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VIA ELECTRONIC SUBMISSION
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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of Waste Discharge Requirements for Oil Fields, General Order Numbers One, Two, and Three – Central Valley Regional Water Quality Control Board Order Nos. R5-2017-0034, R5-2017-0035, and R5-2017-0036	**PETITION FOR REVIEW**

Pursuant to California Water Code, section 13320 and California Code of Regulations, title 23, section 2050, Petitioners hereby bring this Petition for the State Water Board to review an action by the Central Valley Regional Water Quality Control Board ("Regional Board") of April 6, 2017, to adopt Waste Discharge Requirements for Oil Fields, General Order Numbers One, Two, and Three (Order R5-2017-0034, Order R5-2017-0035, and Order R5-2017-0036, respectively). The Regional Board's actions were inappropriate and improper, for the following reasons.

1. NAME, ADDRESS, TELEPHONE, AND EMAIL OF THE PETITIONERS

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2. DATE OFACTION, AND ACTION REQUESTED FOR STATE BOARD REVIEW

Petitioners seek review of the Central Valley Regional Board's Order Nos. R5-2017-0034, R5-2017-0035, and R5-2017-0046, and the administrative record underlying the Regional Board's Orders. Attached as Exhibit 1 is a true and correct copy of Order No. R5-2017-0034 adopted by the Regional Board on April 6, 2017. Attached as Exhibit 2 is a true and correct copy of Order No. R5-2017-0035 adopted by the Regional Board on April 6, 2017. Attached as Exhibit 3 is a true and correct copy of Order No. R5-2017-0036 adopted by the Regional Board on April 6, 2017. Attached as Exhibit 4 is a true and correct copy of the Transcript of the April 6, 2017 hearing, Agenda Item 11, at which the Regional Board adopted the General Orders at issue. Attached as Exhibit 5 is Petitioners' May 27, 2016 comment letter on the proposed General Orders, and attached as Exhibit 6 is Petitioners' July 11, 2016 comment letter on the proposed General Orders.

3. A FULL AND COMPLETE STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

A. The Regional Board Failed to Comply with CEQA.

The California Environmental Quality Act ("CEQA") was enacted to "take *all action* necessary to protect, rehabilitate, and enhance the environmental quality of the state" and to "[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions." (Pub. Resources Code, § 21001 [emphasis added].) The CEQA Guidelines add that "CEQA was intended to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language," and that "[t]he purpose of CEQA is . . . to compel government at all levels to make decisions with environmental consequences in mind." (Cal. Code Regs., tit. 14, § 15003 (hereafter "Guidelines").)

If there is substantial evidence that a project *may* have a significant effect on the environment, an agency must prepare an Environmental Impact Report ("EIR") prior to approving a project. (Pub. Resources Code, § 21080, subd. (d).) If an agency is presented with so much as "a *fair argument* that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even

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though it may also be presented with other substantial evidence that the project will not have a significant effect." (Guidelines, § 15064, subd. (f)(1) (emphasis added); see also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75.) If there is "disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR." (Guidelines, § 15064, subd. (g).)

i. *The Discharges that Are the Subject of the General Orders Are Not Covered by CEQA's Categorical Exemptions.*

The Regional Board violated CEQA by failing to conduct any CEQA environmental review of the General Orders prior to adoption, incorrectly concluding that categorical exemptions to CEQA apply to the General Orders. (Transcript at 66.) "Categorical exemptions may be provided only for 'classes of projects which have been determined *not* to have a significant effect on the environment.'" (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192, quoting Pub. Resources Code, § 21084, subd. (a).) "Exemption categories are not to be expanded beyond the reasonable scope of their statutory language." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125.) "[C]ategorical exemptions must be carefully applied and supported by the evidence." (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 698.)

The Regional Board determined that the discharges fit within three different exemptions. (See, e.g., Order R5-2017-0034, ¶ 66, subds. (a)-(c).) First, the CEQA Guidelines authorize agencies to forgo the CEQA process for projects that involve "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301.) Second, the Guidelines exempt the "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced." (*Id.*, § 15302.) Third, "minor public or private alterations in the condition of land, water, and/or vegetation" are exempt from CEQA. (*Id.*, § 15304.)

The Regional Board incorrectly asserted that all existing ponds are categorically exempt from CEQA analysis. (See, e.g., Order R5-2017-0034, ¶ 66.) Further, in its March 8, 2017 responses to

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comments ("RTC"),[1] the Regional Board argued that CEQA *exceptions* to the categorical exemptions do not apply because the actions will result in no physical changes in the environment, since "[t]he General Orders do not authorize wastewater discharge flow in excess of the baseline." (RTC at 11.) These conclusions are wrong as a matter of fact and law.

Factually, the General Orders plainly permit an operator to discharge *continuously* at the highest monthly average ever recorded from 2004 to 2014. (See, e.g., Order R5-2017-0034, ¶ 8; see also RTC at 5 ["The actual maximum monthly average is the largest monthly average discharge value that occurred in the ten years immediately prior to 26 November 2014."]) This is no mere "negligible or no expansion of use beyond that existing at the time of the lead agency's determination," as the CEQA exemption would require. (Guidelines, § 15301.) While the lead agency is not required to consider the worst-case scenario, i.e., that each discharger *will* hit its maximum discharge levels each and every month, the agency must consider what is reasonably foreseeable. These General Orders expressly permit a significantly greater volume of discharge at each facility than has ever historically occurred. (Transcript at 71.) Therefore, it is reasonably foreseeable under these circumstances that discharges may, in fact, increase. Indeed, recent federal developments expressly encourage increased oil and gas development that could quickly avail itself of these newly increased disposal limits. (See, Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).) Additionally, inactive pits may become active under the General Orders, and some waters may be de-designated for beneficial use. (See, e.g., Order R5-2017-0036, ¶ 32.) Accordingly, the General Orders will reasonably foreseeably lead to potentially significant environmental effects that do not qualify for a categorical exemption.

In addition, many disposal pits have been covered by the requirements of Regional Board Cleanup and Abatement Orders ("CAOs"), which limit discharges to not more than "the average monthly discharge of wastes to the ponds from 1 June 2014 through 1 June 2015." (See, e.g., Central Valley Regional Water Quality Control Board, Cleanup and Abatement Order No. R5-2015-0745 (Dec. 1, 2015) p. 8.) As described by the RTC, "[i]n Discharge Specification B.3 of the tentative General Orders the flow limit already has been expanded to cover a 10-year time period from 1 November 2004 through 1 November 2014." (RTC at 20 (emphasis added).) The General Orders thus permit a higher rate of discharge than currently permitted under the CAOs, causing potentially significant environmental effects for which no CEQA exemption is appropriate. (See also, Transcript at 71.)

[1]http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/1704/11_oilfield_go/35_oilfield_go_rtc.pdf.

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Similarly, the actions authorized by the General Orders are also not minor alterations exempt from CEQA. A minor alternation must "be one that is so small that it does not cross the threshold level set by the Guidelines." (*Azusa, supra*, at 1194.) Allowing discharges of harmful chemicals that may contaminate soil and groundwater, in some cases allowing for higher effluent contaminant levels than what was allowed under individual permits, to hundreds of pits across the Central Valley, over many years, is not a minor disturbance; nor is reactivation of long-dormant pits.

In addition, the General Orders require installation of monitoring wells and treatment technologies, the physical construction and operation of which could exacerbate existing and future pollution conditions. (See, e.g., Monitoring and Reporting Program R5-2017-0034 at 3, 5; Guidelines § 15126.4(a)(1)(D); *Stevens v City of Glendale* (1981) 125 Cal. App. 3d 986; *Save Our Peninsula Comm. v Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 131.) The Board proposes to review and approve these plans only after this process is closed and the permits are adopted, outside of any public or CEQA review, and with no guiding or binding standards that ensure all environmental impacts are avoided, considering the variety of site-specific features that will be encountered. (See *id.* at 5.) Under these factual circumstances, the Regional Board lacked substantial evidence that modifications that will be required at each and every facility qualify for CEQA's existing facilities exemption.

No environmental review has ever been performed for the operation of these facilities, but CEQA requires that environmental review occur *before* a decision is made and before environmental harm occurs. (See Guidelines, § 15004, subd. (a).) An EIR serves as "'an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return' and 'to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action.'" (*City of Carmel-By-The-Sea v. Bd. of Supervisors* (1986) 183 Cal. App. 3d 229, 241, quoting *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810, and *No Oil, Inc., supra*, at 86.) Further, "CEQA cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." (*Topanga Beach Renters Assn. v. Dept. of General Services* (1976) 58 Cal.App.3d 188, 195-196.) Here, significant adverse environmental effects could occur at any number of facilities now regulated by the General Orders, yet neither programmatic nor site-specific CEQA review occurred. The Regional Board was required to comply with CEQA at the outset and should have conducted CEQA review prior to any waste discharges, but was negligent in its responsibility.

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ii. *Exceptions to Categorical Exemptions Apply to the Discharges.*

Even if the ponds do qualify for these categorical exemptions, which they do not, the exemptions have their own exceptions that apply. As one court concisely described:

> The categorical exemptions are not absolute. Even if a project falls within the description of one of the exempt classes, it may nonetheless have a significant effect on the environment based on factors such as location, cumulative impact, or unusual circumstances. '[W]here there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper.' Guidelines section 15300.2 was adopted in recognition of this rule.

(*Save Our Carmel River, supra,* at 689, citations omitted.)

Guidelines section 15300.2 lists two exceptions to the exemptions that apply to these General Orders. First, "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (*Id.*, § 15300.2, subd. (c).) Second, "[a]ll exemptions . . . are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant." (Guidelines, § 15300.2, subd. (b).)

a. <u>The Unusual Circumstances Exception to CEQA the Exemptions Applies Here.</u>

The unusual circumstances exception to CEQA exemptions applies if "the project has some feature that distinguishes it from others in the exempt class, such as its size or location" and if there is "a reasonable possibility of a significant effect due to that unusual circumstance." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.) Unusual circumstances are those that "(i)'differ from the general circumstances of the projects covered by a particular categorical exemption' and (ii) 'create an environmental risk that does not exist for the general class of exempt projects.'" (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 869, citations omitted.) Courts "do not look only to the project's possible environmental effects. Rather, [they] determine as a matter of law whether 'the circumstances of a particular project … differ from the general circumstances of the projects covered by a particular categorical exemption … .'" (*Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1110, quoting *Azusa, supra,* at 1207.)

Here, the Regional Board has improperly applied a categorical exemption to an entire class of operations *without* considering whether any individual operation that would be covered by the General

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Orders may differ from the general class of operations, and thereby create a site specific environmental risk. (RTC at 5.) Whether an activity may have a significant effect due to unusual circumstances requires a case-by-case evaluation that is not appropriate for a General Order as a whole. (Transcript at 69.) By applying the exemption to the entire class, the Regional Board failed to consider the exception to the exemption at all.

As the court explained in *Azusa*, the unusual circumstances exception to CEQA's categorical exemptions was adopted to allow agencies to determine which *specific activities*, within a class of activities that do not normally threaten the environment, should be excluded from the exemption and given further environmental evaluation. (*Azusa, supra*, at 1206.) Under Guidelines section 15300.2, subdivision (c), an activity that would otherwise be subject to a categorical exemption is excluded from the exemption if "there is a *reasonable possibility* that the activity *will have* a significant effect on the environment *due to unusual circumstances*." (Guidelines, § 15300.2, subd. (c) (emphasis added).) In *Azusa*, for example, a landfill was not eligible for the existing facilities exemption because it had potential for groundwater pollution, and had lacked appropriate environmental safeguards. (*Azusa, supra*, at 1198, 1208; see also *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1148 [presence of hazardous wastes on property was unusual circumstance precluding categorical exemption]; *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 831 [existing stock car racing fairgrounds ineligible for exemption due to proximity of residences].) In sum, the lead agency must review the particular facts of each aspect of the project to determine whether any unusual circumstances exist. Given the large number of facilities proposed to be covered by the General Orders, such site-specific inquiry is virtually impossible, and the Regional Board's claim of a categorical exemption therefore cannot be supported. (Transcript at 66-71.)

Indeed, the RTC admits, with no further analysis, that "[t]he General Orders seek to regulate facilities that are located in a variety of areas, some of which are more vulnerable to environmental impact due to the characteristics of the soil or underlying groundwater." (RTC at 5.) Based on the paucity of information the Regional Board has provided about the physical impacts resulting from changes caused by the General Orders, the Regional Board has no evidence supporting its assertion that no environmental effects will occur; and a fair argument exists that these changes may result in significant effects. (Ex. 5 at 2.) Some site-specific evidence bears this out. For example, the Waterboard has already found conditions of pollution and nuisance existing at some of these sites, and increased

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disposal or new construction at these sites could realistically exacerbate these conditions.[2] (Transcript at 66-67, 76; see also Ex. 6 at 1.)

It is unlikely that state regulators had such a large project authorizing hundreds of illegal operations in mind when they developed the existing facilities and minor alterations exemptions in the CEQA Guidelines, sections 15301, 15302, and 15304, as the Regional Board attempts to assert. The circumstances of this project differ from the general circumstances of the projects typically covered by the exemptions, which in the past have included the modernization of a cement plant (*Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 829), the revegetation of a slope near an existing storm drain (*CREED-21 v. City of San Diego* (2015) 234 Cal. App. 4th 488, 497-498), and waste discharge orders concerning an existing wastewater treatment plant (*Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal.App.3d 847, 865).

b. The Cumulative Impacts Exception to CEQA Exemptions Applies.

The CEQA Guidelines state that a categorical exemption cannot be used when the cumulative impact of successive projects of the same type in the same place is significant. (*Id.*, § 15300.2, subd. (b).) Typically, an EIR is required "if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable . . . when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (*Id.*, § 15064, subd. (h)(1).) CEQA defines cumulative impacts as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (*Id.*, § 15355.) CEQA states that "cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (*Id.*)

The Regional Board failed to even consider cumulative impacts in its General Orders. Clearly, there will be cumulative impacts to air quality, climate change, groundwater resources, and wildlife resulting from hundreds of active percolation pits operating in the Central Valley for decades, as well as the indirect effects of the oil extraction operations they support.[3] (Transcript at 69, 71-72, 76.) Some pits

[2] See, e.g., http://www.hcn.org/issues/42.21/oil-and-water-dont-mix-with-california-agriculture; Order R5-2015-0093, http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/kern/r5-2015-0093.pdf; Order R5-2015-0731, https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/kern/r5-2015-0731_cao.pdf; see also Transcript at 67, 76.

[3] CEQA provides that "[a]n indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (Guidelines, § 15064, subd. (d)(3).) The CEQA Guidelines go on to explain that indirect effects include "related effects on air and water and other natural systems, including ecosystems." (Guidelines, § 15358, subd. (a)(2).)

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in the Regional Board's jurisdiction have already contaminated groundwater resources,[4] and the longer groundwater disposal persists at a facility, the greater the cumulative impact to groundwater. For example, at the McKittrick 1 and 1-3 facilities, operated by Valley Water Management, a plume of produced water has extended more than a mile from the site ponds which was constructed in the 1950s and first received a WDR in 1969. (Transcript at 76; see also Ex. 5 at 1; Ex. 6 at 1.) Since the Regional Board first began requiring groundwater monitoring at that site in 2004, monitoring wells have shown evidence that the plume has continued to grow and now extends past all of the existing monitoring wells at the site.[5]

In sum, the cumulative operation of any of these sites over years past and indefinitely into the future contributes to cumulative pollution loading to groundwater, air quality, and climate change, that must be assessed on a facility by facility basis, and clearly qualifies for an exception to any arguably applicable CEQA exemption.

B. The Regional Board Failed to Comply with California's Antidegradation Requirements.

The Regional Board also failed to comply with the State's antidegradation policy, State Water Board Resolution Number 68-16. (Transcript at 73; see also Ex. 6 at 4.) Under Resolution 68-16, the state must grant permits and licenses for the disposal of wastes into waters of the state so as to achieve the "highest water quality consistent with maximum benefit to the people of the State" and "so as to promote the peace, health, safety and welfare of the people of the State." (State Water Resources Control Bd. Res. No. 68-16 (Oct. 28, 1968).) When the antidegradation policy is triggered, the Regional Board can allow discharge of waste into high quality waters *only* after making findings pursuant to a two-step process:

> The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans). The second step is that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit

[4] *An Independent Scientific Assessment of Well Stimulation in California*, California Council on Science and Technology, Volume II, Chapter Two: Impacts of Well Stimulation on Water Resources 112 (2015), https://ccst.us/publications/2015/2015SB4-v2.pdf; see also Transcript at 69.

[5] https://geotracker.waterboards.ca.gov/regulators/deliverable_documents/3559040904/2016%202SAMR_McKittrick%201%20%26%201-3.pdf.

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to the people of the State. (State Bd., Guidance Mem. (Feb. 16, 1995) p. 2.)

(*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1278.)

The Regional Board did not comply with this process. Under step one, the Regional Board did not adequately consider evidence or support its finding that the discharges will be consistent with the maximum benefit to the people of the State. The State Board explained in its guidance memorandum, "'both costs to the discharger and the affected public must be considered. Cost savings to the discharger, standing alone, absent a demonstration of how these savings are necessary to accommodate important social and economic development are not adequate justification for allowing degradation.'" (*Id.* at 1279.) Other factors to be considered include "'(1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods.'" (*Id.*) This determination must be made on "'a case-by-case basis.'" (*Id.*) The Regional Board failed to make such a determination. (See, e.g., Order R5-2017-0034, ¶¶ 30-37.)

First, the General Orders do not address anything related to the *benefit* of discharging wastewater into open pits. (Transcript at 73; see also RTC at 7-8; Ex. 6 at 4.) The Waterboard has not supported its finding that continuing this antiquated wastewater disposal practice indefinitely into the future to support a fossil fuel industry that has externalized billions of dollars of costs to society, would genuinely serve the maximum benefit of the People of the State of California. (Transcript at 75.) The Regional Board's argument principally focuses on the petroleum industry in Kern County, which is not enough to support the benefit of the people of the entire state of California. (See, e.g., Order R5-2017-0034 Information Sheet at IS-12-IS-13.) The General Orders do, however, add that "the reduction in foreign petroleum imports are of the maximum benefit to the people of the state" without quantifying this supposed benefit of the General Orders. (See, e.g., Order R5-2017-0034, ¶ 36.) While the Board recited the local and regional revenues of the industry, it fails to consider, neither quantitatively nor qualitatively, the many externalized costs of oil production, such as degraded air quality, water quality, human health impacts and associated medical costs, destruction of farmland, nuisance to neighbors, and contributions to climate change. (See, e.g., Order R5-2017-0034 Information Sheet at IS-11-IS-14; Transcript at 75; see also Ex. 6 at 4.) One such tool would be balancing the social cost of carbon associated with operations under these permits against the supposed benefit. In addition, the Board's

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illegal permitting of disposal of well stimulation fluids to land for at least three years if not indefinitely is not in the maximum interest of the People of the State, since this practice has been banned for nearly two years already. Without a serious assessment of costs, understanding the net benefits is impossible.

The General Orders also inappropriately made judgments about the entire oil industry. Instead, operators must conduct an antidegradation analyses that show the costs and benefits of specific discharges on a case-by-case basis if they intend to degrade specific waters with beneficial uses. (Ex. 6 at 4.) Additionally, the antidegradation section envisions degradation up to the water quality objective of the Basin Plan. This proposal does not consider other activities that may cause additional degradation. It is inappropriate that the General Orders allocate the full assimilative capacity of these aquifers to the oil and gas industry. Degradation can only be justified by the determination that it is beneficial to the people of the state. A blanket statement that oil production is a benefit does not address the specific activity that would be causing degradation.

Second, the Regional Board did not adequately make the finding that the discharges will not unreasonably affect beneficial use of high quality water, including "'past, present, and probable future uses and include domestic, municipal, agricultural and industrial supply, power generation, recreation, aesthetic enjoyment, navigation, and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.'" (*Id.* at 1280.) Beneficial uses of groundwater described in the Basin Plan include municipal and domestic supply, agriculture, industrial process and service supply, water contact recreation, and wildlife habitat. (GO at 5.)

Protecting beneficial uses "wholly depends upon the General Orders' prohibition of the further degrading of groundwater requiring the means (monitoring wells) by which that could be determined." (*el Aqua, supra*, at 1260-1261.) But the monitoring system proposed by the Regional Board in the General Orders is not adequate to make this finding. (Transcript at 77.) The Monitoring and Reporting Program allows dischargers to revise monitoring frequency or minimize the list of constituents if monitoring shows no significant variation in constituent concentrations or parameters after a number of sampling events. (See, e.g., Monitoring and Reporting Program R5-2017-0034 at 1.) That concentrations of chemicals may be less than acceptable levels for a period of time, does not guarantee that they will be in the future, and therefore does not ensure protection of beneficial uses. "[M]onitoring plans will be submitted on a site by site basis, reviewed and approved outside of public purview and . . . with no clear guiding standards and may be terminated under the broad discretion of the executive officer." (See, e.g., *id.* at 4; Transcript at 77.) The Board also proposed keeping certain chemical constituents confidential.

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(See, e.g., Monitoring and Reporting Program R5-2017-0034 at 3; Transcript at 77.) "These loopholes and shortfalls are insufficient to support a determination that no groundwater degradation will occur." (Transcript at 77.)

Third, the Regional Board did not properly make the finding that the discharges will not result in water quality less than that prescribed in state water quality objectives. Again, the General Orders claim that discharges will not pollute groundwater or violate water quality objectives, but the inadequate monitoring program cannot guarantee these findings. (Transcript at 77.) If the "Order's method for ensuring the groundwater is not further degraded is flawed, its method for ensuring compliance with applicable water quality objectives is likewise flawed." (*el Aqua, supra*, at 1281.)

The Regional Board has abused its discretion by making findings not supported by evidence. (*Id.*, citing *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516.) Similar to the *el Agua* case, here,

> crucial findings that would have allowed the Regional Board to authorize a discharge that would degrade the groundwater, i.e., that the discharge will be consistent with the maximum benefit to the people of the state, that it will not unreasonably affect beneficial uses, and that it will not violate water quality objectives, were all based upon the finding that the Order would not further degrade groundwater quality.

(*Id.*) The Regional Board's findings under the first step of the antidegradation policy are based on flawed cost benefit analyses and an inadequate monitoring program. As such, it has not complied with Resolution 68-16.

Fourth, regarding step two of the antidegradation findings process, the Regional Board did not adequately require that discharges must undergo the "'best practicable treatment or control . . . necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.'" (*el Agua, supra*, at 1282.) The Waterboard has not demonstrated that dischargers will implement the Best Practicable Treatment or Control ("BPTC"). (Transcript at 76.) The Orders do require "[d]ischargers to submit a detailed technical report . . . describing how the proposed discharge will meet BPTC requirements," but the Orders never specify precisely what those BPTC requirements actually are. (See, e.g., Order R5-2017-0034 Information Sheet at IS-15; Transcript at 76.) "[W]ith no guiding standards and no opportunity to review and comment upon the water board's approval of any discharger's proposal," the Regional Board failed to provide any evidence to support its conclusion that BPTC will be met at each and every location where groundwater degradation will occur. (Transcript at 76-77.) Indeed, based on evidence, it

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may be that BPTC is met by not discharging oil and gas production wastewater to land at all.[6] "The oil and gas industry's own best management practices commonly advise against surface discharge of produced water into unlined pits."[7] For example, the independent Center for Sustainable Shale Development has adopted a zero surface discharge performance standard, and the industry-funded oversight body Investor and Environmental Health Network and Interfaith Center on Corporate Responsibility identifies covered wastewater storage tanks as the best practice for preventing contamination.[8]

C. The Regional Board Unlawfully Permits Confidential Submission of Pollution Data.

The General Orders monitoring and reporting program permit that:

> Chemicals that are a part of trade secrets shall be kept confidential at the Central Valley Water Board. Documents containing trade secrets shall be properly marked on the cover, by the Discharger, prior to submitting the document to the Central Valley Water Board. Individuals that have received permission by the Discharger shall be granted access to view the files at the office.

(Monitoring and Reporting Program, fn. 1; see also Ex. 5 at 4; Ex. 6 at 5.) This is both unduly vague, and contrary to public policy and law. Under SB 4, regarding fluids used in well stimulation, "[t]he identities of the chemical constituents of additives," "[t]he concentration of the additives in the well stimulation treatment fluids," and "[t]he chemical composition of the flowback fluid," *inter alia*, shall not be protected as a trade secret. (Pub. Resources Code, § 3160, subd. (j)(2); see also Transcript at 77.) The General Orders' confidentiality provision would negate this legislative directive if the Water Board allows wastewater from wells that have undergone well stimulation to be discharged and decides these chemicals are confidential.

Moreover, "[o]nce a discharge occurs, the claim of trade secret is invalid as that product is entering the environment and part of the public domain." (Transcript at 77.) Just as an operator may not claim the test results from groundwater monitoring as a trade secret, information on added chemicals that are eventually discharged into the environment, as is the case with a discharge to land, must be transparent and in the public domain. Wastewater is also not a proprietary substance subject to such claims. And even if wastewater components were considered trade secrets, the Regional Board has the

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[6] See Clean Water Action & Clean Water Fund, In the Pits: Oil and Gas Wastewater Disposal into open Unlined Pits and the Threat to California's Water and Air (2014), pp. 13-14, http://www.cleanwateraction.org/sites/default/files/docs/publications/In%20the%20Pits.pdf.
[7] *Id.* at p. 13.
[8] *Id.* at pp. 13-14.

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discretion to release that information to the public.

A recent superior court ruling, *Zamora v. Central Coast Regional Water Quality Control Board*, required the release of private records where water quality impacts occurred. (*Zamora v. Central Coast Regional Water Quality Control Board* (Oct. 28, 2016, 15CV-0247) at 2 [nonpub. opn.]; see also Transcript at 77-78.) The court stated that "[t]he public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public's water supplies." (*Zamora, supra*, at 2; see also Transcript at 78.) As the Water Code admonishes, "[a]ll discharges of waste into waters of the state are privileges, not rights." (Water Code, § 13263, subd. (g).) Thus, the Water Board clearly has the authority and mandate to require the disclosure of materials affecting public water supplies, consistent with the principle and policy of SB 4 and *Zamora*. "[I]n order to properly regulate oil and gas activities, it is necessary to know what chemicals are being used and in what amounts and frequencies." (Transcript at 78.)

In addition, the Orders are unduly vague, as there is no clarification or guidance on what constitutes a potentially confidential chemical. (See, e.g., Monitoring and Reporting Program R5-2017-0034 at 3.) A discharger may simply declare whatever information it wishes to be confidential, and thereby remove it from the public purview. This loophole is insufficient to constitute an adequate reporting program and calls into question the integrity and intent of the General Orders. (*Id.*)

D. The Regional Board Improperly Authorized Dischargers to Discharge Wastewater from Stimulated Wells.

The General Orders allow wastewater from wells that have undergone well stimulation to be discharged into pits for three years, if not indefinitely, in violation of existing regulations. (Transcript at 78.) This is both dangerous and illegal under current law. Under the California Code of Regulations, "produced water from a well that has had a well stimulation treatment … *shall not be stored in sumps or pits*." (14 Cal. Code Reg. § 1786, subd. (a) (emphasis added).) The Division of Oil, Gas, and Geothermal Resources has reiterated, "Storage *or disposal* of well stimulation fluids in sumps or pits are [sic] prohibited by the permanent SB 4 regulations."[9]

As drafted, the General Orders allow wastewater from wells that have undergone well stimulation to be discharged into pits, a direct violation of this state regulation. The so-called "three-year time schedule" that allows operators to discharge wastewater from stimulated wells into pits is a blatant

[9] *Center for Biological Diversity v. DOGGR* (Sacramento County Sup. Ct. 2016) Case No. 34-2015-80002149 (DOGGR, Opposition to 1st Amended Petition) (July 13, 2016).

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violation and poses a serious danger to water quality and public health and safety. Here, again, the RTC are legally and factually erroneous, asserting that the General Orders do not permit any violation of law. It would be disingenuous, however, in practical terms, to believe anything other than, as written, the General Orders would totally undermine the requirements of California Code of Regulations, title 14, section 1786, subdivision (a).

First, the RTC relied upon the Waterboard's authority to adopt a time schedule order for compliance under Water Code section 13300, but Water Code section 13300 applies only to actions that "will violate requirements prescribed by the regional board, or the state board." (Water Code, § 13300 (emphasis added); see also RTC at 9; Transcript at 79.) Here, however, the General Orders do not simply undermine a standard prescribed by the State or Regional Waterboards; but rather, undermine a regulation adopted by another state agency. The Waterboard has no authority to contravene another state agency's clear regulatory requirements. (Transcript at 79.)

Second, the Regional Board asserts that "a time schedule is necessary to allow the Discharger to comply with the prohibition without imposing an unnecessary economic burden," but provides no evidence to support this conclusion, especially given that the oil industry is the most profitable on earth. (See, e.g., Order R5-2017-0036, ¶ 46; see also Transcript at 79-80.) The Board also provides no evidence to support its conclusion that "a time schedule is necessary to allow the Discharger to fund, study, and implement appropriate compliance options." (See, e.g., Order R5-2017-0036, ¶ 46.) This conclusion is contrary to the previous determination by DOGGR to adopt this prohibition which has been operative already for nearly two years. (Transcript at 80.) The prohibition on dumping WST fluids in pits is a measure to protect the environment and have industry bear at least some externality costs. In the likely event that industry again starts dumping WST fluids in pits, the Board would rightly be seen as aiding industry at the expense of the environment and public health.

Third, even beyond the time schedule compliance period, the Orders do not ensure well stimulation fluids will not be discharged. (Transcript at 79.) Instead, the time schedule work plan requires that dischargers demonstrate that wastewaters "do not contain well stimulation treatment fluids or related wastes in concentrations that could adversely affect beneficial uses of waters." (See, e.g., Order R5-2017-0036 at 27.) "This stops short of demonstrating that no well stim fluids are present at all," and may create untoward incentives for monitoring reporting. (Transcript at 89.)

Fourth, with no guiding standards or public review, the Orders allow these violations to potentially continue indefinitely, since "[t]he Executive Officer may at its discretion modify this time

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schedule based on evidence that meeting the compliance date is infeasible through no fault of the Discharger." (See, e.g., *id.* at 28; see also Transcript at 80.) "Given that the board has failed to provide any evidence to support the necessity of this . . . compliance extension now, it is equally unclear on what basis future extension would be granted." (Transcript at 80.)

E. The Regional Board Improperly Deleted Groundwater Monitoring for General Order Three.

At the hearing approving the General Orders, the Regional Board moved for and approved deletion of groundwater monitoring requirements from General Order Three, purportedly due to the already-degraded quality of groundwater beneath facilities covered by General Order Three. Petitioners objected to this last-minute change on the basis that such monitoring, already in place for some facilities that could putatively be covered by General Order Three, has revealed significant expansion of groundwater contamination migrating beyond the facility boundaries. (Transcript at 83-84.) Without continued groundwater monitoring in place, the General Order can provide no assurance that groundwater quality will be maintained throughout an affected groundwater basin, nor that anti-degradation principles can be met. Additionally, in the case of facilities covered by General Order Number Three that do not have underlying groundwater with beneficial uses, there could nevertheless be adjacent formations containing high quality groundwater. Without groundwater monitoring of these adjacent formations, isolation and lack of impacts would be impossible to demonstrate. The State Water Resources Control Board used this principle for concurrence on the Aquifer Exemption application for the Dollie Sands of the Pismo formation in the Arroyo Grande oil field.[10] The State Board required groundwater monitoring in an adjacent formation in order to verify isolation of the injection zone. This same principle should be applied to General Order Number Three.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED.

Petitioners are non-profit, environmental organizations committed to reducing water contamination and to protecting water resources in the Central Valley. Petitioners have actively promoted the protection of water quality throughout California before state and federal agencies and the State Legislature. Petitioners regularly participate in administrative, legislative, and judicial proceedings on behalf of their members to protect, enhance, and restore declining water resources. Petitioners'

[10]ftp://ftp.consrv.ca.gov/pub/oil/Aquifer_Exemptions/County/San_Luis_Obispo/Arroyo_Grande_Oilfield/Dollie_Sands_Pismo_Formation/Notices%20and%20Documents/Water%20Board%20Letter%20Final%20Concurrence%20on%20the%20Dolllie%20Sands.pdf.

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members directly benefit from the waters impacted or threatened by land disposal of oil production wastewater that harms drinking water, agricultural, and environmental supplies. Petitioners' members reside in communities whose economic prosperity and health depends, in part, upon the quality of water. Groundwater in the Central Valley are important, critical resources particularly following a time of record drought in California. Petitioners' members depend on groundwater, which comprised up to 60% of California's water supply in the recent drought—and this number is even higher in Kern County. In a 2010 USGS water use report, groundwater was identified as the source of 75% of public water supply and 43% of agricultural supply in Kern County, whose agricultural economy generated $6.7 billion in 2013. An additional 54,000 Kern County residents rely on domestic wells throughout the region.

Petitioners' members are concerned that the Regional Board's action threatens dwindling groundwater resources. For example, Kern County's groundwater basin has been declared in a state of critical overdraft in the Department of Water Resources Bulletin 118-2003. The condition of already strained California groundwater resources has led to legislation to protect and monitor groundwater, making the preservation of groundwater resources a priority in California.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS.

Petitioners request that the Orders be vacated and remanded to the Regional Board with instruction that (1) the action is not exempt from CEQA; (2) the anti-degradation analysis be revised to consider the costs and benefits of the project at a statewide level, and appropriate pre-project water quality, with clear and binding specifications as to what monitoring and treatment requirements will be imposed on each discharger; (3) no discharge data, including information on chemicals used in wells that discharge to land, and monitoring results, may be held as confidential; (4) no land application of wastewater from wells that have undergone in well-stimulation treatments may be permitted; and (5) groundwater monitoring be required under General Order Number Three.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION, INCLUDING CITATIONS TO DOCUMENTS OR THE TRANSCRIPT OF THE REGIONAL BOARD HEARING WHERE APPROPRIATE.

Petitioners' arguments and points of authority are thoroughly and adequately established above. (*See supra* at section 4.) Petitioners further reserve the right to submit supplemental briefing on arguments made and on issues raised by this Petition. Lastly, Petitioners will gladly respond to any additional questions the State Board may have regarding the issues in this Petition.

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8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGER, IF NOT THE PETITIONER.

Copies of this Petition and related attachments are being sent to the Regional Board at the following addresses:

Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

Central Valley Regional Water Quality Control Board
1685 E Street, Suite 200
Fresno, CA 93706

Petitioners are informed and believe that no entities have been authorized to discharge pursuant to any of these General Orders.

9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD.

Each of the foregoing issues or objections was raised in written and/or oral testimony to the Regional Board prior to its approval of the General Orders, except as to revisions made to the General Orders at the April 6, 2017 hearing adopting them, for which inadequate opportunity to comment was provided.

Respectfully submitted,

DATE: May 5, 2017

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