ITEM: [TBD]

SUBJECT: Consideration of Tentative Resolution R7-2022-0036 (Tentative Resolution), Delegation of Authority to Executive Officer under Water Code section 13223

PURPOSE: Revise authority delegated to Executive Officer

BACKGROUND: Subject to certain limitations (discussed below), Water Code section 13223 provides that the Board may delegate its authority to the Executive Officer. The only matters that cannot be delegated under section 13223 are:
- [1] promulgating regulations;
- [2] approving Basin Plan amendments;
- [3] issuing or rescinding Waste Discharge Requirements (WDRs);
- [4] establishing Water Quality Objectives (WQOs);
- [5] issuing or rescinding Cease and Desist Orders (CDOs);
- [6] holding hearings on Basin Plan amendments; and
- [7] referrals to the Attorney General for judicial enforcement, other than certain actions to either enjoin a pollution or nuisance, or to compel compliance with a Cleanup and Abatement Order (CAO). All other powers, including the ability to settle complaints for Administrative Civil Liability (ACL) (i.e., without regard to the amount in controversy), may be delegated to the Executive Officer.

In 1970, the Board adopted Resolution 70-15, which delegated all authority to the Executive Officer to the fullest extent authorized under Water Code section 13223.

In 2017, the Board adopted Resolution R7-2017-0032, which narrowed the delegation of authority under Resolution 70-15. Notably, the 2017 resolution limited the delegated authority to approve settlements of ACL. The constraints on ACL settlements under the 2017 resolution are somewhat byzantine. For settlements involving Mandatory Minimum Penalties (MMPs) pursuant to Water Code sections 13385, 13385.1 and 13399.33, approval authority is limited to settlements of up to $51,000, prior Board Chair consultation and Board notification is also required for all such settlements exceeding $24,000. The Executive Officer was not authorized to approve any settlements involving discretionary imposition of ACL.
CURRENT STATUS: The Executive Officer is currently delegated authority under Resolution 70-15, as modified by Resolution R7-2017-0032.

PROPOSED CHANGES: Under the Tentative Resolution, the Board will replace all prior delegations of authority with a single resolution with a more straightforward framework, particularly with respect to ACL settlements.

KEY ISSUES: Authority to settle discretionary ACLs and higher-value MMP-based ACLs.

DISCUSSION: Under the Tentative Resolution, the Executive Officer would have authority to settle all claims up to $200,000—irrespective of whether the ACL is based on MMPs or other Water Code provisions. This will dramatically simplify the overall enforcement process, potentially free up staff time, allow the Executive Officer greater discretion in determining which actions should be considered by the Board, and align the delegation authority to be consistent with other Regional Water Quality Control Boards (some of which do not have any dollar value restrictions at all).

It should be noted that the current dollar-value limitation on MMP-based ACL settlements is quite unusual, as even the Board itself lacks discretion to do anything other than reject the MMP and impose more liability on a discretionary basis (after a full evidentiary hearing). Moreover, the dollar-value limitations also do not increase proportionally to the number of individual violations alleged. Most MMPs are only $3,000 per violation (Wat. Code, § 13385, subd. (h)), but concurrent violations mean that the specified limits are often exceeded with relatively rote enforcement matters (especially where there is a backlog of prior violations being addressed).

Under the Tentative Resolution, the Executive Officer will still be able to notify and confer with the Board Chair regarding proposed ACL settlements within his or her delegated authority for approval. The Executive Officer will also be able to notify Board Members via email of proposed ACL settlements in advance of their approval. The Executive Officer may also defer to the Board’s judgment and present any proposed ACL settlement to the Board for approval (e.g., where the matter is such that he or she believes it would be more appropriate for the Board to approve the settlement).
Under the State Water Resources Control Board’s 2017 Water Quality Enforcement Policy, all ACL settlements will remain subject to a 30-day public notice and comment period. (See Appendix A to Policy, pp. 5-6.) The Tentative Resolution will not affect this requirement.

COMMENTS: TBD
RESPONSE: TBD
RECOMMENDATION: Adopt Tentative Resolution.
ATTACHMENTS: Resolution 70-15
Resolution R7-2017-0032