

**Agenda Item 21: Late Revisions – 5 December 2012**

**WASTE DISCHARGE REQUIREMENTS GENERAL ORDER  
FOR  
GROWERS WITHIN THE EASTERN SAN JOAQUIN RIVER WATERSHED  
THAT ARE MEMBERS OF THE THIRD-PARTY GROUP**

**Response to Comments**

Attached are the pages with proposed late revisions for the above document.

within 90 days of Executive Officer approval of the farm evaluation template. The third-party has 30 days to provide the farm evaluation template to its Members starting at the beginning of the 90-day period, so Members may have only 60 days to complete the evaluation, or less time, depending on when they become Members of the third-party. Commenters recommended that this 90-day time frame for farm evaluations be extended. One commenter suggested that Members be given six months to complete the farm evaluations.

### **Response**

The tentative Order has been modified to extend the farm evaluation timeline to 1 March 2014 for all members, except Members in low vulnerability areas with Small Farming Operations, who have until 1 March 2017. The change provides additional time while ensuring that management practice information will be submitted to the third-party in time for preparation of its annual report to the board.

### **Master Response 22. Surface water management plan due dates**

#### **Comment summary**

The tentative Order requires that surface water management plans be submitted within 45 days of the plan being triggered (see provision V.III, tentative Order). Comments were submitted requesting that this deadline be extended to 60 days.

### **Response**

The tentative Order has been modified to extend the due date for newly triggered management plans to 60 days.

### **Master Response 23. Private property**

#### **Comment summary**

Provision 13 is inconsistent with Water Code section 13267 and hampers private property rights. Water Code section 13267(c) states that any inspection “*shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure.*” As currently drafted, provision 13 ignores Section 13267 and attempts to allow inspections of private property at any time without notice to or consent from the landowner or obtaining a necessary warrant.

### **Response**

In response to the requests that the inspection provisions be revised to conform to Water Code section 13267(c), staff has proposed a late revision. The late revision would replace the language in provision 13 with the following text: “The Member understands that the Central Valley Water Board or its authorized representatives, may, at reasonable hours, inspect the facilities and irrigated lands of persons subject to this Order to ascertain whether the purposes of the Porter-Cologne Act are being met and whether the Member is complying with the conditions of this Order. To the extent required by Water Code section 13267(c) or other applicable law, the inspection shall be made with the consent of the Member, owner or authorized representative, or if consent is withheld, with a duly issued warrant pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50). In the event of an emergency affecting the public health and safety, an inspection may be performed without the consent or the issuance of a warrant.” This language tracks that of Water Code section 13267(c), and is intended to address the constitutional and statutory concerns raised by the commenters. The provision is consistent with section 13267 of the Water Code, as it will result in notice being provided to an authorized representative prior to an inspection of facilities and does not change the Water Board’s obligation to obtain consent or

~~obtain a warrant absent consent. While the tentative Order does require Members to provide consent for inspections conducted during reasonable hours, the board's inspectors would not attempt a forcible entry if the inspectors do not obtain consent from an authorized person or obtain a warrant. Instead, the board would consider pursuing a formal or informal enforcement action for violation of the tentative Order or would otherwise seek to obtain a warrant. In response to the comment about notice, staff is proposing revisions that clarify that consent would be required only after the Member or its authorized representative receives notice from the board inspector.~~

~~Not only are the inspection provisions consistent with Water Code section 13267, they are consistent with Water Quality Order WQO 2004-0003 (*Agricultural Water Quality Coalition*), a State Water Board precedential decision. That decision reviewed inspection provisions within a 2003 waiver issued under the Central Valley Water Board's irrigated lands regulatory program. The provisions reviewed were nearly identical to the provisions in the tentative Order. In *Agricultural Water Quality Coalition*, the State Water Board first noted that the inspection requirements "are standard in most regulatory actions by the State Board and regional boards." (*Id.*, at p. 14) Indeed, since adoption of the *Agricultural Water Quality Coalition* decision, both the State Water Board and the Central Valley Water Board have adopted waste discharge requirements that include similar inspection provisions. (See, e.g. General Waste Discharge Requirements for Land Application of Biosolids, Order 2004-0012, at D.17; Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035, Standard Provisions and Reporting Requirements, at B.15.)~~

~~After noting that inclusion of inspection requirements was a standard practice, the State Water Board then explained, "[i]t is inappropriate that where a discharger seeks a right to discharge to waters of the state, that it should be expected to consent to reasonable access to its property." (*Id.*, at p. 14) The State Water Board also emphasized that "all discharges of waste into waters of the state are privileges, not rights" in explaining why reasonable inspection requirements are so common. (*Ibid.*, at footnote 33) The tentative Order, as revised (see above), provides a reasonable procedure consistent with the expectation that permittees or their authorized representatives will provide consent for compliance inspections upon receiving notice from the board's staff.~~

~~One commenter asserted that the inspection provisions are inconsistent with a trial court decision reviewing challenges to the board's conditional waivers adopted in 2003 (Orders R5-2003-0826 and R5-2003-0827). *Deltakeeper et al v. Central Valley Water Board et al.* (Super. Ct. Sacramento County, 2004, No. 04CS00235) and *California Farm Bureau Federation et al, v. State Water Board et al.* (Super. Ct. Sacramento County, 2004, No. 04CS00264). While the trial court ruling is not binding or precedential here, the board staff does not concur with the characterization of the ruling. Staff believes that the inspection provisions are consistent with, and are a natural extension of, the trial court's ruling. While the trial court did instruct the board to amend the inspection provisions of those waivers, the purpose was for the board to align the language of the waivers with the board's stated intent that a grower's withholding of consent would not be considered a violation of the waivers; significantly, the remand was not based on a ruling that the inspection provisions violated the Water Code. In fact, the trial court indicated that it might have otherwise agreed with the State Water Board that dischargers might be expected to consent to access in exchange for the protection of the waiver.~~