California Regional Water Quality Control Board
Central Coast Region

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Arnold Schwarzenegger
Governor

June 22, 2004

Central Coast Agricultural Industry Representatives
C/o N. Isakson Consultant Management Services
P. O. Box 804
Carmel, CA 93921

Dear Agricultural Industry Representatives:

RE: CONDITIONAL WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES RELATED TO IRRIGATED AGRICULTURAL LANDS – CENTRAL COAST REGION MONITORING PROPOSAL

Although staff has responded to your letter and monitoring proposal submitted March 19, 2004, as part of a staff report prepared for the July 8 Board meeting, staff has prepared a more in-depth response to further discussion of how best to implement required monitoring for Conditional Waivers.

The text of your proposal is included below, along with specific responses to each item.

> On behalf of the members of *Central Coast Ag Task Force, Central Coast Wine Grower's Association, Coalition of Central Coast County Farm Bureaus, Grower-Shipper Association of Central California, Grower-Shipper Vegetable Association of Santa Barbara and San Luis Obispo Counties, Independent Growers' Association, Monterey County Cattleman's Association, Monterey County CattleWomen's Association, Monterey County Farm Bureau, Monterey County Vintners and Growers Association, Salinas River Channel Coalition, Salinas Valley Chapter of California Women for Agriculture, Salinas Valley Water Coalition, San Benito County Cattleman's Association, San Benito County Farm Bureau, San Luis Obispo County Farm Bureau, San Mateo County Farm Bureau, Santa Barbara County Cattleman's Association, Santa Barbara Flower and Nursery Growers' Association, Santa Barbara County Farm Bureau, Santa Clara County Farm Bureau, Santa Cruz County Farm Bureau, and the Southern San Luis Obispo and Santa Barbara County Watershed Coalition*, we encourage the Central Coast Regional Water Quality Control Board (CCRWQCB) to consider our proposal for meeting the monitoring requirements of Section 13269 of the Porter-Cologne Water Quality Control Act and the Conditional Waiver of Waste Discharge Requirements for Discharges Related to Irrigated Agricultural Lands (Conditional Waiver).
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> We would like to thank the CCRWQCB for its cooperative approach in working with the agricultural industry, as well as acknowledge our appreciation of the CCRWQCB's Agricultural Advisory Panel's tedious work in formulating its recommendations. Working closely with the agricultural representatives on the Agricultural Advisory Panel, industry representatives and 23 Central Coast agricultural organizations reviewed staff's monitoring proposal and the Panel Recommendations.
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> Our concerns with the various staff reports and monitoring proposals to date are two-fold: (1) the scope and cost of staff's proposed monitoring program, and (2) liability implications of the monitoring requirements on existing voluntary water quality programs. We would like to propose

viable solutions to these concerns. Our proposal directly builds upon the work of the Agricultural Advisory Panel, and offers solutions to those items that the Panel was unable to attain consensus on.

(1) Scope and Cost of Monitoring: We understand that monitoring data may be required to ensure compliance with Conditional Waiver conditions. The monitoring program should be designed narrowly and specifically to provide this data; and, the monitoring program should not be developed for the purpose of establishing detailed scientific watershed analysis. The monitoring requirements placed upon the agricultural industry should include only those measures necessary to detect noncompliance with the conditions of the Conditional Waiver program. The RWQCB should take into account background levels of pollution as well as sources of pollution from other land uses to ensure that affected irrigated agricultural operations and landowners are not held responsible for impairments in excess of their contributions. Finally, the scope of these monitoring requirements should be no more onerous or costly than those imposed on other industries with non-point source discharges.

Comment: "The monitoring program should be designed narrowly and specifically to provide this data; and, the monitoring program should not be developed for the purpose of establishing detailed scientific watershed analysis."

Response: Staff agrees. The development of detailed scientific watershed analysis is beyond the scope and intent of the Irrigated Agriculture Waiver monitoring program. The program as proposed is designed to focus on agricultural contributions to water quality impairments and to determine whether water quality is improving as a result of implementation of management practices by agriculture. Follow-up monitoring, and review of management practices will be used to determine sources of problems and the effectiveness of the waiver program.

Comment: "The monitoring requirements placed upon the agricultural industry should include only those measures necessary to detect non-compliance with the conditions of the Conditional Waiver program."

Response: Section 13269 of the water code requires that:
"Monitoring requirements shall be designed to support the development and implementation of the waiver program including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions."
Staff believes that the legislative intent was to measure the "adequacy and effectiveness of the waiver's conditions" as opposed to only individual compliance or non-compliance with the conditions of the waiver. The monitoring program must be designed to assess the adequacy and effectiveness of the conditional waiver program for protecting water quality and beneficial uses, not just to detect non-compliance by individual dischargers.

Comment: "The RWQCB should take into account background levels of pollution as well as sources of pollution from other land uses to ensure that affected irrigated agricultural operations and landowners are not held responsible for impairments in excess of their contributions."

Response: Staff agrees. Sites should be selected to maximize detection of contributions from irrigated agriculture. Furthermore, the proposed cooperative monitoring program contains provisions for follow-up monitoring for the purpose of determining areas which are most likely to be sources of water quality impairments. When non-agricultural sources of water quality impairment are detected by monitoring conducted under the waiver program, staff intends to pursue collection of additional data under the authority granted in section 13267 of the Water Code to further investigate the sources of impairment and establish equitable distribution of responsibility. When background levels of pollution are identified as a

source of 'impairment', staff will identify these sources in water quality assessments and TMDL calculations.

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. The Regional Board's approach to enforcement of the Conditional Waiver is outlined in the July 8 Staff Report. Few enforcement actions will be taken on the basis of water quality alone, except in cases where there is clear violation of water quality standards by a discharger without attempt to comply with the conditions of the waiver. Rather, enforcement effort will be focused on those who are not complying with the requirements for enrollment, plan development and implementation of management practices.

Comment: " the scope of these monitoring requirements should be no more onerous or costly than those imposed on other industries with non-point source discharges. ".

Response: Comparisons with 'other industries with non-point source discharges' are not dealt with in Section 13269 of the Water Code. If water quality impairments are detected by monitoring conducted under the Irrigated Agriculture Waiver program or through other monitoring programs such as CCAMP and prove to be resultant from non-agricultural sources, monitoring requirements for 'other industries with non-point source discharges' may well have to be altered. 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. The agricultural industry also has the unusual opportunity to offset a significant portion of monitoring and implementation costs associated with complying with water quality law through the upcoming Agricultural Grants Program. In addition, our data indicates a relationship 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.

(2) Liability Implications: The Central Coast agricultural industry has been a resource protection leader within the State of California for over five years, and its involvement in the implementation of voluntary water quality protection efforts, such as the Monterey Bay National Marine Sanctuary's *Agricultural and Rural Lands Action Plan IV* among others, has been exemplary. Continuation of these efforts will be critical to the development of ongoing innovative water quality protections in the Region. For these existing water quality programs to continue, however, the Regional Board must ensure that non-irrigators such as industry groups, agencies, nonprofits, etc. are not held responsible for the implementation of the CCRWQCB's water quality regulations, and are not exposed to liability under the CCRWQCB's regulatory requirements.

Response: ***Liability for compliance with Waivers of Waste Discharge Requirements, and/or Waste Discharge Requirements rests with land owners and operators permitted to discharge. 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.

To address the above concerns, we propose that the CCRWQCB undertake the following actions in the development of its Conditional Waiver monitoring program. Our proposal would establish a phased and multi-level monitoring program, comprised of (1) Region-wide and watershed-wide monitoring networks that can be augmented and improved over time, and (2) more focused pilot monitoring programs that could be used to immediately address problems in areas of known impairment. Our proposed monitoring program is designed to develop and implement the waiver program in an efficient and coordinated manner that allows the CCRWQCB, affected parties and other stakeholders to evaluate the adequacy and effectiveness of existing monitoring efforts and to augment the monitoring program over time as necessary to achieve the purposes of the waiver program.

I. Prepare an Inventory and Analysis of All Existing Monitoring Programs and Implement Watershed-Based Monitoring Networks: There are many ongoing water quality monitoring and data collection efforts being undertaken by various agencies and organizations throughout the Region. (Attached is a sample chart of existing monitoring programs in the region and a map of existing monitoring programs within Monterey and Santa Cruz Counties). The Central Coast Region should immediately inventory and analyze all existing monitoring and data collection efforts and should establish region-wide and watershed-wide water quality databases that correlate and synthesize the data from existing monitoring programs. These inventories and analyses will allow the CCRWQCB to evaluate the adequacy and effectiveness of existing monitoring networks, to identify monitoring and data gaps, to effectively and efficiently determine whether additional monitoring is necessary, and to determine whether monitoring requirements can be waived in those areas that are found not to pose a significant threat to water quality.

Response: *Staff has assembled an inventory of existing monitoring and augmented the inventory with information supplied by the agricultural community. While many excellent monitoring efforts have taken place in the past and some are currently underway, existing monitoring programs are neither adequate nor effective in meeting the regulatory requirements associated with the Irrigated Agriculture Program and associated Waiver of Discharge Requirements. Few ongoing programs exist that monitor for toxicity or pesticides. Existing programs have generally been designed to deal with specific scientific questions, as opposed to the regulatory context, which must be addressed by Irrigated Lands Monitoring Requirements. Existing monitoring programs do not adhere to a uniform approach to quality assurance and quality control. No existing program(s) regularly monitors the analytes deemed necessary to fulfill the requirements of Section 13269 which states that "Monitoring requirements shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions."*

Staff has been involved, for some time, in compilation of data from numerous sources including our own Central Coast Ambient Monitoring Program, the State Board's Surface Water Ambient Monitoring Program, the California Department of Water Resources California Data Exchange Network, county monitoring programs, city Monitoring programs, citizen monitoring programs, the US Geological Survey, and others. 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.

II. Establish Two Pilot Programs in Areas of Known Water Quality Impairment: The CCRWQCB should work in cooperation with affected irrigated agricultural operations and landowners in two known impaired locations to develop and implement effective pilot monitoring programs that couple data collection with timely education, outreach, grower feedback, and problem remediation. The PG&E funds in North Monterey County and the Guadalupe funds in North Santa Barbara County provide the unique financial opportunities to develop pilot monitoring programs in known impaired locations. These pilot monitoring programs should utilize existing monitoring data to assess the contributing factors of urban, rural residential, and other land use sources of pollution.

Response: *Staff agrees that it would be beneficial to utilize existing sources of funds to initiate a cooperative monitoring program for irrigated agriculture (see staff report for July 8, 2004). Staff agrees that the cooperative monitoring program should provide information in order to "couple data collection with timely education, outreach, grower feedback, and problem remediation." Existing monitoring data is already being used to assess water quality impairment from contributing factors. The Clean Water Act 305(b) Water Quality Assessment Report and 303(d) Total Maximum Daily Load assessments both require assessment of contributing factors. These assessment efforts utilize data from a variety of sources, including city and county monitoring programs, stormwater monitoring programs, volunteer monitoring programs, and others.*

We support the establishment of two pilot monitoring programs – to the extent these monitoring programs are not more onerous than the monitoring requirements imposed on other industries with non-point source discharges. In this regard, the pilot monitoring programs should observe the following parameters and limitations (which are modeled after the existing General Industrial NPS Permit requirements):

Response: *The requirements for monitoring under Waivers of Waste Discharge Requirements or Waste Discharge Requirements for irrigated agriculture cannot be modeled after existing General Industrial Non-Point Source Permit requirements. Monitoring requirements must consider knowledge of existing water quality impairments, threat to water quality, complexity of discharges, and factors unique to agriculture. 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 and was not included in the Advisory Panel recommendations. 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. 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.

(a) Frequency: We propose monitoring one storm event per year, and one irrigation event per year. (By comparison, the General Industrial Permit requires monitoring of 2 storm events per year). Monitoring frequency shall be reduced to "first flush" [1] events after the discharger has demonstrated compliance with the Waiver rule for at least two years by completing the following: 1) Submittal of two consecutive years of monitoring data that meet the conditions of the Conditional Waiver; 2) Adoption of a Farm Water Quality Plan; and 3) Implementation of appropriate management practices. The Federal agricultural technical assistance agency, USDA Natural Resources Conservation Service, designs agricultural storm water[2] protection practices to contain 10-year storm events[3]; accordingly, affected irrigated agricultural dischargers and landowners should not be held accountable for compliance with water quality standards for storm water in rain events greater than the local 10-year storm event.

Response: Based on evaluation of existing monitoring data, two sampling events per year would not provide sufficient information to comply with the requirements of Section 13269 which states that "Monitoring requirements shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions." The task of "verifying the adequacy and effectiveness of the waiver's conditions" requires 1) sufficient sampling to provide a realistic opportunity for detection of water quality impairment, 2) sufficient sampling to provide evaluation of differences between monitoring sites and, 3) sufficient sampling to evaluate changes over time. Staff does not believe the suggested frequency would allow assessment of the effectiveness of the program, nor detect improvements in an adequate time frame.

(b) Constituents: We propose basic nutrient constituent monitoring, limited to only those nutrient pollutants that are likely to be applied by the farming operations near the location of the monitoring site. Monitoring for toxicity should not be required. (Although toxicity findings may indicate a problem, toxicity sources and causes are difficult and costly to pinpoint, especially in mixed-use areas where agriculture, rural, suburban and urban residential, commercial and industrial discharges flow to the same receiving water. Toxicity tests cost a minimum of $5,000 per sample to adequately pinpoint the cause of the toxicity).

Response: Basic nutrient monitoring, including additional analytes necessary to interpret the nutrient information, is one requirement of the monitoring program. An evaluation of existing data indicates that confining nutrients sampled to those applied in the immediate vicinity of a monitoring site would not provide sufficient data to evaluate impacts to beneficial uses and/or sources of nutrient impacts. Nutrients change form in the aquatic environment and are uptaken in plant material. Assessment of impacts requires a broader view than that provided by sampling only of locally applied chemicals.

An evaluation of existing data indicates that a significant number of monitoring sites associated with agricultural land use exhibit toxicity. Nutrient constituent monitoring alone would not address this problem at all. Based on current laboratory cost quotations and estimates, four toxicity samples (3 water samples and one sediment sample) including tests for survival, reproduction and growth are estimated to cost $2,432 for laboratory analysis. Staff assumes the comment's $5,000 figure refers to a type of toxicity testing called a Toxicity Identification Evaluation (TIE). TIEs are not required as a component of regular monitoring. While it is true that identifying the specific chemical(s) responsible for toxicity can become

necessary in some circumstances, identification of toxicity source locations does not necessarily require the use of TIEs. A variety of management practices are available to prevent runoff. Expensive sampling and laboratory work to identify specific chemicals may not be necessary to reduce or eliminate toxic runoff. Although staff recognizes that causes of toxicity testing 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.

(c) **Rotations and Cooperatives**: We propose that the pilot programs allow participation on a rotational basis, wherein the monitoring sites rotate over a period of time. Affected irrigated agricultural operations and landowners should be able to submit data and demonstrate compliance with monitoring requirements consistent with sections (a) and (b) above as part of a rotational program.

Response: *As described by the commentors, it seems that the concept of the cooperative program is being confused with that of individual monitoring programs. The commentors' suggested monitoring requirements in section (a) and (b) are insufficient to comply with the Water Code. Use of a rotational strategy would have the effect of reducing sample counts or reducing spatial coverage. If it is the commentors' intent to reduce costs through a rotational approach, it is important to understand that the cooperative monitoring program approach already provides cost reductions to participants by greatly reducing the number of sites being monitored, as compared to 2,500 individual discharge monitoring programs.*

III. Proportionate Allocation of Monitoring Program Costs: The undersigned support a fair and equitable methodology for assigning financial responsibility for the Monitoring Program, which focuses on the cost of services being provided under the Conditional Waiver rule or monitoring program. Accordingly, we believe that the financial responsibility of each irrigated agricultural discharger or landowner for the monitoring program should be proportional to their respective contributions to water quality impairment. To the extent necessary, the financing methodology should include *off-sets or credits* for those dischargers and landowners that contribute to or cause *water quality improvements* as a result of agricultural or drainage practices. Furthermore, the costs associated with the monitoring program should not be assigned to those irrigated agricultural dischargers or landowners in areas where testing indicates compliance with the Conditional Waiver rule. We believe that a per-acre fee assessed to include all irrigated agricultural dischargers and landowners in the Region, is not fair or equitable, and may be legally suspect.

Response: *The current proposal for a cooperative monitoring program conducted by agricultural interests allows the agricultural community to determine the financial obligations of its participants. While Regional Board staff has provided examples of possible cost allocation methods, the examples are not intended as requirements. 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. 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.

IV. Support for Non-regulatory Technical Assistance: While we believe that monitoring is an important tool for protecting and improving water quality in the Region, it must be coupled with educational and outreach programs to be effective in the long-term. Technical expertise and financial resources must be made available to the industry and resource agencies within the Region for *non-regulatory* technical assistance to help growers and landowners analyze monitoring results and implement on-farm management decisions.

Response: Staff agrees. The Regional Board is committed to supporting the implementation of the waiver through settlement and grant funds wherever possible. The Regional Board will be able to fund short courses and technical assistance through settlement funds within the next several months. The upcoming Agricultural Water Quality Grants Program prioritizes waiver implementation. 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. (See staff report for further details).

V. Establish a Clear and Effective Enforcement Plan: The CCRWQCB shall develop, administer, and implement an effective enforcement plan to address noncompliant affected irrigated agricultural operations and landowners. This plan should be clear and precise, to ensure that affected irrigated agricultural operations and landowners have a clear understanding of the Conditional Waiver requirements and the consequences of noncompliance.

Response: The Regional Board's approach to enforcement of the conditional waiver is outlined in the July 8, 2004 staff report.

VI. Liability Protections for Non-irrigators Assisting in Program Implementation: The CCRWQCB should provide adequate protections within the Conditional Waiver program to assure that organizations and associations which assist in Conditional Waiver implementation will not be held responsible for Conditional Waiver implementation, or subject to liability under the Conditional Waiver rule. Existing water quality programs in the Region, including for example those developed by the Coalition of Central Coast County Farm Bureaus and the Southern San Luis Obispo and Santa Barbara Watershed Coalition, are assets to water quality protection in the Region. The Conditional Waiver rule must include assurances that existing programs – including persons or entities sponsoring these programs and technical service providers (i.e., governmental agencies, resource conservation districts, water districts, private consultants, nonprofit organizations, etc.) – are not responsible for compliance with the Conditional Waiver or exposed to liability for non-compliance with the Conditional Waiver.

Response: Landowners and operators are responsible for compliance with the conditional waiver; existing programs or technical service providers are not responsible. The language of the draft Order is consistent with our regulatory jurisdiction. The Order does not make any monitoring entity liability for failure to comply with waiver conditions. Footnote 1, P. 14 of the Order explicitly states that the Regional Board does not have jurisdiction to regulate the entity. If the cooperative monitoring entity

cannot comply with the monitoring requirements, the individual dischargers and not the entity would be out of compliance with the waiver conditions. If the commentors' concern is the entity's liability to the participants, the commentors are encouraged to address this issue in establishing the entity through hold harmless or other agreements.

VII. Adopt the Following Confidentiality Clause:

To the extent farm water quality plans, lists of practices, annual reports, technical reports, monitoring reports or any other information requested or required by the Regional Board pursuant to this Conditional Waiver or any subsequent Waste Discharge Requirement contains trade secrets, information concerning secret processes, or confidential information, such trade secrets, secret processes information and confidential information may be withheld from submission to the Regional Board upon the election of the Discharger. If and to the extent the Discharger elects to withhold trade secrets, secret process information or confidential information, the Discharger shall make the information available for review by the Regional Board in connection with any investigation or report concerning water quality, and such information shall be available for use by the Regional Board or any state agency in judicial review or enforcement proceedings involving the person furnishing the information. The Regional Board shall not make such information available for inspection by the public unless specifically authorized, in writing, by the discharger.

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.*

[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.)

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.

If you have questions, please call Alison Jones at (805) 542-4646.

Sincerely,

FOR Roger W. Briggs
Executive Officer

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