

STAFF REPORT

**CONDITIONAL WAIVERS
FOR
DISCHARGES FROM IRRIGATED LANDS
WITHIN THE CENTRAL VALLEY REGION**

5 August 2005 Board Meeting

BACKGROUND

On 11 July 2003, the Regional Water Quality Control Board, Central Valley Region (Water Board) adopted Resolution No. R5-2003-0105 *Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region* (Conditional Waivers). The Water Board also adopted Monitoring and Reporting Program (MRP) Order No. R5-2003-0826 for Coalition Groups, MRP Order No. R5-2003-0827 for Individual Dischargers, and Resolution No. R5-2003-0103 approving an Initial Study and adopting a Negative Declaration for the Conditional Waivers.

In August 2003, six agricultural interests and one environmental interest submitted petitions to the State Water Resources Control Board (State Water Board) regarding these actions. On 22 January 2004, the State Water Board adopted Order WQO 2004-0003, which upheld the Conditional Waivers and MRPs with minor revisions.

On 26 February 2004, DeltaKeeper, WaterKeepers Northern California, Environment California, the Natural Resources Defense Council, Inc., and California Sportfishing Protection Alliance (collectively “DeltaKeeper”) filed a petition for peremptory writ of mandate in Sacramento County Superior Court (Court) alleging that the Conditional Waivers violated the Porter-Cologne Water Quality Control Act, particularly Water Code section 13269 and that the Water Board violated the California Environmental Quality Act (CEQA) by not preparing an environmental impact report and by relying on a negative declaration that is contrary to law and not supported by substantial evidence.

On 3 March 2004, the California Farm Bureau Federation (Farm Bureau) filed a second petition for peremptory writ of mandate in Court alleging that the Conditional Waivers are a departure from long-held Water Board positions and are not in accordance with the law. The Farm Bureau requested that: (1) the requirement for submittal of the Individual Annual Monitoring Report and Coalition Group Notice of Intent be stricken because the costs of such reports do not bear a reasonable relationship to the need for the reports; (2) the requirement that water quality objectives not be violated should be stricken because such requirement is contrary to Water Code section 13269 and because water quality objectives cannot reasonably be applied to many of the affected water bodies; and (3) the provisions that would deprive farmers of trade secret and private property protections should be stricken because they are inconsistent with the Water Code.

The Northern California Water Association, Farm Bureau, the Western Plan Health Association, and the Agricultural Coalition also filed a petition for writ of mandate as “Intervenors.”

LEGAL OVERVIEW

The Court consolidated the writ petitions and held a hearing on 28 April 2005. On 9 May, the Court issued a ruling and concluded the following:

- (1) The Water Board has the discretion to waive substantial discharges of waste conditioned upon compliance with applicable water quality objectives;
- (2) The Water Board findings that the Conditional Waivers are "not against the public interest" and that the Conditional Waivers are consistent with other State policies are supported by the weight of the evidence;
- (3) The Water Board did not violate CEQA by adopting a negative declaration instead of preparing an environmental impact report;
- (4) The Conditional Waivers' reporting requirements do not violate the California Water Code; and
- (5) With respect to inspections and trade secrets, the language of the Conditional Waivers appears to conflict with fundamental privacy protections provided by the Water Code and thus the offending language must be stricken.

The Court ordered the Water Board to address the two issues with respect to privacy. The Court also addressed the issue of the application of the Conditional Waivers to agricultural dominated waterways and constructed agricultural drains. The Court ordered the Water Board to clarify the application of "the extent to which the Waiver is intended to apply to agricultural dominated waterways and constructed agricultural drains and other non-stream tributaries; the extent to which the Waiver purports to impose receiving water limitations upon such water bodies; and, in light of the foregoing, the extent to which the Waiver may rely on application of the Tributary Rule for these purposes."

The Water Board staff proposes that the Water Board take action on the Court Order in two steps. The staff has prepared for the Water Board's consideration at the 5 August 2005 Board meeting a Resolution amending the Conditional Waivers with respect to inspections and trade secrets. The Water Board staff proposes that the Water Board address the Court's Order to clarify the application of the Conditional Waivers to agricultural dominated waterways and constructed agricultural drains at its September meeting. Staff plans to propose changes to Attachment A of the Conditional Waivers, will provide an opportunity for public comment, and take an action item to the Water Board for consideration at its September 2005 meeting.

DISCUSSION

To comply with the Court's ruling, Water Board staff proposes the following modifications to Attachments B and C, as presented in the proposed *Resolution Amending Resolution No. R5-2003-0105, Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region*.

No. A.7 of the *Conditions – General* Section of Attachments B and C is modified as follows:

"Dischargers shall allow Regional Board staff, upon reasonable notification, access onto the affected property to determine compliance with conditions of this Waiver, subject to CWC section 13267(c)¹."

Footnote 1 is proposed as follows:

“CWC Section 13267(c) states: “In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with. The 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) or Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant.”

No. B.9 of the *Technical Reports* Section of Attachments B and C is modified as follows:

“All materials submitted pursuant to this Conditional Waiver shall be available for public inspection at the Water Board offices, except for Reports, or portions of such Reports, subject to an exemption in accordance with California law and regulations, including CWC section 13267(b)(2) and the Public Records Act. NOIs shall not be considered confidential. If the Discharger asserts that such Reports, or portions of such Reports, are subject to an exemption, the Discharger must provide information to the Water Board describing how those portions of the Reports contain trade secrets or secret processes or are otherwise exempt from public disclosure. Any Discharger that is claiming that all or a portion of a Report is exempt from public disclosure shall submit two copies of the Report. The first copy shall be a complete, unredacted Report; the second copy shall be a complete Report with only the portion(s) claimed to be exempt redacted. Both copies of such Reports shall clearly indicate on each page’s header ‘Discharger Asserts that Portions of this Report are Exempt from Public Disclosure.’ The Water Board staff shall determine whether any such Report qualifies for an exemption from public disclosure, and shall treat those Reports accordingly.”

RECOMENDATION

Staff recommends that the Water Board adopt the proposed *Resolution Amending Resolution No. R5-2003-0105, Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region, Attachments B and C*, and forward the Resolution to the Court.

WATER BOARD STAFF CONTACTS FOR STAFF REPORT

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