

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

SUPPLEMENTAL SHEET FOR REGULAR MEETING OF NOVEMBER 13-14, 2014

Prepared on November 10, 2014

ITEM NUMBER: 15

SUBJECT: Irrigated Lands Regulatory Program: Water Board Review of Central Coast Groundwater Coalition's Drinking Water Notification Process

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KEY INFORMATION: Comments

COMMENTS

Staff received comment letters related to this staff report. See Attachments.

Attachment 1: Letter dated November 7, 2014 from Pearl Kan, Attorney, and Kenia Acevedo, Attorney, California Rural Legal Assistance, Inc.



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November 7, 2014

Via electronic mail; return receipt requested

Mr. Ken Harris
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

Re: Agenda Item 15 – November 2014: Review of CCGC’s Drinking Water Notification Process

Dear Mr. Harris:

We appreciate the Regional Board staff’s attention to CRLA’s request for discretionary review regarding alignment of CCGC’s notification process with the individual grower’s notification process.

In the staff report staff explains that unlike the individual monitoring program, CCGC’s coalition monitoring program is:

- (1) not obligated to provide a copy of exceedances to the local health department;
- (2) not obligated to submit a copy of the notification letter that CCGC sends to its members to the Regional Board.

These are two critical pieces of information necessary to directly verify that all regulated parties are performing their requirements under the Ag Order. It is critical that local health offices are notified about drinking water exceedances. Staff itself notes that “[i]n discussions with several county staff, Water Board staff understands that county staff finds this documentation useful and timely and have encouraged the Water Board staff to continue this practice.” (Staff Report Agenda Item No. 15 Nov 13 – 14, 2014) And yet, under the current coalition program, CCGC is not required to copy local health agency regarding drinking water exceedances.

We request the Regional Board to bring the CCGC’s monitoring program directly into alignment with the individual monitoring program by (1) requiring the CCGC to provide copies of drinking water notification letters to the Board and; (2) copying nitrate exceedances to the local health department.

I. Delegating Away Regulatory Power to Private Interests Without Public Accountability is Not Good Governance

The Central Coast Water Board’s Conditioned Work Plan Approval letter to the Coalition, dated December 17, 2013 states the following:



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“The Coalition must [...] provide copies of the individual notification letters sent to Coalition members informing them of the exceedance of the drinking water standards, upon request of the Central Coast Water Board.”

CCGC’s October 9, 2014 letter to the Executive Officer states:

“We believe our offer to provide an off-site audit of [the drinking water notification documents] at Central Coast Water Board’s request . . . will negate the Central Coast Water Board’s need for these letters.”

From December of last year to the present, the Regional Board has gone from articulating the staff’s power to affirmatively obtain copies of drinking water notification letters from CCGC upon request; to actually requesting copies of drinking water notification letters; but now that the regulated party does not want to provide copies upon request, the Regional Board has conceded that it would be entirely satisfactory if the staff could simply audit the notification letters in the CCGC’s offices under extraordinary circumstances. This is simply not good policy and not good governance.

Obtaining copies of drinking water notifications sent by the CCGC to its members is the most straightforward and transparent manner to verify that the monitoring program conducted by the CCGC is occurring according to the workplan. Instead of moving forward with the most sensible and efficient manner of doing business, the Regional Board now has the option of creating a separate monitoring system for a private third party group that is *less* transparent than the individual monitoring program.

What we are dealing with here is a public health threat. Hundreds if not thousands of water users in the Salinas Valley alone may be at critical risk of consuming contaminated water. The Regional Board’s willingness to sacrifice its ability to ascertain with all due speed whether a water user might be drinking contaminated water or not in order to satisfy a private third party’s unsubstantiated privacy concerns is alarming.

II. It is Unlawful for a Third Party to Control the Disclosure of Information that Would Otherwise be Available to the Public

“A state or local agency may not allow another party to control the disclosure of information that would otherwise be available to the public.” Cal. Gov. Code 6253.3.

A reading of the Staff Reports and related CCGC material posted for the July and November Board Meetings reveals that the CCGC is effectively dictating what information the Regional Water Board should require and on what terms, in an effort to control what information becomes publically available.



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The CCGC believed that providing the information using the proposed approach “allows for a certain level of protection to alleviate security and privacy concerns expressed by CCGC members.” (Oct. 9, 2014 CCGC letter). The proposal itself is couched in such terms:

“Our members concerns are specifically related to personal privacy and biosecurity issues as well as protection for individuals that work and/or live at member’s facilities. The CCGC proposes that this approach be used in lieu of submitting all exceedance notification letters to Central Coast Water Board.”

There are already procedures in place to protect legitimate privacy interests and biosecurity, including Public Records Act exemptions. The words of the State Water Board Oder 2013-0101 synthesizes the issue perfectly in an analogous, far more sensitive situation:

We must strike a balance between the need of the Central Coast Water Board to obtain information for compliance determination and the need of the public for transparency on the one hand, and the need of the agricultural community to innovate and compete on the other hand. *Given the significant water quality problems facing the Central Coast region due to agricultural discharges, we decline to strike that balance in a manner more protective of business information than that established by the Legislature in the Water Code and the Public Records Act.* The Central Coast Water Board has established an appropriate process in the Agricultural Order in Provision 65 for identifying information that is asserted to be exempt from disclosure. (emphasis added, p. 28)

The State Board itself has declined to strike a balance in a manner more protective of information than that which is established by Legislature in the Water Code and the Public Records Act. The Regional Board should not authorize measures that would compromise the public’s ability to access and understand the significant water quality problems facing the Central Coast region. For those dischargers who have a tangible and substantive privacy concern, the burden lies on that discharger to raise a claim of exemption for release of information that would otherwise be public.

Further, because Regional Board is delegating a task to the CCGC that would otherwise be performed by the Regional Board staff itself, the CCGC is essentially performing a public function. The Regional Board must be able to adequately verify the CCGC’s monitoring program by going to the source of the evidence directly, copies of the notification letter. Again, because the Regional Board is delegating essentially a public function to a private third party, the Board needs to ensure that they are accountable to the public. Aiding a private third party to control what would otherwise be public documents is against the spirit of the law and against the spirit of the Ag Order.

Further, hundreds of growers in the Individual Monitoring program already submit notifications letters. The disclosure of growers’ identity and the identity of users receiving the notices has not resulted in any catastrophe. In fact, the Individual Monitoring program is running smoothly, with no need for the agency to waste valuable staff time, energy and taxpayer dollars to assure compliance with a basic requirement.



III. Coalition Monitoring and Reporting is Not Functionally Equivalent to Individual Monitoring and Reporting Program

As made clear in the staff report and the Oct. 9 CCGC letter, the Coalition's Proposal merely associates domestic wells with landowners/operators. That is not sufficient to "verify that proper drinking water notification has occurred in compliance to the Agricultural Order." Proper notification, according to the SWB Order, occurs when (1) discharger[s] notify the users within 10 days and (2) specific "minimum information" outlined in the State Board Order is included in the notification.

With such a widespread public health threat at issue, claims that notifications took place cannot substitute for concrete evidence that users have been notified that their water is contaminated. As with the Individual Monitoring Program, both the Regional Water Board and the Department of Health should verify and substantiate concrete evidence as soon as information becomes available.

CCGC's proposed auditing system that would allow the Regional Board to look through their records "under certain circumstances" inverts the relationship between regulator and regulated party. Why would the Regional Board allow for a situation where the Board is disempowering its own staff from properly regulating dischargers? CCGC, as a private third party, should not be allowed to control information -- notification letters -- that would otherwise be public. Now that the drinking water program has been transferred to the water boards, the Regional Board has all the more duty and obligation to control and verify information that would allow the Regional Board to both discern where drinking water problems lie and to make decisions about further actions.

An agency responsible for the protection of people's drinking water cannot allow a private regulated third party to dictate what is accessible to the public or not. Allowing what would otherwise be public records to be housed in private hands is not only inadequate under the State Water Board's Order requirement for notifications, but also a gross disregard for the health and well being of residents who may be consuming contaminated water.

IV. Conclusion

The Regional Board has equal duty to both carry out the requirements of the Ag Order to its fullest extent and to be accountable to the public. There is no need or compelling reason to accommodate time consuming and special requests from private third party groups. Board members and staff regularly speak to the severity and urgency of the health issues associated with nitrate contamination and their commitment to help disadvantaged communities. And yet, the actions of the Regional Board do not reflect this asserted commitment. The Board should not permit a third party private monitoring group to control what information is available to the Regional Board itself and neither should the Board permit the coalition to control what would otherwise be public records.



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We respectfully request that the Regional Board require (1) CCGC to provide all notification letters to the Water Board; (2) copy the local health department regarding notification letters documenting nitrate exceedance; and finally (3) abide by the other provisions outlined in the March 21, 2014 letter from the Executive Officer to the CCGC.

Very truly yours,

/s/ Pearl Kan
Attorney
California Rural Legal Assistance, Inc.

/s/ Kenia Acevedo
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cc:

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