

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

STAFF REPORT FOR REGULAR MEETING OF MAY 11-12, 2017
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ITEM NUMBER: 15

SUBJECT: Salinas Valley Interim Replacement Drinking Water Agreement

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This Action: Discussion/Informational

SUMMARY

In early April 2017, the State Water Board's Office of Enforcement, the Central Coast Water Board, and the Salinas Basin Agricultural Stewardship Group (Stewardship group) issued an interim replacement water agreement (Agreement, Attachment 1). The Agreement is a framework through which the Stewardship group provides interim replacement drinking water to those reliant on small water systems in the Salinas Valley that currently have unsafe drinking water due to groundwater nitrate pollution. The Agreement contains minimum performance metrics, a maximum term of two years, and grows out of prior individual water system replacement water enforcement actions by the Central Coast Water Board staff. This Agreement provides a significant potential step forward on the interim replacement water portion of the Central Coast Water Board's two-part strategy (replacement water and nitrate-loading reductions) for dealing with nitrate discharges from agriculture while not restricting efforts by the Irrigated Lands Regulatory Program's efforts to reduce excess nitrate loading to groundwater. The Staff Report highlights and provides general description of some of the Agreement's components; the Agreement's full details are found in Attachment 1.

HISTORY

Nitrate in groundwater has created unsafe drinking water for those reliant on a large number of small water systems and domestic wells throughout the Central Coast region, as has been documented in Central Coast Water Board staff reports ([July 2014](#) and [March 2016](#)). In Monterey County alone, approximately 200 small water systems exceed the safe drinking water standard for nitrate and there are significantly greater numbers of domestic wells with similarly unsafe drinking water throughout the region.

Local Individual System Replacement Water Strategy: Since 2013, Central Coast Water Board enforcement staff has engaged with individual small water system owners (i.e., San Lucas [a disadvantaged community], Wildhorse Café, and San Vicente Mutual) and the parties responsible for the nitrate pollution causing the well impairments, to mandate interim and long-term replacement water solutions. At the same time, Central Coast Water Board staff has also

contracted with groups (i.e., Environmental Justice Coalition for Water [EJCW] and Coalition for Urban/Rural Environmental Stewardship [CURES]) to provide interim safe drinking water (generally bottled water) in several communities (i.e., Las Lomas) in Monterey County. As discussed at recent Water Board meetings, progress on individual replacement water cases can be both resource-intensive and slow.

In support of efforts on these individual replacement water cases, Central Coast Water Board staff also retained the State Water Board's Office of Enforcement for assistance. Office of Enforcement has also assisted the Central Valley and Lahontan Regions with a half dozen additional individual replacement water orders relating to nitrate contamination of drinking water.

Crafting a Larger, Collective Replacement Water Strategy: In late 2014, State Water Board Executive Director Tom Howard and Office of Enforcement's Director Cris Carrigan decided a near-term legislative solution was unlikely, despite a recommendation in the 2013 report to the legislature recommending development of a stable, long-term funding mechanism to resolve the nitrate contamination in drinking water problem. In the 2013 report, the State Water Board also noted that Water Code section 13304 authority could also be used to compel the provision of replacement drinking water by responsible parties, albeit in a more limited set of circumstances. At the same time, the State Water Board had recently absorbed the Division of Drinking Water and was considering adopting a resolution in support of the Human Right to Water.

This sequence of events suggested the timing was appropriate to initiate a plan to take on some larger-scale drinking water enforcement actions. Central Coast Water Board and Office of Enforcement staff began working on a concept for a large-scale enforcement order that would require replacement water throughout the Salinas Basin. Executive Director Howard and Cris Carrigan met with then Central Coast Water Board Executive Officer Ken Harris and Board Chair Dr. Wolfe to determine which agency should act as the lead in prosecuting this action. Through collective agreement, the State Water Board took the lead role, and Jonathan Bishop was appointed lead prosecutor. Central Coast Water Board staff, led by Michael Thomas, provided a significant amount of data, analysis and information to Office of Enforcement in support of this effort, and this was augmented with additional research and evidence and formed into a draft Cleanup and Abatement Order (CAO) for replacement water. The Office of Enforcement then communicated the plan for moving forward with this enforcement action to, and received the go-ahead from, CalEPA and the Governor's Office.

Negotiating a Larger Replacement Water Agreement: The draft CAO's directives were to all persons who owned more than 10 acres of land being used for commercial agricultural, representing about 1,600 people in the Salinas groundwater basin; this number was determined to be too many for reasonable or effective negotiation. In December 2015, the Office of Enforcement addressed a confidential settlement communication with the draft CAO attached to the 19 largest owners of land in agricultural production and requested they meet with Office of Enforcement staff to discuss the possibility of "settling our dispute" over responsibility for the nitrate-related groundwater contamination by providing replacement water for the entire Basin, but without admitting liability. The confidential communication also advised that in the event the parties were unable to negotiate a solution, the Office of Enforcement would adjudicate all 1,600 of the landowners' liability in front of the State Water Board, and invited the "Group of 19" to a February 1, 2016 settlement negotiation. The Office of Enforcement also invited representatives from Western Growers Association, Grower-Shippers, Monterey County Farm Bureau and the California Farm Bureau.

Initial negotiations with the smaller group took place February 1 and March 18, 2016 and covered a wide-ranging dialogue before a group of cooperative parties emerged. In May 2016, Office of Enforcement and this select group started working together on an agreement whereby farm owners and operators would pay for and provide replacement water. During the next several months, Office of Enforcement met with representatives of Monterey County, EJCW and Community Water Center to discuss general parameters of the agreement. The Office of Enforcement also periodically updated Central Coast Water Board enforcement staff regarding the general concepts of the proposed agreement during this time. After undertaking considerable efforts to identify impacted persons and systems, and negotiating the potential terms of a cooperative arrangement, the cooperative group of farmers and Office of Enforcement reached agreement on a term sheet in November 2016, and proceeded to formally memorialize the Agreement in January 2017.

Central Coast Water Board's Re-engagement in the Process: In mid-February 2017, Executive Director Tom Howard contacted Central Coast Water Board Executive Officer John Robertson, requesting that either he or Assistant Executive Officer Michael Thomas sign the Agreement. As the draft Agreement was still confidential, Central Coast Water Board staff had not seen nor commented on its contents, Executive Officer Robertson initially declined and instead requested a briefing be provided from Office of Enforcement for Chair Wolff, himself, and included Deputy Chief Counsel Lori Okun on the call. Following the briefing, Executive Officer Robertson reviewed the draft Agreement and communicated with the lead representative (Dennis Sites) for the Stewardship group, requesting several modifications to the Agreement. The Stewardship group, along with the Central Coast Water Board and Office of Enforcement staff concluded changes and finalized the Agreement in late-March 2017.

AGREEMENT CONTENT

Primary Terms of the Agreement: The Agreement provides for a one-year enforcement "standstill" by the State and Central Coast Water Boards for their respective replacement water enforcement authority, in exchange for the provision of replacement water by the participating farmers and land owners at no cost to the impacted persons and/or systems. The farmers and land owners represented by the Stewardship group agreed to provide replacement water to 58 total wells (including three local small systems, 42 state small systems, and 13 private domestic wells, included as Exhibit A of the Agreement) during the standstill. The Agreement also provides that any disadvantaged person whose domestic well tests above the safe drinking water level for nitrate may opt in to the program and be provided replacement water at no cost.

The Stewardship group may elect to extend the enforcement standstill for a second year **if:**

- 1) They provide replacement water to 35 water systems from the list attached to the agreement, as verified by the State or Central Coast Water Boards, or exhaust all reasonable efforts attempting to do so; and
- 2) They submit, obtain approval for, and implement a Replacement Water Plan which would identify and extend replacement water to all impacted persons on domestic wells (i.e., all impacted persons in the groundwater basin), irrespective of socio-economic status. The Replacement Water Plan must include a sampling and analysis plan, an outreach and education plan and an implementation schedule and must be approved by the State and Central Coast Water Board staff.

Under this Agreement, the enforcement standstill suspends the State and Central Coast Water Boards' authority to issue replacement water orders under Water Code section 13304. All other

enforcement authority and discretion by the State and/or Central Coast Water Boards is retained, including authority to issue cleanup and abatement orders, to take enforcement actions pursuant to Ag Order 3.0, and to take enforcement actions under the Central Coast Basin Plan and the Water Code, as these might pertain to excessive loading of nitrate, for example.

Stewardship Group Membership and Who Can Join: The Stewardship group is an LLC with approximately 18 growers and landowners who control the operation of approximately 175,000 of the 225,000 acres of commercial agricultural land overlying the Salinas groundwater basin. Under the Agreement, additional growers and landowners may join the Stewardship Group without prejudice within 45 days of execution of the agreement and obtain all the advantages of the standstill, in exchange for participating in the funding of the replacement water efforts. The Office of Enforcement is supporting Stewardship group's efforts to expand its membership.

Agreement Performance Requirements:

Year one: The Stewardship group must serve replacement water to 35 water systems from the list attached to the agreement in the first year. This includes serving adequate interim replacement water to each household connected to the system. Central Coast and State Water Board staff will survey and audit water recipients to ensure adequacy of supplied replacement water.

Prior to Year two: If the Stewardship group elects to extend the Agreement, prior to the start of the second year, they must prepare, and gain approval of, a plan to expand the Agreement to those dependent on all impacted wells in the Salinas groundwater basin.

Working Toward the Larger Solution Through this Agreement: One of the purposes of the Agreement is to allow the Stewardship group members to work towards creating a stable, long-term funding source for long-term replacement water for systems that are impaired due to nitrate contamination in groundwater. These actions potentially include regional planning, development of water supply infrastructure through capital funding, and operation and maintenance funding associated with the incremental increase in costs associated with operating the more expensive systems needed to address nitrate contamination. Section 6.1 of the agreement spells out respective duties of cooperation. The parties will look to establish a legislative, regulatory, policy-based, or similar approach to creating a durable and transparent long-term solution to nitrate-based drinking water contamination.

AGREEMENT IMPLEMENTATION

The Stewardship group selected CURES as the contractor for implementing the Agreement. The State and Central Coast Water Boards will review the Agreement's implementation, both through regular meetings with the Stewardship group's contractor and by auditing replacement water deliveries for identified water system users. Additionally, State and Central Coast Water Board staff's experience with replacement water implementation has proven the importance of utilizing an environmental justice outreach specialist to assist in developing community contacts and trust with disadvantaged communities. With this outcome in mind, Water Boards staff is considering using grant money to employ an environmental justice group to assist with outreach, sign up, and customer satisfaction/follow up implementation functions.

Finding Those With Interim Drinking Water Needs: The Stewardship group and CURES will first use Exhibit A from the Agreement, reaching out to operators of these systems to collect

confirmatory samples. Through the system owners/operators, CURES will be able to identify individual household interim replacement water needs for those served by each system. Additionally, the "Opt-In Systems" component of the Agreement (Section 2.1) allows for domestic well systems that have unsafe drinking water due to nitrate to join the Agreement if they are within the four primary subbasins of the Salinas groundwater basin as defined in the Agreement.

State and Central Coast Water Board staffs have identified critical outreach and communication needs as areas where environmental justice community assistance will be necessary and are already working to develop that capacity. Through this assistance, CURES will be better able to find, understand, and provide the type of interim replacement water that best suits the needs of the individual communities and households. State and Central Coast Water Board staffs are working to ensure outreach to disadvantaged communities and individuals with impacted drinking water.

Interim Replacement Water Method and Validation: Based on existing replacement water experience, the Stewardship group and State and Central Coast Water Board staffs expect replacement water to be primarily in the form of bottled water deliveries. The Stewardship group has indicated they will also consider treatment systems such as under-counter (point-of-use) reverse osmosis systems, as appropriate.

The Agreement includes minimum performance metrics and validation/auditing mechanisms. The Stewardship group must take all reasonable steps to provide interim replacement water to a minimum of 35 systems in year one (Section 2.3). This target must be satisfied for the second year of the agreement to be available for the Stewardship group.

The Stewardship group and CURES will provide regular reports to both State and Central Coast Water Board staffs regarding project implementation. State and Central Coast Water Board staffs will audit deliveries of interim replacement water and survey recipients to ensure adequacy of quantities and forms of interim replacement water. Special delivery provision of water must be made for aged and disabled persons, where applicable.

The Central Coast Water Board has dedicated staff (Angela Schroeter, Groundwater Section Manager) to oversee and validate performance of this Agreement. Similarly, the Office of Enforcement has also dedicated a staff person to this project's oversight. Ms. Schroeter will work with staff from CURES, Office of Enforcement, and environmental justice assistance group(s) to ensure that those who need interim replacement water receive it consistent with this Agreement, and validate the adequacy and appropriateness of replacement water service. Ms. Schroeter is the Central Coast Water Board staff environmental justice liaison and has extensive experience with CURES and the issues surrounding providing replacement water to disadvantaged communities. Ms. Schroeter has already met with Office of Enforcement staff to establish roles and expectations for oversight of this Agreement. Our stated goal is to maximize the effectiveness and success of this Agreement through the provision of adequate and appropriate quantities of interim replacement water to all who need it.

ACCOUNTABILITY ASSURANCE ACTIONS

To help ensure replacement water reaches those in need under this Agreement, State Water Board's Office of Enforcement and Central Coast Water staffs have taken the following actions:

- Working with Monterey County Environmental Health and other departments to get the word out about the program. The Water Boards' staffs are planning additional meetings in early May with both Monterey County supervisors and the County Environmental Health director to continue planning coordination with the County.
- The State Water Board's Office of Enforcement is planning to leverage an existing Cleanup and Abatement Account grant with an environmental justice advocacy group. This action would expand scope and funding to identify and sign up disadvantaged persons who are eligible to opt in, and to verify the performance measures with respect to replacement water quantity and special deliveries are being met.
- The State and Central Coast Water Board staffs are planning additional outreach meetings within the basin and are engaging the Office of Public Participation. The scope of the environmental justice grant detailed above will include participation in the planning and implementation of this component.
- To establish expectations, transparency, and accountability, the State and Central Coast Water Board staffs will initiate regular meetings with CURES. This regular format will allow for feedback on replacement water deliveries and project goals. The Office of Enforcement currently meets every two weeks with the Stewardship group's Board of Directors and will use this venue to convey any inadequacies in Agreement's implementation. The Agreement and obligation to perform is with the Stewardship group and its members.
- Central Coast Water Board staff will provide regular updates to the Board on the effectiveness of replacement water provision and the Agreement's implementation through regular agenda items and the Executive Officer's report.

AGREEMENT ANALYSIS

Strengths: The Agreement provides a framework for significant immediate and short-term interim replacement water and some relief for the human health exposure component resulting from widespread nitrate contamination of groundwater in this portion of the Salinas groundwater basin. These desired results will only be realized through the effective implementation of the Agreement.

In exchange for the potential for interim replacement water under this Agreement, the State and Central Coast Water Boards suspended their enforcement authority to require provision of replacement water. Using this enforcement authority in some manner (directly or indirectly), the Central Coast Water Board staff has achieved replacement water in fewer than five systems over the last several years. As previously stated, in year one, the Stewardship group is required to provide replacement water to 35 water systems, significantly better than the current rate of replacement water production for the same enforcement authority that would be suspended under this Agreement. Based on this component alone, the opportunity to significantly increase the rate of interim replacement water production under the Agreement makes the enforcement authority trade worthwhile, and downside risk is mitigated because this is a one-year agreement if minimum interim replacement water metrics are not achieved.

Under the Agreement, farmers and landowners will fund the interim replacement water. This Agreement potentially also provides a funding model for interim replacement water that could be extended to other areas of the region and/or state that have nitrate impacted drinking water. Additionally, this Agreement offers new, additional momentum for pursuing a regional or state-

wide legislative solution covering a funding mechanism and provision short- and/or long-term replacement water.

Weaknesses: The Agreement does not address the larger issues of long-term replacement water and the attendant planning and funding issues, nor does it address the issue of restoration of the groundwater resource and associated beneficial uses. Additionally, the Agreement does not address interim replacement water for nitrate impacted areas in the region outside of the four Salinas groundwater subbasins listed. The Agreement is dependent on effective implementation to achieve extensive replacement water deliveries and this is not a given. Similarly, growing the Agreement to other portions of the region, other regions, or creating a permanent funding mechanism for short- and long-term replacement water are not givens.

THE AGREEMENT AS PART OF A LARGER STRATEGY

The Central Coast Water Board's strategy to address nitrate impacts from excessive application of fertilizers (Strategy) is comprised of two primary components:

1. **Safe Drinking Water:** Address acute, human health issues related to unsafe drinking water through the provision of interim short- and long-term replacement water, and
2. **Restore Groundwater Resources:** Reduce loading of nitrate to groundwater through implementation of Irrigated Lands Program (i.e., Ag Order 3.0 and Water Code associated tools).

The Agreement addresses interim, short-term replacement water (a portion of the Strategy's Part One) for a portion of the region. This partially mitigates the acute, human health issues arising from discharges from irrigated lands for a specific and significant portion of the region.

Under the Water Code, we are required to also deal with the discharges of excessive nitrate from fertilizers and other sources that have impaired the drinking water beneficial use in numerous areas throughout the region. This second, significantly longer-term portion of the two-part Strategy is implemented through the Irrigated Lands Regulatory Program via Ag Order 3.0 (and subsequent orders) and using traditional water code authority and tools (i.e., 13267, etc.).

The authority to regulate and enforce requirements in the area of nitrate (or other pollutant) load reduction has not been altered by this Agreement and Central Coast Water Board staff will continue to implement Ag Order 3.0 and work with growers to reduce loading of nitrate to soil, surface water, and groundwater, unimpeded by this Agreement. Where necessary, the State Water Board's Office of Enforcement will continue to provide enforcement assistance where and when requested in this effort. This second component of the two-part Strategy requires constant, steady attention and vigilance as it will play out over decades to restore groundwater to drinking water-safe nitrate concentrations. Central Coast Water Board staff will continue to update the Board on progress in implementing Ag Order 3.0 and development of the subsequent order 4.0 regularly at future meetings.

CONCLUSION

The Salinas Valley interim replacement drinking water agreement provides a framework through which a significantly greater amount of interim replacement water could be provided through effective implementation of the Agreement. Central Coast Water Board staff will invest and play a role in maximizing the effectiveness of the Agreement, as well as in validating and quantifying the amount and adequacy of replacement water served under the Agreement. We will bring our significant experience to bear in maximizing the effectiveness of outreach to those in disadvantaged communities with unsafe drinking water to honor the human right to water law. We will build accountability with the Stewardship group and CURES early and throughout the implementation, and will report back regularly to the Board on the Agreement's implementation progress and how replacement water is proceeding under the Agreement.

ATTACHMENTS

1. Interim Replacement Water Settlement Agreement