SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

CARMEN ZAMORA, an individual, and ENVIRONMENTAL LAW FOUNDATION, a California nonprofit organization,

Petitioners,

vs.

CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD, a California state agency,

Respondent.

CENTRAL COAST GROUNDWATER COALITION, INC., a California nonprofit organization,

Real Party in Interest.

CASE NO. 15CV-0247

RULING AND ORDER GRANTING DECLARATORY RELIEF AND PETITION FOR WRIT OF PEREMPTORY MANDATE AND ORDERING DISCLOSURE OF DOCUMENTS UNDER THE PUBLIC RECORDS ACT

I. INTRODUCTION

Percolation of fertilizers and pesticides into groundwater from more than 3,000 irrigated agriculture operations is a vast source of nitrate pollution, now widely recognized as a critical threat to the Central Coast's public water supply. The Porter-Cologne Water Quality Control Act (Water Code §13000, et seq.; "Water Quality Act")[1] mandates public access to all "monitoring results" related to discharges of pollution from agricultural operations.

Petitioners Carmen Zamora and Environmental Law Foundation seek a writ of mandate setting aside two actions taken in December 2014 by the Central Coast Regional Water Quality Control Board ("Regional Board") that restricted public access to the results of groundwater monitoring being conducted on agricultural lands in the Central Coast Region of California.

While individual farms provide their test results for public scrutiny, real-party-in-interest Central Coast Groundwater Coalition ("Coalition"), which performs monitoring services for large groups of farms on the Central Coast, does not. The Regional Board and Coalition take the position that letters from the Coalition informing dischargers (i.e., farmers) about the polluted level of their well water, letters from dischargers informing well users about the results, and letters from dischargers to the Coalition confirming they have informed well users of the high pollution levels, are not "monitoring results" and, therefore, need not be made public.

Two pillars of the Water Quality Act are to protect the *quality* of community water supplies and to promote public access. Giving a plain and commonsense meaning to the words of the statute, the written notification letters must be considered "monitoring results" because they summarize the numeric results of extensive nitrate pollution in well water and help verify whether farmers are doing enough to control agricultural runoff into groundwater aquifers. The public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public's water supplies.

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[1] All statutory references are to the Water Code unless indicated otherwise.

Instead of simply making these notification and confirmation letters available to the public, the Coalition generates three technical documents that intentionally make it difficult for all but the most sophisticated user to figure out the owners and locations of polluted well water. There is no justification for such obfuscation: the strong interest in public accountability cannot be overcome by vague notions of privacy or unsupported allegations of terrorist threats to polluted groundwater supplies.

The argument that Petitioners waited too long to file their Petition is meritless. During 2014, Petitioners were specifically authorized by the Regional Board, in accordance with newly-adopted procedures, to participate in administrative proceedings designed to address the exact issues now being raised in this lawsuit. The lawsuit is timely and the Regional Board is estopped from arguing otherwise.

The Coalition notification and confirmation letters are also subject to production under the Public Records Act because these documents relate to the conduct of the public's business and are "used" by the Regional Board in assuring compliance with on-farm best management practices.

Accordingly, for the reasons discussed more fully below, the Court grants the Petition.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The State Water Resources Control Board ("State Board"), together with the nine Regional Water Quality Control Boards (§13200), are primarily responsible for maintaining beneficial water quality in California. (§13001.) Anyone who discharges waste (i.e., pollution) into State waters must obtain a permit for doing so that contains waste discharge requirements ("WDRs"), unless the permit requirement is "waived" by a regional board. (§§13260, 13263, 13269.) Waivers are limited to five-year increments, must be in the public interest, and must contain a monitoring program to verify effectiveness. (§13269, subd. (a)(1) and (2).)

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Since 2004, the Regional Board has adopted several resolutions establishing, and then continuing in effect, conditional waivers for agricultural lands in the Central Coast Region.[2] A "conditional waiver" is subject to revocation by either the State or Regional Board for good cause. Eligible participants must "opt in" and agree to comply with a Monitoring and Reporting Program ("Monitoring Program"). Instead of doing their own monitoring, dischargers can participate in a "cooperative groundwater monitoring program" in order to lower costs. The Central Coast Groundwater Coalition ("Coalition"), the real-party-in-interest, is one such cooperative.

On September 24, 2013, the State Board issued an order that, for the first time, required participants in the agriculture waiver program to notify the Regional Board and drinking water well users of excess nitrate levels in the regional well-water supplies ("2013 State Board Order"). This new requirement prompted a dialogue among the Coalition, the Regional Board, and certain members of the public, over how best to implement the new requirements. The dialogue surrounded modifications to the Coalition's "Workplan," a written agreement between the Regional Board and Coalition containing details regarding monitoring, reporting, and related requirements designed to ensure compliance with the conditional waiver.

In December 2013, the Executive Officer approved modifications to the Coalition's Workplan by adding and revising certain time frames for: (a) notifying the Regional Board about exceedances of drinking water standards; (b) notifying Coalition members of their obligation to alert landowners and well users of exceedances (i.e., high pollution levels); (c) providing copies of notification letters to the Regional Board if requested to do so; and, (d) providing a summary of any follow-up actions undertaken.[3]

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[2] The 2004 resolution, Resolution No. R3-2004-0117, established a Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (2004 Agricultural Order). The 2012 Order, Order No. R3-2012-0011, refined and expanded the 2004 requirements in several respects.

[3] A regional board may delegate many of its powers and duties to its Executive Officer. (§13223, subd. (a).)

Six weeks after approving these changes, the Regional Board directed its staff to revise the Coalition's brand-new Workplan to bring it into alignment with the notification and exceedance reporting process for individual farms. Year-long negotiations then ensued over how this could best be accomplished.

In June 2014, in the midst of these negotiations, the Regional Board notified the public that, pursuant to the 2013 State Board Order, "interested parties" could seek discretionary review of the Executive Officer's approval of the Coalition's Workplan. "Interested parties" had 30 days from the date of the notice to seek discretionary review.

On July 3, 2014, accepting the invitation, CRLA requested discretionary review of the notification process for agricultural wells containing excessive nitrates.

On December 8, 2014, the Regional Board's Executive Officer approved a revised Drinking Water Notification process in the Workplan requiring the Coalition to: (a) provide a "relational key" so that the Regional Board could identify specific well locations; (b) submit reports identifying any drinking water wells containing excessive nitrates; (c) provide written notification to users of wells that exceed safe drinking water nitrate standards; and, (d) bring copies of all notification letters to quarterly meetings for inspection by Regional Board staff.

On December 11, 2014, CRLA submitted a California Public Records Act ("PRA") request for the discharger notification and confirmation letters sent and received by the Coalition.

On December 18, 2014, the Regional Board denied CRLA's request for discretionary review on the basis that the procedures adopted on December 8, 2014, would bring the Coalition's notification process in line with the notification process required for individual farmers.

On December 19, 2014, responding to the Public Records Act request, the Regional Board denied that it possessed discharger notification and confirmation letters but it confirmed that these documents were available to the Regional Board if it requested them from the Coalition.

On January 7, 2015, Petitioners petitioned the State Board for review of both the Executive Officer's (a) December 8, 2014 approval of the Coalition's revised Drinking Water Notification process; and, (b) December 18, 2014 denial of the CRLA's petition for discretionary review.

On April 8, 2015, the State Board having taken no action, the petition was denied by operation of law. (23 CCR §2050.5, subd. (e).)

On April 22, 2015, ELF joined CRLA in reiterating its request for the discharger notification and confirmation letters issued and received by the Coalition. That same day, CRLA and ELF sent a PRA request to the Coalition seeking the same notification and confirmation letters.

On April 27, 2015, the Coalition refused the PRA request on the basis that it had no legal obligation to respond.

On May 1, 2015, the Regional Board responded to both CRLA and ELF, stating that: (1) the letter superseded an April 30, 2015 response from the Regional Board; (2) it understood the CRLA and ELF were "re-requesting" the documents; (3) it did not have control or ownership over the Coalitions records; and, (4) a further response would be forthcoming.

On May 7, 2015, the Regional Board sent its further response containing a lengthier discussion of the reasons for its denial. (Kane Declaration, ¶7 and Exhibit 5.) That same day, the Regional Board asked the Coalition to provide the requested documents directly to ELF.

On May 8, 2015, Petitioners filed this litigation seeking a declaration of their rights to the monitoring results under the Water Code, as well as production of the discharger notification and confirmation letters under the Public Records Act.

III. DISCUSSION

A. Exhaustion of Administrative Remedies

The Regional Board and the Coalition argue that Petitioners cannot obtain a ruling on the merits of their Petition because they did not exhaust their administrative remedies and the

Petition is untimely. Had Petitioners sought to contest the terms of the monitoring and notification process, so the argument goes, they should have petitioned the State Board to review the Coalition's Workplan within 30 days of its approval by the Regional Board Executive Officer on December 17, 2013. (§13320.)

The exhaustion doctrine is designed to let administrative agencies wrestle with an issue until a final decision has been reached. (*Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 391.) "[W]hether exhaustion of administrative remedies has occurred depends upon the procedures applicable to the public agency in question." (See, e.g., *Citizens for Open Gov't. v. City of Lodi* (2006) 144 Cal.App.4th 865, 876.) There are three independent but equally compelling reasons why the exhaustion requirement has been satisfied in this case.

First, how to treat the Coalition's notification and confirmation letters was a controversial topic that was not resolved in December 2013. During the next year, Regional Board staff pressed for the submission of those letters so that it could ensure compliance with the agricultural waiver. (AR 156:022518-022519.)

On January 30, 2014, at the instigation of its staff, the Regional Board re-initiated its review of the Coalition's drinking water notification procedures in order to bring them into line with the public reporting process that existed for individual farmers. (AR 69:012771; 96:014332).

It was not until December 8, 2014, that the Regional Board reached a final decision as to how the Coalition needed to treat the notification and confirmation letters. Only then did Petitioners need to exhaust their administrative remedies. (*Farmers Ins. Exch.*, 2 Cal.4th at 391.)

Second, the September 2013 State Board order set up a new administrative review procedure. Section A.6 of Part 2 of the Monitoring Program was modified to allow "an interested person" to *first apply* to the Regional Board for discretionary review of the

Executive Officer's approval or denial of any cooperative groundwater monitoring program. (AR 41:001518 [emphasis added].)[4]

In June 2014, the Regional Board invited review of the Executive Officer's December 2013 order under Section A.6 of Part 2 of the Monitoring Program. CRLA requested discretionary review. (AR 117:014882; AR 134:015097.) The Regional Board *accepted* discretionary review and considered it as a parallel agenda item with its own review of the reporting procedures during the remainder of 2014.

The two items were placed on the agenda together because CRLA and the Regional Board were seeking the same thing: to bring the Coalition's "notification process into alignment with the individual monitoring program." (AR 134:015098; 140:015175; 174:022756 ["[I]t is appropriate for staff to also respond to the CRLA's request for discretionary review of the [Coalition's] drinking water notification process as part of this Board item" (i.e., staff's evaluation of the Coalition's October 2014 proposal)].)

The Regional Board did not deny CRLA's request for discretionary review until December 18, 2014, concluding that the CRLA's concerns had been addressed by adoption of the Coalition's October 2014 proposal. (AR 187: 022972-022973.)

Petitioners then petitioned the State Board under section 13320 to review the Regional Board's December 2014 denial of review. (AR 188:022976-023014; §13320.) When the State Board took no action on the petition, it was denied by operation of law on April 8, 2015. (23 CCR §2050.5, subd. (e); AR 190:023504.)

This lawsuit was timely filed 30 days after the State Water Board's denial of review. Requiring Petitioners to have pursued a piecemeal review of the Coalition's notification process, once in December 2013 and again in December 2014, would be inefficient and wasteful. (*Farmers Ins. Exch.*, 2 Cal.4th at 391.)

Third, having affirmatively authorized Petitioners' participation in its 2014 administrative review of the Coalition's notification process, the Regional Board cannot now

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[4] Section 13320 of the Water Quality Act ordinarily requires petitioning the State Board to review any action by the Regional Board, or its Executive Officer.

contend that Petitioners should have challenged its decision before the review process was completed. The estoppel doctrine has been applied in analogous situations and it prohibits the Regional Board from making such an argument. (See, e.g., *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 486-487 [County equitably estopped from asserting need for administrative exhaustion in retaliation lawsuit]; *J. H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 991-993 [Franchise Tax Board estopped from asserting administrative exhaustion after misleading Taxpayer]; *Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1496-1497.)

Petitioners took advantage of the September 2013 discretionary review procedures explicitly set forth by the State Board in section A.6 of Part 2 of the Monitoring Program. Their request to participate in the 2014 administrative proceedings to bring the Coalition's notification process into alignment with the individual monitoring program, the exact issue raised in this lawsuit, was endorsed by the Regional Board.

By petitioning the State Board for review of the two pertinent Regional Board orders (i.e., the December 8, 2014 approval of the Coalition's revised Drinking Water Notification process, and the December 18, 2014 denial of CRLA's petition for discretionary review), Petitioners sufficiently exhausted their administrative remedies. (*Farmers Ins. Exch.*, 2 Cal.4th at 391.) The Regional Board is estopped from arguing otherwise. (*Shuer,* 117 Cal.App.4th at 486-487; *J. H. McKnight Ranch, Inc.,* 110 Cal.App.4th at 991-993; *Farahani,* 175 Cal.App.4th at 1496-1497.)

B. Public Availability of "Monitoring Results" Under Section 13269

The parties dispute whether the notification letters sent to dischargers by the Coalition (informing them that their water wells contain excessive nitrates), and from dischargers to well users, and the confirmation letters from the dischargers back to the Coalition (confirming they have informed well users of the exceedance), are "monitoring results" that must be made available to the public under section 13269.

The Regional Board and Coalition argue that the Regional Board did not interpret "monitoring results" to include these items and that the Regional Board's interpretation is

entitled to deference. They claim the definition of "monitoring results" is highly technical and entwined with policy issues and that Petitioners' interpretation is in conflict with the plain understanding of the phrase.

Petitioners counter that the notification letters and confirmations are a consequence and outcome of the monitoring and reporting program, that a plain reading of the statute supports a broad interpretation of the phrase "monitoring results," and that the Regional Board's interpretation is cramped and at odds with the statute.

Statutory construction is a question of law on which a court exercises independent judgment. (*Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District* (2015) 235 Cal.App.4th 957, 963.) "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent – the 'weight' it should be given – is [] fundamentally situational." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

> ... greater weight may be appropriate when an agency has a "comparative interpretive advantage over the courts," as when "the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." [Citation.] "Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility." [Citation.] (*Friends of Oceano Dunes,* 235 Cal.App.4th at 963, quoting *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415–416.)

When construing a statute, courts "first examine the statutory language, giving it a plain and commonsense meaning." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Courts do not examine the language "in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. ... If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]" (*Ibid.*)

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As in *Friends of Oceano Dunes*, the issues of statutory construction in this case are not highly technical, scientific, obscure, or complex. (*Friends of Oceano Dunes, Inc.*, 235 Cal.App.4th at 963.) The term "monitoring requirements" and "monitoring results" are discussed in the waiver provision of the Water Quality Act, section 13269, subd. (a)(2):

> ... The conditions of the waiver shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring . . . **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.** In establishing monitoring requirements, the regional board may consider the volume, duration, frequency, and constituents discharge; the extent and type of existing monitoring activities, including, but not limited to, existing watershed-based, compliance, and effectiveness monitoring efforts; the size of the project area; and other relevant factors. **Monitoring results shall be made available to the public.** ([emphasis added].)

Attachment A of the 2012 Agricultural Order broadly defines "monitoring" as:

> Sampling and analysis of receiving water quality conditions ... **Monitoring includes** but is not limited to: **surface water or groundwater sampling, on-farm water quality monitoring undertaken in connection with agricultural activities** ... and **effectiveness monitoring, maintenance of on-site records** and management practice reporting. (AR 63:012671 [emphasis added].)

The term "monitoring" is defined in Webster's Online Dictionary as "to watch, observe, listen to, or check (something) for a special purpose over a period of time." Webster's New World Dictionary defines a "result" as "anything that comes about as a consequence or outcome of some action, process, etc." (5th College edition, 2014, at 1239.)

The letters informing dischargers that their well water exceeds maximum contaminant levels for nitrates come about as a consequence of "observing" and "checking" their well water over time. These letters provide "sampling and analysis" results of "groundwater sampling" regarding "on-farm water quality monitoring undertaken in connection with agricultural activities" and they help verify "the adequacy and effectiveness of the waiver's conditions."

The confirmation letters from the dischargers back to the Coalition also "come about as a consequence" of "observing" and "checking" their well water over time, and they are "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 same is true of the notification letters from dischargers to well users informing them of the exceedance.

The policies of the Water Quality Act and the governing waiver orders support a broad interpretation of the phrase "monitoring results." One of the "highest priorities" of the 2012 Agricultural Order is "[p]rotecting public health and ensuring safe drinking water." (AR 6:000135.) Both the State Board and Regional Board have repeatedly acknowledged that that the serious pollution of central coast groundwater supplies "presents a significant threat to human health as pollution gets substantially worse each year, and the actual numbers of polluted wells and people affected are unknown." (AR 6:000135.)[5]

In issuing the 2012 Agricultural Order, the Regional Board reported that:

> Since the issuance of the 2004 Agricultural Order, the Central Coast Water Board has compiled additional and substantial empirical data demonstrating that water quality conditions in agricultural areas of the region continue to be severely impaired or polluted by waste discharges from irrigated agricultural operations and activities that impair beneficial uses, including drinking water.... The most serious water quality degradation is caused by fertilizer and pesticide use, which results in runoff of chemicals from agricultural fields into surface waters and percolation into groundwater. ...
>
> Nitrate pollution of drinking water supplies is a critical problem throughout the Central Coast Region. Studies indicate that fertilizer from irrigated agriculture is the largest primary source of nitrate pollution in drinking water wells and that significant loading of nitrate continues as a result of agricultural fertilizer practices. (AR 6:000134.)

In issuing the 2013 State Board Order, the State Board recognized "the potential severity and urgency of the health issues associated with drinking groundwater with high concentrations of nitrates...." (AR 41:001517-001518). That is an important reason why the

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[5] See also AR 6:000134-000135, fns. 1-7.

State Board strengthened section A.7 of Part 2 of the Monitoring and Reporting Program as follows:

> If a discharger conducting individual groundwater monitoring or a third party conducting cooperative groundwater monitoring determines that water in any well that is used or may be used for drinking water exceeds or is projected to exceed [the MCL for nitrate], the discharger or third party must provide notice to the Central Coast Water Board within 24 hours of learning of the exceedance or projected exceedance. For wells on a Discharger's farm/ranch, the Central Coast Water Board will require that the Discharger notify the users promptly. (AR 41:001519.)[6]

Critical to the effectiveness of groundwater monitoring programs in general, and the Central Coast agricultural program in particular, is *transparency*, a strong public policy of public disclosure expressed in the Water Quality Act and acknowledged by the State Board. (See, e.g., §13269, subd. (a)(2) ('[m]onitoring requirements [must be designed to verify] the adequacy and effectiveness of the waiver's conditions [and that] [m]onitoring results shall be made available to the public.')) Public accountability of administrative agencies is an important tenet of American jurisprudence. (See *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329 ["Openess in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions.' [Citation.]" (addressing PRA request)].)

The State Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program ("NPS Policy") (§13369; AR 3:000062) emphasizes that monitoring programs must include "sufficient feedback mechanism so that the [Regional Board], dischargers, and *the public* can determine whether the program is achieving its stated

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[6] The State Water Board expected the Regional Board to "reevaluate any previously approved cooperative groundwater monitoring programs to ensure that they are consistent with this Order." (AR 41:001517, fn. 82.) The Regional Board subsequently modified the 2012 Agricultural Order and related Monitoring Program as directed. (AR 63:012583; 118:14885; 119:014904; 125:014956.)

purpose(s), or whether additional or different [management practices] or other actions are required." (AR 3:000076 [emphasis added].)

While acknowledging that monitoring groups such as the Coalition provide valuable expertise, technical assistance and training to growers, thereby saving precious staff resources (AR 41:001498), the State Board's 2013 Order went on to emphasize "the need to be wary of third party programs that report compliance at too high a level of generality." (AR 41:001498-001499.) In the face of efforts by the regulated community to obfuscate groundwater monitoring data, the State Board's 2013 Order recognizes that monitoring programs "may be equally concerning to interested persons" "because a proposed project may not be sufficiently protective of water quality or a third party monitoring program may be designed to obscure accountability" (AR 41:001498); and "[b]ecause the data to be generated through groundwater monitoring is of significant public interest and value ...." (AR 41:001517.)

It must be plainly stated that the monitoring and reporting data of *individual farms* participating in the agricultural waiver are readily available to the public. Members of the public need only ask, and the monitoring results are provided by the Regional Board as a matter of course.

The Coalition monitoring program, on the other hand, essentially buries the monitoring results by necessitating "manipulation" of three different documents: (1) an Exceedance Report, which identifies dischargers by "Field Point Name";[7] (2) the Coalition's membership list, which identifies members' contact information and includes each member's ranch-specific "Global ID";[8] and (3) a relational key, which links the Field Point Name of all wells monitored under the Coalition's Workplan with the members' ranch-specific Global ID. (AR 155:022515; see also AR 185:022957 [Relational Key].)

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[7] "Field Point Name" is a well identifier used on GeoTracker. (AR 155:022515.) GeoTracker is the State Water Board's online data management system for sites that impact groundwater or have the potential to impact groundwater.

[8] The Exceedance Report also included a Global ID but that ID was "a Coalition ID (AGL100000001) as opposed to the ranch specific Global ID ...." (AR 156:022517, fn. 2.)

All along, "one of the central tenants of [the Coalition's] program includes not providing individual member information that specifically ties domestic well exceedances with individual growers, companies, or landowners in a manner that would then be public." (AR 120:014937.) Its approach is specifically designed to "protect well location and grower identity," because a member of the public "would need to request all three documents and manipulate the data in order to match up a nitrate value with an individual's name." (AR 155:022514; 155:022515.)

The justification for such legerdemain rests upon the privacy rights of farmers, as well as the potential threat of terrorism to individual drinking water wells. Yet neither the Regional Board nor the Coalition has provided this Court any authority endorsing the privacy rights of dischargers as a counterweight to the public's interest in obtaining monitoring results. (Coalition Opp., pp. 6 and 21-23.) Regional Board staff accurately assessed the situation: "This is a sensitive issue for growers, [but] the real public health risk component of this issue outweighs the desire for privacy." (AR 96:014332.) Nor has either party provided evidence of a realistic threat of terrorism directed toward (already polluted) individual drinking water wells on the Central Coast of California.

The Regional Board and Coalition strenuously contend that "[t]he Workplans as approved by the Executive Officer contain sufficient mechanisms to ensure that the Regional Board is informed that notification letters were sent by the Coalition and farmers, has sufficient means to verify that such representations are true, and all the enforcement tools necessary to deter and punish for noncompliance." (Resp. Opp., pp. 17-18.)

Whatever may be the efficacy of the Workplan mechanisms vis-à-vis the Regional Board, the *public* is entitled to know whether the Regional Board is doing enough in the way of on-farm best management practices to protect the public's water supplies. Given the heavily polluted condition of Central Coast groundwater supplies, it is debatable whether the Regional Board is doing an adequate job of achieving the important goals of the Water Quality Act.

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Reasonably construed, both the notification and confirmation letters constitute "monitoring results" that must be made available to the public under section 13269. They are a direct consequence of monitoring well-water pollution levels over time. They verify whether the best management practices of farmers are effective in reducing groundwater pollution and they are designed to support the development and implementation of the waiver program.

The Coalition's Drinking Water Notification process, as modified by the Regional Board in December 2014, does not meet the requirements of law and is therefore arbitrary and capricious.

C. Petitioners' Public Records Act Request[9]

Aside from claiming that the discharger notification or confirmation letters are "monitoring results" that must be made available under the Water Quality Act, Petitioner ELF alternatively requests their production under the Public Records Act because these documents relate to the conduct of the public's business and are "used" by the Regional Board in assuring compliance with on-farm best management practices.

Between December 11, 2014 and May 7, 2015, the Regional Board, CRLA, and ELF engaged in back-and-forth correspondence regarding their legal positions. The Regional Board eventually declined to produce the notification or confirmation letters because it claimed not to have control or ownership of them. Instead, it asked the Coalition to produce the documents directly to ELF, which the Coalition declined to do.

The Regional Board and Coalition urge that ELF lacks standing to challenge the adequacy of the Regional Board's PRA responses because neither ELF nor Petitioner Zamora was the author of the December 11, 2014 PRA request. (Resp. Opp., pp. 25-26.) ELF responds that its latter joinder in the original request is sufficient for standing purposes. (Reply, pp. 18-20.)

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[9] Petitioner Zamora did not participate at all in the requests for documents under the Public Records Act. She is therefore not entitled to relief under this cause of action.

Whether considered a new request or a joinder in an existing request, ELF's April 22, 2015 letter was a specific demand on behalf of one of the Petitioners that the Regional Board produce the discharger notification and confirmation letters sent and received by the Coalition. (Kane Declaration, ¶¶ 2, 4, 5-6, and 8, Exh. 1, Attachment A, Attachment B, Exh. 3, Exh. 4 and Exh. 6 [showing history of correspondence].)

The Regional Board's May 1, 2015 response, both to ELF and CRLA, did not express any confusion as to who was making the request. (*Id.*) It acknowledged that those two entities were requesting information pursuant to the PRA and it recognized that the new letter constituted a follow-up to the previous PRA request. (*Id.*) The Regional Board also stated that it understood the new request was a "re-request" of the same documents. (*Id.*)

ELF's name appears on more than one of the PRA requests, and ELF engaged in negotiations with both the Regional Board and Coalition prior to filing suit. While it is true that a request under the PRA must be personally made by the individual or group that subsequently seeks judicial review (*McDonnell v. U.S.* (3d Cir. 1993) 4 F.3d 1227, 1236–37), such requirement is satisfied here. ELF plainly has standing to file suit under the PRA. (*McDonnell v. U.S.*, 4 F.3d 1227 at 1238 [individual who pursues administrative appeals and exhausts remedies has standing for purposes of the federal Freedom of Information Act ("FOIA")].)[10] To rule otherwise would promote form over substance.

Interpretation of the Public Records Act is a question of law that rests with the court. (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 397 ("*Regents*").) Each word and phrase in the statute should be given meaning. (*Id.*) The California Constitution provides that the PRA be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. Const., Art. I, §3.)

The critical issue facing the Court under the Public Records Act is whether the notification and confirmation letters maintained by the Coalition must nevertheless be

[10] Courts may look to federal case law interpreting the FOIA to interpret the PRA because the latter was modeled on the FOIA. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.)

produced as public records either due to their status under the Water Quality Act and/or their treatment or use by the Regional Board.

The most closely analogous case is *Regents*, *supra*, wherein the Court of Appeal was asked to decide whether certain documents held by a venture capital fund in which the Regents had invested millions of dollars were public records. The court started from the premise that, to satisfy the definition of public record, a document must: (1) relate to the conduct of the public's business; and (2) "be prepared, owned, used or retained" by a public agency. (222 Cal.App.4th at 400.)

While conceding the first prong, i.e., that the requested documents relate to the conduct of the public's business, the Regional Board and Coalition contend that, since the discharger notification and confirmation letters are maintained by the Coalition and are not in the Regional Board's actual possession, they do not satisfy the second prong of the test.

The Court of Appeal in *Regents* had the following to say about the second prong of the test:

> To qualify as an "agency record" subject to FOIA disclosure rules, "an agency must 'either create or obtain' the requested materials...," and "the agency must be in control of [them] at the time the FOIA request is made." The fact that an agency has access to data produced by its grantee does not mean that production of the data is required under the FOIA. Similarly to the FOIA, no language in the CPRA creates an obligation to create or obtain a particular record when the document is not prepared, owned, used, or retained by the public agency. (222 Cal.App.4th at 400)

The Regional Board and Coalition point out that notification and confirmation letters are not "prepared" or "owned" by the Regional Board, and that the agency has not "retained" any of them. Nor has the Regional Board "used" such documents except on occasions when it conducts an audit.

While recognizing that discharger notification and confirmation letters are not "prepared" or "owned" by the Regional Board, ELF focuses on the argument that these documents are in the "constructive possession" of the Regional Board as discussed in

Consolidated Irr. Dist. v. Superior Court (2012) 205 Cal.App.4th 697, which involved a dispute under the California Environmental Quality Act ("CEQA") over the definition of documents that should be "included in the ... public agency's files on the project" (Public Resources Code §21167.6, subd. (e)(10).)

Because the terms of a written contract stated that the agency "owned" all the consultants' work product, the court in *Consolidated Irr. Dist.* concluded that all of the consultants' documents were therefore "constructively possessed" by the agency and needed to be included in the administrative record.

For several reasons, ELF's reliance upon the decision in *Consolidated Irr. Dist.* is misplaced. First, the *Consolidated Irrigation District* court was directly addressing an issue under CEQA, rather than the PRA. Second, the court never analyzed the PRA's use of the words "prepared, owned, used, or retained." Third, the *Regents* court limited the importance of *Consolidated Irrigation District* and seriously questioned its rationale. (222 Cal.App.4th at 401 and fn. 15.)

At oral argument, counsel for the Regional Board conceded that the agency had indeed reviewed all of the then-existing Coalition notification and confirmation letters during compliance meetings with the Coalition on February 10, 2015, and March 18, 2015. (August 3, 2016 Transcript at pp. 19-20.)[11] While it is urged that merely reviewing these letters does not equate with "using" them, it is unclear to the Court what other use *could be made* of such documents other than reviewing them during an audit or compliance meeting.

To review a notification or confirmation letter is to "use" it, particularly when the point of reviewing it is to confirm compliance with the law. Since these documents have been

[11] Counsel for the Regional Board claimed that his concession in response to the Court's questions was inadmissible hearsay and that Petitioners had not met their burden of establishing a "prima facie" case. As an officer of the court, Regional Board's counsel has a duty of candor (Bus. & Prof. Code, § 6068(e).) Public agencies have an affirmative duty to assist members of the public in making an effective PRA request (Gov't. Code, § 6253.1). The burden of proof rests on the agency, "the only party able to explain" why materials sought are not agency records or have been properly withheld. (222 Cal. App.4th at 398, fn. 10, quoting *United States Dept. of Justice v. Tax Analysts* (1989) 492 U.S. 136, 142, fn. 3.)

"used" by the Regional Board, they must be considered subject to production under the Public Records Act.

Based upon the pertinent legal authorities, ELF is entitled to any discharger notification and confirmation letters that were reviewed, i.e., "used," or retained by the Regional Board on or before April 22, 2015 (the date of the amended PRA request by CRLA and ELF). Unlike discovery in a civil case, there is no ongoing or "rolling" duty to produce such records. (*United States Dept. of Justice v. Tax Analysts* (1989) 492 U.S. 136, 144–145 [agency need only produce documents as of the date a FOIA request is made].) Similarly to the FOIA, no language in the CPRA creates an obligation to create or obtain a particular record when the document is not prepared, owned, used, or retained by the public agency." (*Regents,* 222 Cal.App.4th at 400 [emphasis added].)

IV. CONCLUSION

The Petition for a peremptory writ of mandate is GRANTED. Accordingly, a writ of mandate will be issued declaring that any discharger notification and confirmation letters reviewed by the Regional Board on or before April 22, 2015, are public records, and directing the Regional Board to: 1) set aside its December 8, 2014 approval of the Coalition's revised Drinking Water Notification process; 2) set aside its December 18, 2014 denial of CRLA's petition for discretionary review; 3) take such action as to bring the Coalition's Drinking Water Notification process into compliance with section 13269 of the Water Quality Act; 4) produce all discharger notification and confirmation letters that were reviewed, i.e., "used," or retained by the Regional Board on or before April 22, 2015; and, 5) undertake any further proceedings in a manner consistent with this Ruling and Order.

The Court encourages the parties to reach agreement on the form of the Writ of Mandate and Judgment and to submit them for signature as soon as possible.

If agreement cannot be reached on or before November 14, 2016, counsel for Petitioners shall file and serve the proposed Writ of Mandate and Proposed Judgment. Any objections (as to form only) shall be filed and served on or before November 28, 2016. If

disagreements remain, they will be considered at a Case Management Conference on December 5, 2016, at 2:00 p.m. No other pleadings are authorized.

IT IS SO ORDERED.

Dated: October 28, 2016

CHARLES S. CRANDALL
Judge of the Superior Court