continue to view a stay as an extraordinary remedy and expect a party seeking a stay to fully meet its burden under all three prongs of section 2053, subdivision (a) before granting a stay.

n12 See fn. 4 of this Order.

### III. CONTENTIONS AND [\*11] FINDINGS

Generally, the Agricultural Petitioners argue that dischargers will suffer substantial harm if they are required to comply with certain provisions of the Agricultural Order because they will incur excessive implementation costs pending State Water Board review of their petitions on the merits. These provisions include requirements for TMDL compliance; installation of backflow prevention devices; management, construction, and maintenance of containment structures to avoid percolation of waste to groundwater; maintenance of riparian vegetative cover in aquatic habitat areas and maintenance of riparian areas; reporting of practice effectiveness and compliance; groundwater monitoring, submission of an annual compliance form; determination of nitrate loading risk factors and typical crop nitrogen uptake, photo monitoring of streams and riparian and wetland habitat; and individual surface water discharge monitoring. The Agricultural Petitioners additionally argue that dischargers will suffer substantial harm because they will face immediate liability from non-compliance with the Agricultural Order's requirement that they comply with water quality standards. n13

n13 The Agricultural Order uses the phrase "water quality standards," which generally is a federal term referring to designated uses and water quality criteria to protect designated uses for waters of the United States. (40 C.F.R. § 131.3.) Throughout this order, we use the phrase as the Central Coast Water Board did, recognizing that it encompasses not only federal water quality standards, but also beneficial uses and water quality objectives for waters of the state, and further recognizing that the Agricultural Order does not serve as a federal authorization to discharge under the Clean Water Act (33 U.S.C. § 1251).

[\*12]

In addition, the State Water Board received numerous non-evidentiary submissions and heard policy statements from agricultural groups and dischargers, as well as from their representatives in the California legislature, pointing to hardship complying with Agricultural Order provisions. Among other issues, the submissions relate that the Agricultural Order is difficult to decipher and additional time is needed to clarify requirements and develop tools and templates for compliance; compliance with many of the Agricultural Order provisions will require dischargers to hire additional employees or consultants, leading to significant expense; and dischargers are having difficulty finding appropriate consultants to help comply with the requirements of the Agricultural Order. n14

n14 Submissions received in response to June 26, 2012, letter from Chief Counsel Michael Lauffer, providing parties and interested persons an opportunity to respond to the requests for stay; written policy statements received in response to the August 21, 2012, Revised Notice of Public Hearing on Stay Request, and policy statements delivered at the August 30, 2012, hearing.

[\*13]

There is significant disagreement between the Agricultural Petitioners and the Central Coast Water Board as to the economic cost of compliance with the terms of the Agricultural Order during the time period the petitions may be pending before the State Water Board. We held an evidentiary hearing on August 30, 2012, in order to elicit additional evidence and testimony from the parties. We specifically requested that the parties submit evidence to support and verify their proffered cost estimates -- provision by provision. After consideration of the parties' submissions and testimony presented, we make the following findings regarding each of the provisions of the Agricultural Order that Ocean Mist or Grower-Shipper, or both, requested be stayed.

#### **A. Water Quality Standards Compliance (Agricultural Order Provisions 22 & 23)**

The Agricultural Petitioners argue that provisions 22 and 23 of the Agricultural Order expose dischargers to immediate liability due to non-compliance. n15 In its responses to the requests for stay, and in testimony at the August 30, 2012, hearing on the stay requests, the Central Coast Water Board explained that discharges from agricultural lands cause wide-spread [\*14] exceedances of water quality standards. To address those exceedances, the Central Coast Water Board expects compliance with provisions 22 and 23 to be achieved by dischargers over a number of years, not immediately. n16 It did not, however, include an explicit compliance schedule for these provisions in the Agricultural Order.

n15 Agricultural Order provisions 22 and 23 read as follows:

22. Dischargers must comply with applicable water quality standards, as defined in Attachment A, protect the beneficial uses of waters of the state and prevent nuisance as defined in Water Code section 13050.

23. Dischargers must comply with applicable provisions of the Central Coast Region Water Quality Control Plan (Basin Plan) and all other applicable water quality control plans as identified in Attachment A.

n16 See Agricultural Order, finding 10 and provision 12, and Attachment A, finding 2; Schroeter Testimony (Aug. 30, 2012); Thomas Testimony (Aug. 30, 2012).

Because provisions 22 and 23 are not qualified [\*15] by any compliance schedule, the Agricultural Petitioners argue that the Agricultural Order requires immediate compliance with water quality standards and will inevitably leave the dischargers vulnerable to enforcement action and civil liability. The Agricultural Petitioners also point to the groundwater and individual surface water monitoring requirements of the Agricultural Order n17 to argue that the required data may be used by the Central Coast Water Board to establish violations of water quality standards.

n17 Tier 1 MRP, Part 2; Tier 2 MRP, Part 2; Tier 3 MRP, Parts, 2 and 5. The groundwater monitoring data and the individual surface water data must be reported by October 1, 2013 and March 15, 2014, respectively.

On these points, the Agricultural Petitioners do not meet the high bar set by section 2053, subdivision (a) for establishing substantial harm. While the Agricultural Petitioners are correct that the Agricultural Order contains no explicit compliance schedule for meeting water quality standards, n18 the [\*16] Central Coast Water Board has made it sufficiently clear in the Agricultural Order that it will not take enforcement action against a discharger that is implementing and improving management practices to address discharges impacting water quality. n19 For example, provision 12 of the Agricultural Order states that "[d]ischargers who are subject to this Order shall implement management practices, as

necessary, to improve and protect water quality and to achieve compliance with applicable water quality standards." Finding 10 of the Agricultural Order clarifies this statement further: n20

This Order requires compliance with water quality standards. . . . Consistent with the Water Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy, 2004), dischargers comply by implementing and improving management practices and complying with other conditions, including monitoring and reporting requirements. This Order requires the discharger to address impacts to water quality by evaluating the effectiveness of management practices . . . and taking action to reduce discharges. If the discharger fails to address impacts to water quality by [\*17] taking the actions required by this Order, including evaluating the effectiveness of their management practices and improving as needed, the discharger may then be subject to progressive enforcement and possible monetary liability.

n18 Table 4 at page 38 of the Agricultural Order sets "milestones" for compliance. The Table sets out that "measurable progress towards water quality standards in waters of the State or the United States" should be ongoing, but that water quality standards are expected to be met in waters of the state or the United States by October 1, 2016.

n19 Because the Agricultural Order is not a National Pollutant Discharge Elimination System (NPDES) permit issued under the federal Clean Water Act (33 U.S.C. § 1251 et seq.), dischargers are generally not subject to third-party lawsuits. Accordingly, only the Central Coast Water Board or the State Water Board may enforce the terms of the Agricultural Order and assess liability for violations of the Agricultural Order.

n20 See also, Agricultural Order, Attachment A, finding 2.

[\*18]

In State Water Board Order WQ 2006-0007 (*Boeing Company*), we rejected the possibility of enforcement actions as a basis for the requested stay. We expressed concern with the possibility of enforcement actions as the basis of a stay in general, and further stated that, under the facts of that particular case, a stay could not be justified, even though the regional water quality control board had already issued notices of violation. "In this case, in any event, the State Water Board finds that the possibility, or even probability, of enforcement actions does not justify a stay because it is very unlikely that these [enforcement] actions would be concluded during the time a stay would remain in place." n21 Given the statements in the findings of the Agricultural Order, as well as the Central Coast Regional Board's oral and written testimony regarding compliance with water quality standards through implementation and improvement of management practices, it is extremely unlikely that the dischargers will be subject to enforcement actions predicated on provisions 22 and 23 while the petitions are pending before State Water Board.

n21 State Water Board Order WQ 2006-0007 (*Boeing Company*), at p. 10.

[\*19]

In addition, provisions 22 and 23 of the Agricultural Order are substantially the same as provisions contained in the Central Coast Water Board's 2004 Agricultural Order. The 2004 Agricultural Order, too, prohibited dischargers from causing or contributing to conditions of pollution or nuisance in violation of Water Code section 13050, and exceedances of any numeric or narrative water quality standards. It also required dischargers to comply with all applicable water quality control plans. n22 As a result, dischargers should have been making progress towards complying with water quality standards' provisions since 2004. Arguing that substantial harm exists now -- eight years after initial adoption of the provisions -- does not support the extraordinary, interim remedy of a stay. Nor would it maintain the

status quo, as a stay is designed to do. Instead, Agricultural Petitioners are effectively requesting that the stay roll back the clock to prior to 2004.

n22 2004 Agricultural Order, Part II, D.1-3.

Furthermore, the [\*20] fact that the Central Coast Water Board has maintained substantially the same requirement regarding water quality standards for eight years reveals that the Agricultural Petitioners also fail to meet the second and third prongs necessary to be granted a stay request (lack of substantial harm to others or to the public interest and substantial questions of fact and law). The public interest would be substantially harmed by dischargers failing to continue to make progress to meet water quality standards provisions that have been in place for so long. Further, since these provisions have been in place for the duration of the 2004 Agricultural Order and are now part of the 2012 Agricultural Order, there can be no genuine issue of fact or law as to the Central Coast Water Board's application of the provisions or authority to [re-]adopt these same water quality standards provisions.

In sum, we reject the claim of immediate, potential liability as a basis for granting a stay of provisions 22 and 23. The failure to satisfy any single element of our stay regulations is sufficient grounds to deny a stay. We further find that substantial harm to the public interest would occur if a stay were [\*21] issued. And, no questions of fact or law (substantial or otherwise) exist here. As a result, we deny the request that these provisions be stayed.

#### **B. TMDL Compliance (Agricultural Order Provision 24)**

The Agricultural Petitioners argue substantial harm from the Agricultural Order's requirement to comply with applicable Total Maximum Daily Loads (TMDLs). We disagree.

Initially, the various TMDLs are already included as part of the Central Coast Water Board's water quality control plan. It appears that the Agricultural Order's expansive description of water quality standards and requirements to comply with plans and policies would embrace TMDLs. As a result, for the same reasons that we deny a stay of water quality standards provisions 22 and 23, we would deny a stay of provision 24.

Moreover, a discharger's implementation of the Agricultural Order will constitute compliance with certain applicable TMDLs. In other words, the TMDL provision does not lead to any costs above and beyond what is already required by the Agricultural Order. n23 In addition, the Agricultural Order is simply the implementation vehicle for TMDL compliance -- it does not require dischargers to do anything [\*22] more than would be required of them under the applicable TMDLs. Last, as with the water quality standards provisions discussed above, this provision also carries over from the 2004 Agricultural Order. n24

n23 See Pajaro River Nitrate TMDLs and Salinas River Chlorpyrifos and Diazinon TMDLs at [http://www.waterboards.ca.gov/centralcoast/water\\_issues/programs/tmdl/303d\\_and\\_tmdl\\_projects.shtml](http://www.waterboards.ca.gov/centralcoast/water_issues/programs/tmdl/303d_and_tmdl_projects.shtml). (Last visited September 8, 2012.)

n24 See 2004 Agricultural Order, Part II, D.6.

As a result, we find no harm to dischargers in the absence of a stay, because this provision does not create any additional obligations beyond other operative provisions of the Agricultural Order. In addition, we find substantial harm to the public interest if a stay is granted and no questions of fact or law, because a substantially similar provision has been in place since 2004. We deny the request to stay provision 24.

#### **C. Backflow Prevention Devices (Agricultural Order Provision 31)**

The Agricultural Petitioners argue substantial [\*23] harm from the requirement to install backflow prevention devices for any irrigation system that is used to apply fertilizers, pesticides, fumigants, or other chemicals.

Backflow prevention devices are employed to prevent fertilizers and pesticides applied through an irrigation system from flowing directly back down a groundwater well or to surface water, causing pollution. Under Department of Pesticide Regulation requirements, dischargers must already install backflow prevention devices for chemigation. n25 Dischargers impacted by this requirement are therefore primarily those that use irrigation systems for fertigation.

n25 Cal. Code Regs., tit. 3, § 6610.

Grower-Shipper submitted declarations asserting that the requirements regarding the types of backflow prevention devices that may be required are vague and that costs may range between \$ 20 and thousands of dollars for the device itself, and between \$ 1,000 and \$ 3,000 to install each device. n26 Jensen declared that the total cost of installing backflow devices [\*24] on its six ranches were expected to be approximately \$ 20,400. n27 By contrast, the Central Coast Water Board estimated the cost to install backflow devices at the high end to be \$ 435 per farm as a one-time cost, including the cost of the device and installation. n28

n26 Zelinski Decl. (Aug. 25, 2012), PP 4-10; Campbell Decl. (Aug. 24, 2012), P 7; Mercer Decl. (Aug. 25, 2012), P 6; Zelinski, Campbell, and Mercer Testimony (Aug. 30, 2012).

n27 Jensen Decl. (Aug. 25, 2012) P 5.

n28 Submission by Central Coast Water Board in Response to Revised Notice of Public Hearing on Stay Request (Aug. 27, 2012) (hereinafter cited as Central Coast Water Board Submission (Aug. 27, 2012)), pp. 15-16; Thomas Testimony (Aug. 30, 2012); Schroeter Testimony (Aug. 30, 2012). To support its cost estimate testimony, the Central Coast Water Board cited to costs projected by Pacific Ag Water in Santa Maria, CA, documented in Technical Memorandum: Cost Considerations Concerning Conditional Waiver of Discharge Requirements for Discharge from Irrigated Lands, Appendix F to the Staff Report for Board Meeting Item 14, March 2011, Central Coast Water Board, p. 20, Table 5. At the August 30, 2012, hearing, counsel for Grower-Shipper entered a general evidentiary objection to the Central Coast Water Board's submissions, without identifying the specific basis for the objection to any particular evidence proffered by the Central Coast Water Board. We do not consider such a general evidentiary objection sufficient to exclude proffered evidence without specific identification of the evidence to which the party objects and the reason for that objection. (*See Gov. Code, § 11513, subd. (d)* [stating that hearsay evidence is not in itself sufficient to support a finding *over timely objection*].) In any case, there is no need to resolve here whether the projected costs by Pacific Ag Water constitute hearsay evidence, since we do not rely on them for a determination of substantial harm.

[\*25]

We recognize that there are variable costs associated with the installation of backflow devices, but decline to decide if those costs rise to the level of substantial harm to the dischargers. Given the clear harm to the environment and to the public interest of having fertilizers and other chemicals flow back to a groundwater well or to surface water, we find that the Agricultural Petitioners cannot show lack of substantial harm under the second prong of the stay inquiry.

Additionally, we disagree that the backflow prevention requirement is so open-ended as to leave dischargers unable to comply. Provision 31 states that "backflow prevention devices used to protect water quality must be those approved by U.S. EPA, DPR, CDPH, or the local public health or water agency," providing the dischargers with general guidance on acceptable devices. Nor does it appear that the provision improperly dictates the manner of compliance in contradiction of Water Code section 13360, subdivision (a), because Provision 31 does not specify the type of backflow prevention device that must be installed. Accordingly, there are no substantial issues of fact or law that have been raised by the Agricultural [\*26] Petitioners that would meet their burden under the third prong.

The State Water Board will nevertheless exercise its discretion under section 2053, subdivision (c), to stay the effect of provision 31 until March 1, 2013. The Agricultural Order currently requires backflow prevention devices to be installed by October 1, 2012. A delay of five months in the effect of the provisions will provide dischargers an opportunity to consult with the Central Coast Water Board and achieve installation of cost-effective backflow prevention de-

vices, approved as stated in provision 31, and appropriate for the particular physical characteristics of each point of installation.

We hereby stay provision 31, but only to March 1, 2013.

#### **D. Containment Structures (Agricultural Order Provision 33)**

The Agricultural Petitioners argue substantial harm from the requirement to "manage, construct, or maintain" containment structures "to avoid percolation of waste to groundwater" and to "minimize surface water overflows." The Agricultural Petitioners offered testimony from several witnesses explaining that excessive compliance costs would be incurred by farm owners and operators in all tiers to design and construct [\*27] new containment structures, or replace or upgrade existing containment structures/retention ponds (including lining such containment ponds) in order to comply with the Agricultural Order. Cost estimates (including design, construction and maintenance costs) ranged from \$ 260,000 to well over \$ 1 million per farm analyzed by the Agricultural Petitioners' witnesses. n29

n29 *See* Huss Decl. (Aug 24, 2012), P 5; Grice Decl. (Aug. 26, 2012), PP 3-11; Mercer Decl. (Aug. 25, 2012), P 7; Giannini Decl. (Aug. 24, 2012), P 8; Huss, Grice, and Mercer Testimony (Aug. 30, 2012).

In response, the Central Coast Water Board's response to the stay request and the testimony proffered by Assistant Executive Officer Michael Thomas argued that there is no requirement to line containment structures. n30 Instead, the Central Coast Water Board argues dischargers simply need to make "iterative" progress and report to the Central Coast Water Board on such discharge progress, estimating costs at \$ 1,440 for dischargers to evaluate ponds, [\*28] with no incurred capital costs to dischargers because lining is not a requirement of the provision. n31

n30 Central Coast Water Board Submission (Aug. 27, 2012) at pp. 17-18; Thomas Testimony (Aug. 30, 2012).

n31 Schroeter Testimony (Aug. 30, 2012); Thomas Testimony (Aug. 30, 2012).

With respect to substantial harm to dischargers, we find the Agricultural Petitioners' arguments persuasive. We see no language within the Agricultural Order that would inform dischargers of the Central Coast Water Board's "iterative" implementation expectations of provision 33.

Furthermore, while acknowledging in its testimony that farmers were confused about the provision's expectations, the Central Coast Water Board proffered no clarifying solution to the declarants who argued that they would need to line or redesign ponds in order to comply with provision 33's requirement that dischargers "manage, construct, or maintain" containment structures to "avoid percolation of waste to groundwater" and "minimize surface water overflows." [\*29] In fact, under cross examination, Mr. Thomas stated that he knew of no other tool or practice besides liners that would guarantee compliance with provision 33 as written. n32

n32 Thomas Testimony (Aug. 30, 2012).

Since the plain language of provision 33 does not align with the Central Coast Water Board's stated intentions for it, the Central Coast Water Board acknowledged that there may be misunderstanding of the intent of provision 33 within the agricultural community covered by the Agricultural Order, n33 and the high costs proffered by the Agricultural Petitioners may derive from the Agricultural Order's ambiguity, the State Water Board agrees with the Agricultural Petitioners that there may be substantial harm on a region-wide basis if a stay is not granted.

n33 *Ibid.*

The Agricultural Petitioners assert that there will be no harm to the public [\*30] interest if provision 33 is stayed. In response, the other parties urged the State Water Board to consider that staying this provision would exacerbate groundwater pollution from agricultural discharge, which is of great concern in the Central Coast region. We find on balance, however, that provision 33 as drafted could have a deterrent effect on dischargers' use and/or construction of containment structures, which in turn would generate more surface water discharge. Thus, with respect to this second prong, we find that the Agricultural Petitioners satisfy their burden that during the course of State Water Board review of the petitions on the merits, no harm to the public interest would emanate from staying provision 33.

Last, as stated in the discussion of the first prong above, we find provision 33 to be sufficiently vague in its compliance expectations and deadlines that substantial questions of fact exist (i.e., when and how provision 33 applies to Petitioners' farms) to find in favor of Petitioners on the third prong as well.

The request to stay provision 33 is hereby granted.

#### **E. Maintenance of Riparian Areas (Agricultural Order Provision 39)**

In its response to the Agricultural [\*31] Petitioners' request for stay, the Central Coast Water Board clarified that provision 39 of the Agricultural Order does not require dischargers to take any restorative action, although dischargers may choose to include restorative work as part of a suite of agricultural best management practices. n34 Instead, dischargers are to minimize removal of riparian vegetation, but need not deviate from their historic farming practices. n35 The Agricultural Petitioners have indicated that they were satisfied with this explanation, and have abandoned their cost argument. n36 As a result, the request to stay provision 39 is denied.

n34 Submission by Central Coast Water Board in response to June 26, 2012, letter from Chief Counsel Michael Lauffer, providing parties and interested persons an opportunity to respond to the requests for stay (July 13, 2012), pp. 20-21.

n35 Central Coast Water Board Submission (Aug. 27, 2012), pp. 18-19; Thomas Testimony (Aug. 30, 2012).

n36 Farm Bureau and Grower-Shipper Response to Revised Notice of Hearing on Stay Request (Aug. 27, 2012), p. 4, P C. Ocean Mist proffered no cost evidence for this provision. We note that Jensen declared that provision 39 would require him to maintain a 30-foot riparian buffer area on the boundaries of his farms. (Jensen Decl. (Aug. 25, 2012), P7). Provision 39 does not address buffer zones and the buffer plan provisions of the Agricultural Order have deadlines outside the consideration of this Order.

[\*32]

#### **F. Practice Effectiveness and Compliance (Agricultural Order Provision 44.g.)**

The Agricultural Petitioners contend that provision 44.g., requiring inclusion in the Farm Plan of a description and results of methods used to verify practice effectiveness, will cause dischargers substantial harm. n37

n37 In its Request for Stay and Petition dated April 16, 2012, Ocean Mist referenced the development of a Farm Plan as one of the provisions leading to substantial harm. In his declaration dated August 24, 2012, and testimony, Dale Huss of Ocean Mist Farms referred to several provisions of the Farm Plan, including the requirements to identify irrigation and storm water runoff discharge locations (provision 44.c.), reporting of farm water quality management practices, such as fertilizer management and management of tile drain discharges (provision 44.f.), and the requirement for reporting practice effectiveness and compliance (44.g.). (Huss Decl. (Aug. 24, 2012), PP 5-10.) Counsel to Ocean Mist clarified at the August 30, 2012, Hearing that Ocean Mist remained concerned with provision 44.g. and those other portions of the Farm Plan addressing nitrates. (Statement by Counsel William Thomas (Aug. 30, 2012)). However, dischargers were subject to the requirement to prepare a Farm Plan under the 2004 Agricultural Order and substantially similar or identical requirements are identified or referenced in that Order. Where the requirements of the Farm Plan represent incremental increases in the amount

and type of information that was required to be contained in the 2004 Farm Plan, we do not agree that this constitutes substantial harm to the dischargers.

[\*33]

The requirement to report practice effectiveness and compliance was not a component of the Farm Plan under the 2004 Agricultural Order and constitutes a new requirement under the Agricultural Order. What may constitute appropriate methods to evaluate practice effectiveness and compliance is not clearly laid out in provision 44.g. or elsewhere in the Agricultural Order. The Central Coast Water Board testified that provision 44.g. does not dictate how a discharger must evaluate practice effectiveness and that the Central Coast Water Board anticipates that standard farming practices (such as evaluating irrigation efficiency to determine water use and nutrient budgeting to determine fertilizer applications), combined with visual inspection and record keeping, will be sufficient to evaluate practice effectiveness. n38 The Central Coast Water Board additionally pointed to its draft annual compliance form sections on practice effectiveness as examples of the type of practices it would expect to be reported. The Central Coast Water Board also clarified that the provision does not require dischargers to demonstrate effectiveness, but rather only to report the methods and results. n39

n38 Central Coast Water Board Submission (Aug. 27, 2012), pp. 20-23. Thomas and Schroeter Testimony (Aug. 30, 2012).

[\*34]

n39 Central Coast Water Board Submission (Aug. 27, 2012), Exh. 23; Schroeter Testimony (Aug 23, 2012).

By contrast, Dr. Marc Los Huertos testified for Grower-Shipper that the use of the term "verify" in provision 44.g. implies the need to accurately measure the potential pollutant load before and after the implementation of a practice and as a result dictates the development of a study design and of statistical analysis of the results. He estimated that this type of study could cost \$ 28,640 per year per practice. n40

n40 Los Huertos Decl. (Aug. 26, 2012), PP 6-17; Los Huertos Testimony (Aug. 23, 2012).

We acknowledge the Central Coast Water Board's testimony that 44.g. does not require the type of study and sampling asserted by Dr. Los Huertos. In this regard, we cannot say that the Agricultural Petitioners have met their burden of showing substantial harm. Even if the Petitioners were able to show substantial harm, we recognize [\*35] that practice effectiveness and compliance determination is an essential component of improving water quality management practices in the iterative manner described in the Agricultural Order and that it significantly advances the interest of the environment and public.

However, we find that the provision as written is ambiguous, and that, with no further clarification of its meaning or guidance elsewhere in the Agricultural Order, it poses a challenge to dischargers seeking to comply with its requirements. n41 The Agricultural Petitioners have advanced extreme interpretations of the provision that magnify the burden on dischargers, but there appears also to be genuine confusion about what types of practices are contemplated by the provision. n42 Accordingly, we will exercise our discretion under section 2053, subdivision (c) and stay provision 44.g. on our own motion pending resolution of the petitions.

n41 We do not find the examples in the draft Annual Compliance Form sufficient to overcome the confusion concerning methods of compliance with this Farm Plan provision.

n42 This confusion would have risen to the level of a "substantial issue of fact" had the State Water Board needed to consider the third prong of the stay under section 2053, subdivision (a).

[\*36]

Provision 44.g. is hereby stayed.

**G. Groundwater Monitoring (Agricultural Order Provision 51; Tiers 1, 2, and 3 MRPs; Part 2, Sections A-1--5, B)**

The Agricultural Petitioners contend substantial harm from the provisions requiring monitoring of private domestic drinking water and agricultural groundwater wells.

Groundwater monitoring and reporting requirements vary by tier. Tier 1 and 2 dischargers must sample at least one groundwater well and all drinking water wells twice in the first year of the permit. Tier 3 dischargers must additionally sample the wells once annually thereafter. Tier 1 and Tier 2 dischargers may submit existing data in lieu of monitoring and dischargers in any tier may opt to conduct cooperative monitoring and reporting. Costs accordingly vary by the number of wells on the farm, by the tier, and by the availability of existing data or cooperative monitoring options.

Grower-Shipper produced testimony that annual sampling in the first year (i.e., two sampling events) for a single well would cost approximately \$ 4,600 in the Salinas area and \$ 6,800 in the Santa Maria area. n43 The Central Coast Water Board introduced quotes from laboratories that offered [\*37] to sample, analyze, and report data for one sampling event for one well at \$ 155-\$ 180, n44 significantly lower than the cost asserted by Grower-Shipper.

n43 Clark Decl. (Aug. 24, 2012), PP 8-11.

n44 Central Coast Water Board Submission (Aug. 27, 2012), Exh. 21; Schroeter Testimony (Aug. 30, 2012). As stated in footnote 28, a general objection to the Central Coast Water Board's evidence made by Grower-Shipper's counsel was not sufficient to reject any particular piece of evidence. In any case, the laboratory quotes in Exhibit 21 are records made in the regular course of business that would survive a hearsay objection. (Evid. Code, § 1271.)

We find that, in light of the evidence provided by the Central Coast Water Board, the Agricultural Petitioners have failed to meet their burden as to establishing substantial economic harm from compliance with the groundwater monitoring provisions of the Agricultural Order. Further, even if the Agricultural Petitioners had met their burden of showing substantial harm, they [\*38] did not meet their burden on either of the other two prongs. We emphasize that we find the arguments made by the Central Coast Water Board and the environmental parties and community regarding drinking water safety extremely compelling. We are keenly aware of the need to act quickly and decisively on addressing nitrates in groundwater. We consider sampling of groundwater wells an essential component of the Agricultural Order's requirements, the stay of which would cause substantial harm to public health. Further, the Central Coast Water Board has clear authority to require groundwater monitoring under Water Code sections 13267 and 13269. Although a review on the merits is pending, for the purposes of considering the requests for stay only, n45 it appears that the Central Coast Water Board has shown that the costs of groundwater monitoring and reporting bear a reasonable relationship to the benefits. The record contains estimates of the costs of groundwater monitoring; n46 and the Agricultural Order lays out the public health concerns with nitrates in groundwater in significant detail. n47 Accordingly, the Agricultural Petitioners have not met their burden of showing substantial issues [\*39] of law or fact.

n45 During our review on the merits, we may consider whether the scope and frequency of monitoring require adjustments.

n46 See Technical Memorandum: Cost Considerations Concerning Conditional Waiver of Discharge Requirements for Discharge from Irrigated Lands, Appendix F to the Staff Report for Board Meeting Item 14, March 2011, Central Coast Water Board, p. 34.

n47 See Agricultural Order, finding 6.

We deny the stay request for Agricultural Order provision 51, Tier 1, 2, and 3 MRPs Part 2, sections A, provisions 1-5, and section B.

**H. Determination of Nitrate Loading Risk Factors/Total Nitrogen Applied (Agricultural Order Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C); Determination of Typical Crop Nitrogen Uptake (Agricultural Order Provision 74)**

The Agricultural Petitioners contend that calculation by Tier 2 and Tier 3 dischargers of their nitrate loading risk factors and total nitrate loading risk level will cause substantial harm. They also contend that the provision [\*40] requiring Tier 2 and Tier 3 dischargers with high nitrate loading risk factors to report typical crop nitrogen uptake will cause substantial harm.

The Central Coast Water Board designed these provisions of the Agricultural Order to measure the relative risk of loading nitrate to groundwater based on the nitrate hazard index using two alternate methods, one including the crop type, the irrigation system type, the irrigation water nitrate concentration and the soil type; and the other using the Nitrate Groundwater Pollution Hazard Index developed by University of California Division of Agriculture and Natural Resources (UCANR). These provisions apply to Tier 2 and 3 dischargers. A result of "high" nitrate loading risk triggers certain other requirements of the Agricultural Order, including the reporting of total nitrogen applied per crop, per acre, per year to each farm, and the determination of typical crop nitrogen uptake for each crop type produced.

The Central Coast Water Board asserted in its testimony that calculation of the nitrate loading risk factor would require approximately four hours. If a discharger hired a consultant to make the calculations, four hours would result in [\*41] approximately \$ 720 in costs. n48 For Grower-Shipper, the owner of Bob Campbell ranches testified that the cost of making the calculation for his farming operation could be \$ 40,000. n49 Farm consultant Kay Mercer additionally testified that the provisions related to nitrate loading risk factors and nitrogen uptake could require the development of a database, which would cost the dischargers thousands of dollars. n50 And Consultant Lowell Zelinski declared that the nitrate loading risk factor methodologies of the Agricultural Order are simplistic and inaccurate. n51

n48 Central Coast Water Board Submission (Aug. 27, 2012), pp. 29-20; Thomas and Schroeter Testimony (Aug. 30, 2012).

n49 Campbell Decl., (Aug. 24, 2012), P 13; Campbell Testimony (Aug. 30, 2012).

n50 Mercer Decl. (Aug. 25, 2012), PP 9-29; Mercer Testimony (Aug. 30, 2012).

n51 Zelinski Decl. (Aug. 25, 2012), PP15-20; Zelinski Testimony (Aug. 30, 2012).

We find that the evidence provided by the Agricultural Petitioners is not sufficient [\*42] to meet their burden of showing substantial harm from the provision requiring nitrate risk factor calculation. We will nevertheless exercise our discretion to stay these provisions on our own motion under section 2053, subdivision (c). As stated under the discussion of groundwater monitoring, we believe that addressing nitrates in the groundwater is an extremely high priority and recognize the need to act decisively on that priority. Precisely for that reason, we also recognize that the methodologies for calculation of nitrate loading risk factors must provide meaningful and reliable information. While we will review the methodologies during our review on the merits, the Agricultural Petitioners have raised enough concerns and questions about the reliability of the methodologies -- showing substantial questions of fact as to the third prong -- that we are hesitant to ask dischargers to weather the confusion and uncertainty of compliance while the petitions are being resolved. Despite our strong support for the Central Coast Water Board's efforts to address groundwater pollution, we do not believe that a stay will significantly harm the public interest and the environment in the short [\*43] term. Nitrogen impacts on groundwater from fertilizer applications generally take years to accumulate to such a level as to impact a drinking water supply. Short term public health concerns will be adequately addressed by the groundwater monitoring provisions that we have declined to stay.

Because we are staying the requirement to calculate the nitrate loading risk factors, we will also stay the requirement to determine typical crop nitrogen uptake that is triggered by a high nitrate loading risk factor calculation. We will not, on the other hand, stay the requirement for reporting total nitrogen applied under Tiers 2 and 3 MRPs, Part 2, sec-

tion C, provision 5, which is also triggered by a high nitrate loading risk factor. That reporting is not due until October 1, 2014.

The stay request for Agricultural Order provision 68 and 74, and Tiers 2 and 3 MRPs, Part 2, section C, provisions 1-4 is hereby granted. The stay request for Tiers 2 and 3 MRPs, Part 2, section C, provision 5 is hereby denied.

**I. Photo Monitoring of Streams and Riparian and Wetland Habitat (Agricultural Order Provisions 69, 80(a) as Incorporated into 69; Tiers 2 and 3 MRPs; Part 4)**

As a preliminary matter, [\*44] Grower-Shipper identifies provision 80(a), through its incorporation into provision 69 (photo monitoring), as one of the provisions that will lead to economic harm if not stayed. Provision 80 requires submission of a Water Quality Buffer Plan by October 1, 2016, for Tier 3 dischargers adjacent to or containing an impaired water body. We do not read provision 69's reference to provision 80 to require compliance with the maintenance of a buffer by the photo monitoring deadline of October 1, 2012. The Central Coast Water Board also confirmed in its Response to the Stay Requests that compliance with this provision is not due until October 1, 2016. n52 We therefore deny the request to stay provision 80(a).

n52 Central Coast Water Board, Response to Stay Requests at p. 30 (July 13, 2012).

Provision 69 requires Tier 2 and Tier 3 dischargers with farms adjacent to impaired water bodies to, among other things, photo monitor the condition of perennial, intermittent, or ephemeral streams and riparian and wetland area habitat. [\*45] On August 15, 2012, the Interim Executive Office of the Central Coast Water Board issued a "Photo Monitoring and Reporting Protocol" (Protocol), to assist dischargers in meeting the requirements of the Agricultural Order's photo monitoring provisions. n53

n53 Protocol available at:

[http://www.waterboards.ca.gov/centralcoast/water\\_issues/programs/ag\\_waivers/docs/resources4growers/photomonitoring\\_protocol15aug2012.pdf](http://www.waterboards.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/resources4growers/photomonitoring_protocol15aug2012.pdf) (Last visited September 8, 2012.)

The Central Coast Water Board projects that the photo monitoring provision applies to fewer than 800 of the approximately 3,800 dischargers in the region. It estimates that the overall cost of the photo monitoring (including equipment, time and reporting) criteria set forth in the Protocol is \$ 1,440 per half mile. n54 Grower-Shipper offered the testimony of Bob Campbell, who estimated that the cost to photo monitor the 11 miles of riparian property of his Tier 2 farms that are adjacent to impaired water bodies would be \$ 60,000 (i.e., upwards of \$ 2,700 per half [\*46] mile -- in other words, a \$ 29,000 discrepancy between his estimate and the Central Coast Water Board's estimate). n55 Mr. Campbell explained that his costs would be higher than estimated by the Central Coast Water Board because his property's frontage has numerous "bends and curves," which would require his consultant to take additional photographs from multiple points to obtain the line of site required by the Protocol. n56

n54 Central Coast Water Board Submission (Aug. 27, 2012), pp. 31-32; Thomas and Schroeter Testimony (Aug. 30, 2012).

n55 Campbell Decl. (Aug. 24, 2012), P 14; Campbell Testimony (Aug. 30, 2012).

n56 Campbell Testimony (Aug. 30, 2012).

It is apparent to us that the Agricultural Petitioners' challenge to provision 69 would fail under section 2053, subdivision (a). The provision itself has relatively minimal costs for most dischargers. The provision itself is of great benefit to the public, because it creates photographic riparian baselines across the region. And, there is no dispute [\*47] of fact or law here regarding the application of the provision to farms, or the Central Coast Water Board's authority to require photo monitoring.

While the stay request fails to satisfy section 2053, subdivision (a), we will nonetheless stay provision 69 under our own motion pursuant to section 2053, subdivision (c) until June 1, 2013. We are extending the deadline within provision 69 not because of the provision itself, but because of the limited implementation avenues the Central Coast Water Board has afforded dischargers by means of its Protocol. The Protocol, by allowing only fixed-point photographic lines of site, unnecessarily increases costs for farmers such as Mr. Campbell, where topography magnifies the number of fixed-point photographs. Mr. Campbell could obtain the same photo monitoring results the Central Coast Water Board seeks at much lower costs, if the Central Coast Regional Board would permit the use of other photo documentation methods, such as aerial photography or the use of elevated vantage points in its Protocol. The State Water Board is selecting June 1, 2013, so that the vegetation will be more readily visible, as it will not be in its dormant state.

Provision [\*48] 69 is hereby stayed until June 1, 2013, so that the Central Coast Water Board has time to amend and revise its Protocol to allow dischargers to conduct photo monitoring of their farms' riparian habitat using alternative photo documentation methods.

#### **J. Annual Compliance Form (Agricultural Order Provision 67; Tiers 2 and 3 MRPs; Part 3)**

The Agricultural Petitioners argue that dischargers face indeterminable data management costs associated with the Annual Compliance Form provisions of the Agricultural Order. Grower-Shipper offered the testimony of Kay Mercer to explain the complexities and costs associated with dischargers hiring consultants, tracking and maintaining data, and developing database systems in order to comply with the Annual Compliance Form provisions of the Agricultural Order, in particular those provisions requiring reporting of nitrate loading risk factors by October 1, 2012, and future reporting on total nitrogen applied and on certain elements of the Irrigation and Nutrient Management Plan. n57 She testified that it was difficult to estimate the database creation and management costs associated with the Annual Compliance Form, because the Central Coast Water [\*49] Board had not posted its online form yet. n58

n57 Mercer Decl. (Aug. 25, 2012), PP 8-29; Mercer Testimony (Aug. 30, 2012). *See also* Zelinski Decl. (Aug. 25, 2012), PP 21-25; Giannini Decl. (Aug. 24, 2012), P 12; Huss Decl. (Aug 24, 2012). In general, costs attributed to the Annual Compliance Form by dischargers are primarily those associated with nitrate loading risk factor calculations, total nitrogen loading calculations, and other monitoring and reporting independently required by provisions elsewhere in the Agricultural Order.

n58 Mercer Decl. at P 8.

In response, the Central Coast Water Board submitted a draft version of its Annual Compliance Form, and the five-page form does not require the complex database development tools that Grower-Shipper's witness estimated. n59 The Central Coast Water Board asserts that the Annual Compliance Form reporting can be done without hiring consultants, based on information that is already readily available to the dischargers or required to be compiled by other provisions [\*50] of the Agricultural Order, and by using online forms created and managed by the Central Coast Water Board that contain drop down menus -- thereby facilitating ease of reporting. The Central Coast Water Board estimates the cost for these provisions to be the time spent by the discharger to review the information and enter it on-line -- at no more than \$ 1,440 per farm. n60

n59 Central Coast Water Board Submission (Aug. 27, 2012), Exh. 23.

n60 Central Coast Water Board Submission (Aug. 27, 2012), p. 26.

Accordingly, we find that the Agricultural Petitioners have not met their burden on any of the three stay prongs for *most* of the content within the Annual Compliance Form. First, dischargers would need to invest little money, effort or time to complete the five pages of drop-down menus and checklists created by the Central Coast Water Board. Second, we agree with the Central Coast Water Board that the data and information mined from the Annual Compliance form is necessary to evaluate: (1) general compliance [\*51] with the Agricultural Order; (2) the effectiveness of management practices, treatment or control measures; and, (3) any changes in farming practices. n61 Staying the entire Annual Compliance Form until we resolve the petitions on the merits would harm the public interest. Third, we find no issue of fact

here, as the Annual Compliance Form exists, albeit in draft form, and has been submitted into evidence in draft form. There is no issue of law, as no party disputes the Central Coast Water Board's authority to require an Annual Compliance Form.

n61 *Ibid.*

As discussed previously, some information required to be reported on the Annual Compliance Form is information pertaining to provisions stayed by other parts of our order. Consistent with the holdings in Sections III.H. (Nitrate Loading) and III.I. (Photo Monitoring) of this Order, Part 3, Section A.1.k. in the Tiers 2 and 3 MRPs (Nitrate Loading Reporting) is hereby stayed until we resolve the petitions on the merits. Further, we extend the compliance date of [\*52] Part 3, Section A.1.m. in the Tiers 2 and 3 MRPs (Photo Monitoring) until June 1, 2013, for inclusion in the 2013 version of the Annual Compliance Form (for October 2013 reporting). Last, in its September 13, 2012, comment letter in response to our September 10, 2012, draft version of this Order, the Central Coast Water Board requested that we stay the Annual Compliance Form's submission deadline until December 1, 2012, in order to give dischargers two additional months to comply. We agree that such a temporary extension is reasonable and warranted in light of our other findings in this Order. The Central Coast Water Board released a Sample Annual Compliance Form on September 6, 2012, that will now need to be revised for consistency with this Order. We therefore, on our own motion pursuant to section 2053, subdivision (c), stay the submission deadline for Part 3, Section A.1.a.-j. and l. in the Tiers 2 and 3 MRPs to December 1, 2012. n62 The Central Coast Water Board is directed to revise the Sample Annual Compliance Form consistent with the requirements set forth in this Order within two weeks of the date of this Order. The Central Coast Water Board shall not require dischargers to [\*53] submit any information on the Annual Compliance Form that has been stayed by this Order.

n62 With regard to provisions 3.A.1. n.-q. of the Annual Compliance Form requirements, we note that compliance deadlines are outside of the one year time period in which we expect to resolve the petitions on the merits.

#### **K. Individual Surface Water Discharge Monitoring and Reporting (Agricultural Order Provisions 72 & 73; Tier 3 MRP, Part 5)**

Provisions 72 and 73 require Tier 3 dischargers to prepare an individual sampling and analysis plan (SAP) and quality assurance project plan (QAPP) by March 15, 2013, and initiate individual surface water discharge monitoring by October 1, 2013. n63

n63 The reporting requirements for the individual surface water monitoring do not take effect until March 15, 2014. (Agricultural Order, provision 73.)

Because the State [\*54] Water Board expects that it will resolve the petitions on the merits prior to October 1, 2013, n64 it is not necessary to address the Agricultural Petitioners' request to stay the requirement to initiate individual surface water discharge monitoring at this time. Accordingly, here we only consider the costs of the preparation of the SAP and QAPP. n65

n64 See footnote 8 of this Order.

n65 We understand that the actual sampling costs will be higher than the cost of preparation of the SAP and QAPP. (See Central Coast Water Board Submission (August 27, 2012), p. 33; Thomas and Schroeter Testimony (August 30, 2012)); Clark Decl. (Aug. 24, 2012), PP 4-7.)

Grower-Shipper has submitted declarations, estimating the cost of preparation for the required SAP and QAPP at 28,800. n66 The Central Coast Water Board asserts that the cost of the preparation of the QAPP will range between \$ 750 and \$ 3,000, assuming the availability of a ready-to-use template requiring 5-20 hours to complete. n67 The Central Coast Water Board [\*55] asserts that such a template will be made available prior to the compliance date. n68

n66 Johnson Decl. (Aug. 24, 2012), PP 6-14.

n67 Central Coast Water Board Submission (Aug. 27, 2012), p. 33.

n68 *Id.* at 32-33.

Grower-Shipper's estimates for the cost of SAP and QAPP strike us as inflated, based on the State Water Board's experience with preparation of such documents. The State Water Board has prepared templates and directions for such documents in other contexts. n69 These are generally relatively inexpensive documents to prepare, but necessary precursors to monitoring. Additionally, the Central Coast Water Board testified that only 110 dischargers are currently classified as Tier 3 dischargers which pose the highest threat to water quality based on the criteria established by the Central Coast Water Board. We accordingly find that as to the SAP and QAPP, the Agricultural Petitioners have not met their burden to show substantial harm.

n69 *See, e.g.*, the State Water Board's Surface Water Ambient Monitoring Program's online tools, available at [http://www.waterboards.ca.gov/water\\_issues/programs/swamp/tools.shtml](http://www.waterboards.ca.gov/water_issues/programs/swamp/tools.shtml) (last visited September 10, 2012), providing guidance on QAPPs. We acknowledge that the cost of a SAP may be variable, but do not find that the preparation of a SAP under the Agricultural Order requires the level of effort projected by the agricultural petitioners. For example, the selection of monitoring points is limited to characterization of irrigation run-off (Tier 3 MRP, Part 5, Section A.7) and need not incorporate characterization of storm water sheet flow across fields, as suggested by Ocean Mist (Huss Testimony (Aug. 30, 2012); Ocean Mist, Comment Letter on Draft Stay Order (Sept. 14, 2012).

[\*56]

The Agricultural Petitioners assert that there will be no harm to the public interest if the SAP and QAPP provisions are stayed. Without knowing whether we will ultimately uphold the individual surface water monitoring requirements, the most that can be said is that a SAP and a QAPP are very important for assuring that the monitoring data can be used for its intended purpose, which is certainly a matter of public interest.

In the third prong of the stay analysis, we find that the Agricultural Petitioners did not meet their burden of showing substantial questions of fact or law specific to the requirement that Tier 3 dischargers prepare a SAP and QAPP. The cost of preparing a SAP and QAPP is reasonably related to the benefit of having meaningful monitoring data, and the requirement is clearly within the Central Coast Water Board's legal authority under Water Code sections 13267 and 13269.

We deny the request to stay provisions 72 and 73 and Tier 3 MRP, Part 5.

#### **ORDER**

IT IS HEREBY ORDERED that certain provisions of the Agricultural Order are stayed as follows:

- . Provision 31 (Backflow prevention devices): compliance deadline stayed, but only until March 1, 2013;
- . Provision [\*57] 33 (Containment structures): stayed until the petitions are resolved on the merits;

- . Provision 44.g. (Practice effectiveness and compliance): stayed until the petitions are resolved on the merits;
- . Tiers 2 and 3 MRPs, Part 3, Section A.1.a.-j, and l. (Annual Compliance Form): compliance deadline stayed, but only until December 1, 2012;
- . Tiers 2 and 3 MRPs, Part 3, Section A.1.k. (Annual Compliance Form: Nitrate Loading Risk Factors): stayed until the petitions are resolved on the merits;
- . Tiers 2 and 3 MRPs, Part 3, Section A.1.m. (Annual Compliance Form: Photo Monitoring): compliance deadline stayed, but only until June 1, 2013 (for reporting in October 2013);
- . Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C, provisions 1-4 (Determination of nitrate loading risk factors): stayed until the petitions are resolved on the merits;
- . Provision 69; Tiers 2 and 3 MRPs, Part 4 (Photo monitoring): compliance deadline stayed, but only until June 1, 2013; and,
- . Provision 74 (Typical crop nitrogen uptake): stayed until the petitions are resolved on the merits.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Environmental Law Water Quality Clean Water Act Water Quality Standards Real Property Law Water Rights Beneficial Use Real Property Law Water Rights Riparian Rights

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