



To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.

August 23, 2005

Kenneth Landau
Assistant Executive Officer
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Re: *Deltakeeper, et al. v. California Regional Water Quality Control Board, et al.*
Case No. 04CS00235
Proposed Resolution to Amend the Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands within the Central Valley Region

Dear Mr. Landau:

Northern California Water Association ("NCWA") submits the following comments on the above-referenced matter, which is scheduled for consideration by the Regional Water Quality Control Board ("Regional Board") on September 15 and 16, 2005.

1. Determination of Beneficial Uses

Page 3 of Draft Attachment A2 includes a list of five ways that beneficial uses can apply to waters of the state. Item number four on this list states:

Beneficial uses can be attributed by operation of law. (See, e.g. 33 U.S.C.A. § 1251(a)(2) (FWPCA § 101(a)(2)). The federal CWA requires that "waters of the United States" be protected for the beneficial uses of fishing and swimming.)

This statement requires clarification and appears to overstate the Clean Water Act ("CWA") requirements.

As an initial matter, it is unclear what "attributed" is intended to mean. There is no explanation of the difference between "designated" uses and "attributed" uses. NCWA has not before heard of the term "attributed" uses with respect to the CWA or Porter-Cologne

Water Quality Control Act (Wat. Code, § 13000, et seq.) (“Porter-Cologne”). NCWA requests clarification of the term “attributed.”

Second, the cited example implies that the CWA designates all waters of the United States for fishing and swimming uses. This is not the case. Rather, the CWA provides “it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved...” (33 U.S.C. § 1251(a)(2).) The CWA then delegates to States the role of designating beneficial uses and developing water quality criteria. (33 U.S.C. § 1313.) The CWA does not itself, by operation of law or otherwise, designate beneficial uses for any water bodies.

The federal regulations further clarify this point. The federal regulations provide that “[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.” (40 C.F.R. § 131.2.) The regulations go on to state that “States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). ‘Serve the purposes of the Act’ (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, and agricultural, industrial, and other purposes including navigation.” (*Id.*) In addition, section 131.10 of Title 40 of the Code of Federal Regulations specifically provides “Each State must specify appropriate water uses to be achieved and protected” taking into consideration numerous uses and values of water. (40 C.F.R. § 131.10.)

The regulations do not support the conclusion that fishing and swimming uses are designated for all waters of the United States via the CWA. In fact, the regulations make clear that this is not the case by providing that when the Environmental Protection Agency reviews a state’s proposed water quality standards, “[t]he review involves a determination of ... [w]hether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses...” (40 C.F.R. § 131.5(a)(4).) It is clear, therefore, that it is the State’s responsibility to determine whether fishing and swimming uses should be designated and, if not, to support that determination.

Based on the CWA and federal regulations, it is improper to conclude that the CWA designates all waters of the United States as having beneficial uses of fishing and swimming. NCWA is unaware of any examples of uses being “attributed” or designated by operation of law and, therefore, suggests that item number four be deleted. Alternatively, NCWA requests clarification of the term “attributed” and identification of all instances where the Regional Board believe that uses are “attributed by operation of law.”

2. Constructed Agricultural Drains and Agricultural Dominated Water Bodies

Footnote 1 of Draft Attachment A2 defines constructed agricultural drain as “a water body that conveys drainage from agricultural operations and was constructed in a location where no natural water body (including intermittent swales, etc.) existed prior to the construction activity. Every other water body is a ‘stream’ under the terms of the tributary rule, whether it has been modified for agricultural discharge conveyance, flood control, water supply, or other purposes or not.”

This definition is more restrictive than the common understanding of what constitutes a constructed agricultural drain. In particular, State Board Resolution No. 88-63 uses the following language to describe such water bodies: “systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters” The definition in Resolution No. 88-63, therefore, is not limited to locations where no natural water body ever existed. NCWA does not agree that a drain only meets the definition of constructed agricultural drain if it was constructed in a location where no water ever existed. This narrow definition fails to account for site-specific factors that may warrant a conclusion that a particular drain qualifies as a constructed agricultural drain. For example, there are many constructed agricultural drains throughout the Central Valley that may be located in or across areas where, during heavy rains, some water historically appeared.¹ It is not necessarily the case, however, that those areas would be considered “streams” for purposes of applying the CWA and Porter-Cologne. NCWA recommends that the definition of constructed agricultural drain be deleted and the determination of whether a waterway is a constructed agricultural drain be made on a case-by-case basis taking into consideration the policy set forth in State Board Resolution No. 88-63 and site-specific factors.

While the Regional Board squarely addresses constructed agricultural drains, draft Attachment A2 fails to adequately discuss agricultural dominated water bodies. Agricultural dominated water bodies are unique in that agricultural discharges actually support any beneficial uses in those water bodies. But for the agricultural discharge, there would be insufficient flow to support beneficial uses in agricultural dominated water bodies. The Regional Board has acknowledged that beneficial uses of agricultural dominated water bodies should be further evaluated in light of their unique character. The Regional Board has identified the need to develop a strategy to address agricultural dominated water bodies, including identification of agricultural dominated water bodies and evaluation of appropriate beneficial uses, site-specific objectives, and/or basin-wide objectives. The Regional Board, however, has not aggressively pursued development of this strategy. NCWA suggests that the Regional Board renew its efforts to develop a strategy for agricultural dominated water bodies. Further, because such a strategy would provide critical guidance with respect to application of the Conditional Waivers, NCWA also suggests that the Regional Board

¹ Indeed, in prehistoric times, the entire Central Valley was covered with water.

identify the goal of developing such a strategy in its response to the Court's writ of mandate.

3. Protection of Downstream Uses

The last two sentences on page 4 of Draft Attachment A2 provide, "It must also be noted that the Receiving Water Limitations protect the beneficial uses of all water bodies within the Central Valley Region that ultimately receive the dischargers' waste. Therefore, regardless of the beneficial uses that apply to the water body that directly receives the waste discharge, dischargers must also ensure that their discharges do not impact the beneficial uses of any downstream water bodies." This statement contradicts prior statements in Draft Attachment A2 and should be revised to be consistent with the Conditional Waivers themselves.

In particular, the Conditional Waivers apply to all surface waters of the state, rather than "all water bodies within the Central Valley Region." (See, e.g., Regional Board Resolution No. R5-2003-0105, Att. B at Introductory Paragraph and ¶ A.5.) Similarly, page 2 of Draft Attachment A2 makes clear that the "Conditional Waivers regulate discharges of waste from irrigated lands to all surface 'waters of the state'..." (Draft Attachment A2 at p. 2, emphasis added.) Reference to "all water bodies within the Central Valley Region," therefore, should be removed.

Additionally, the conclusion that discharges may not "impact" downstream beneficial uses is over-broad. In fact, the Clean Water Act and the Water Code require prevention of activities that cause or contribute to violations of water quality objectives, but do not preclude all activities that may "impact" beneficial uses. The term "impact" is too broad and can refer to both positive and negative impacts or to changes that do not result in impairment.

Indeed, the last two sentences of Draft Attachment A2 provide no new information or clarification that does not already appear in the Conditional Waivers themselves, and are not necessary to respond to the Court's remand. NCWA suggests, therefore, that the last two sentences of Draft Attachment A2 be deleted. In the alternative, NCWA suggests that the last two sentences of Draft Attachment A2 be replaced with the following language from the Conditional Waivers:

[The Conditional Waivers] require persons who obtain coverage under the waivers to comply with applicable water quality objectives, protect beneficial uses, and prevent nuisance by implementing monitoring and reporting programs, evaluating the effectiveness of management practices, and where water quality exceeds water quality objectives by identifying and implementing additional management practices to comply with water quality objectives. (Resolution No. R5-2003-0105, ¶ 13.)

Kenneth Landau
August 23, 2005
Page 5

Thank you for the opportunity to provide comments on the proposed revisions to the Conditional Waivers. If you have any questions or would like to discuss these comments further, please feel free to contact me. NCWA looks forward to continuing to work with the Regional Board and other stakeholders to implement a successful waiver program.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Guy". The signature is stylized with a large, looping initial "D" and a long, sweeping underline.

David J. Guy

DJG/jp

cc: Art Baggett
Wendy Cohen
Clif McFarland
Brenda Jahns Southwick
William Thomas
Alison Siegel
Jan Kahn
Kristen Castaños