

STAFF REPORT

REVISIONS TO AMENDED ATTACHMENT B OF THE COALITION GROUP CONDITIONAL WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS (AMENDED ORDER NUMBER R5-2006-0053) - CONSIDERATION OF PROPOSED MODIFICATIONS TO CONDITIONS UNDER WHICH GROWERS CAN JOIN COALITION GROUPS

24/25 April 2008 – Central Valley Water Board Meeting

INTRODUCTION

In August 2006, the California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) created a deadline for growers to join Coalition Groups to increase participation and accountability in the Irrigated Lands Regulatory Program (ILRP). After 31 December 2006, growers have been required to obtain approval from the Central Valley Water Board Executive Officer to join a Coalition Group and must meet one or more conditions. The deadline resulted in a thirty percent increase in grower participation in Coalitions Groups – over 5,000 growers and 1,000,000 acres.

The limited conditions under which growers can join Coalition Groups without case-by-case review of the growers' "situation" have created unintended program impacts. Many growers who could work effectively within a Coalition Group cannot join and would need to be regulated individually in perpetuity. Staff is proposing changes to the Coalition Group Conditional Waiver (Coalition Group Waiver) to clarify the Executive Officer's authority to allow growers to join Coalition Groups. These changes will allow the Central Valley Water Board to focus its efforts in regulating individual growers who are not working to protect water quality or who are not meeting program requirements, rather than on growers who missed the deadline.

In addition to the proposed waiver changes, staff will propose fee schedule modifications to the State Water Resources Control Board (State Water Board) later this year. An administrative fee for applications to be applied for most growers joining Coalition Groups after June 30 2008 will be recommended, as well as recommended increases in the fee schedule for growers under the Individual Discharger Conditional Waiver (Individual Waiver). The intent is for these fees to cover Central Valley Water Board staff costs for processing applications and overseeing individual dischargers.

HOW AND WHY WAS THE DEADLINE CREATED?

The Central Valley Water Board enacted a deadline for growers to join a Coalition Group to increase participation and accountability in the ILRP. Discussions regarding a deadline began at a Central Valley Water Board meeting in 2006.

On 22 June 2006, the Central Valley Water Board adopted Order No. R5-2006-0053, *Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges From Irrigated Lands* (Conditional Waiver). On 23 June 2006, the Board further discussed Condition A.9 in Attachment B of the Conditional Waiver. The Board requested staff to develop conditions in which dischargers could join a Coalition Group after the 31 December 2006 deadline. On

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3 August 2006, the Board established a deadline¹ by which a discharger/property needed to join Coalition Groups, after which they must meet certain conditions² before being approved by the Executive Officer to join. Condition A.9.f. in Amended Attachment B provides that growers could be approved to join a Coalition Group in, “[o]ther situations reviewed and approved by the Executive Officer on a case-by-case basis.” In adopting this condition the Central Valley Water Board did not identify specific situations where it intended this condition could apply, nor was the Executive Officer given direction regarding the use of this condition. The 31 December 2006 deadline resulted in a thirty percent increase in enrollment and over 5,000 dischargers and 1,000,000 acres.

WHAT IS THE CURRENT PROCESS FOR A GROWER TO JOIN A COALITION GROUP?

After the deadline, staff developed an application process for dischargers to request Central Valley Water Board approval to join a Coalition Group. The application requires information on the irrigated property and waiver condition that would allow them to join a Coalition Group after the deadline (hereafter, these waiver conditions will be referred to as the exceptions to the deadline). It also requires growers to submit supporting documentation verifying their statements. A supplemental application is provided for growers who do not meet Conditions A.9.a. through d. in Amended Attachment B (summarized in Footnote 2 of this report). The supplemental application requests information on the grower’s contact with the Central Valley Water Board and Coalition Groups. It also gives the applicant an opportunity to explain why they had not chosen to join a Coalition Group prior to the deadline.

Once the application is received by the Central Valley Water Board, it is reviewed by staff. Based upon the condition and supporting documentation, staff makes a recommendation for Executive Officer approval.

WHO HAS APPLIED FOR CENTRAL VALLEY WATER BOARD APPROVAL TO JOIN A COALITION GROUP?

Applicants have ranged from small land owners with under 10 acres of irrigated lands to large growers. Many growers meet an exception to the deadline which is easily verifiable with supporting documents. These exceptions include an owner transfer of the property, an applicant becoming a discharger after the deadline, a new Coalition Group formed, and Coalition Group boundaries change. Thirty-five percent of the applications received have identified one of these exceptions as their reason for requesting to join a Coalition Group after the deadline.

¹ California Regional Water Quality Control Board, Central Valley Region, Resolution No. R5-2006-0077 Amending Order No R5-2006-0053 Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, Attachment B

² Examples of conditions include, but are not limited to: the grower became a discharger after the deadline, Coalition Group boundaries change, a grower transfers Coalition Groups, and the land was acquired after the deadline.

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The remaining sixty-five percent of applicants have selected the “other”³ exception (Condition A.9.f. of Amended Attachment B). Little direction was given by the Board on how to apply the “other” condition. The requirement for the Executive Officer to make case-by-case assessment may suggest that the case-by-case consideration is based on the reason the applicant did not meet the deadline, rather than the applicant’s suitability for coverage under the Coalition Group Waiver.

WHAT IS THE STATUS OF THE CURRENT APPLICATIONS?

Since the 31 December 2006 deadline, the Central Valley Water Board has received 249 applications, encompassing approximately 58,000 acres.⁴ With the current conditions which allow a discharger to join a Coalition Group after the deadline, thirty-five percent of the applications have been approved to join a Coalition Group, have withdrawn an application, or were determined to currently be a participant in the Coalition Group they were requesting to join. One percent of the applications are pending Executive Officer approval. The majority of the remaining sixty-four percent of applications have selected the “other” condition. Many of these applicants arguably may not be approved by the Executive Officer because they did not demonstrate, with supporting documentation, the reason they did not join a Coalition Group prior to the deadline. If these applications were disapproved, these growers would be required to obtain coverage under the Individual Discharger Conditional Waiver (Order No. R5-2006-0054) or Waste Discharge Requirements (WDRs) for their irrigated lands.

HOW IS THE CENTRAL VALLEY WATER BOARD CONTINUING WITH PARTICIPATION EFFORTS?

On 27 March 2008 the Central Valley Water Board began issuing California Water Code (CWC) section 13267 Orders (Orders) to owners of irrigated lands not yet participating in the ILRP. Issuance of these Orders is scheduled to continue through 2008. This will increase the number of applications from owners and operators seeking approval to join Coalition Groups. Without any changes to the exceptions to join Coalition Groups, the efforts to increase participation would result in potentially thousands of growers who must be regulated individually.

WHAT ARE THE IMPACTS TO THE PROGRAM FROM THE DEADLINE?

Currently, the major impacts to the program have been time and resources. Managing the application process has taken approximately 300 hours⁵ for 2007. A great deal of staff time is currently required to process applications that state they fall under the “other situations” exception. Staff often must follow-up to gather complete information, determine the veracity of the information, and develop case specific recommendations for Executive Officer consideration.

³ “Other situations reviewed and approved by the Executive Officer on a case-by-case basis.” Examples of the “other situations” include, but not limited to, an out of state resident leasing their California property or growers who purchased land in 2006 and were not aware of the ILRP and health problems.

⁴ Applications are received on an ongoing basis. Figures cited in this report are best available data from 28 March 2008.

⁵ 300 hours equates to approximately 15% of a person year.

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Even after the information is gathered and confirmed, many applicants do not have an acceptable reason for missing the deadline to join a Coalition Group. These applicants need to be managed under the Individual Waiver if the application is disapproved. The unintended impact of establishing a deadline with limited exceptions is large number of growers would need to be managed under the Individual Waiver or WDRs in perpetuity. Many of these growers are seeking to comply and can be effectively managed under the Coalition Conditional Waiver.

The ILRP currently regulates five Irrigation Districts and one irrigated lands discharger under the Individual Waiver. Staff is working with a second discharger who is seeking coverage under the Individual Discharger Conditional Waiver (Individual Waiver).

Based on our limited work with individuals under the current program, annual costs to oversee a discharger enrolled under the Individual Waiver are approximately \$4,000 to \$8,000 per year each.⁶ Fees collected⁷ through the ILRP under the Individual Waiver, which are based upon acreage, cover three percent or less of staff costs. Table 1 shows the acreage required for staff to manage an individual discharger. With the current fee schedule, an individual discharger would need to have over 10,000 acres enrolled in the ILRP to cover the staff cost.⁸

Focusing staff time on individual dischargers decreases the amount of time spent on enforcement with unauthorized discharges, program participation efforts, public outreach, and supporting growers and the Coalition Groups.

WHAT ARE THE IMPACTS TO GROWERS FROM THE DEADLINE?

The main impact to growers who have missed the deadline is cost. The Individual Waiver or WDRs have much higher costs and a steeper learning curve for a discharger. In addition to state fees, an individual pays for the water quality monitoring and reporting of their properties. This process can run into the thousands of dollars for a grower to analyze contaminants in the discharge from their fields. These growers do not pose a higher threat to water quality than growers in a Coalition Group. They have just failed to meet the deadline for joining a Coalition Group.

HOW CAN THE IMPACTS BE ADDRESSED?

Impacts can be addressed two ways, through changes to the Coalition Group Waiver and implementing fee increases through the State Water Board fee schedule.

⁶ This equates to 50 - 100 hours per year per individual discharger.

⁷ Under Title 23, section 2200.6 in the California Code of Regulations, fees for the Individual Discharger Conditional Waiver are \$100 plus \$0.30 per acre.

⁸ Regional Water Board staff is proposing increased fees to the State Water Board fee schedule for the Individual Discharger Conditional Waiver. Staff is currently discussing the proposed changes with the State Water Board. Any proposed modifications are currently scheduled to go to the State Water Board for consideration in September 2008.

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Changes to the Conditional Waiver

Modifications in Attachment B of the Coalition Group Waiver are proposed to clarify the conditions for dischargers to join Coalition Groups. Providing the Executive Officer with this discretion to allow growers to join Coalition Groups will help ensure that staff resources are focused on addressing water quality problems or recalcitrant dischargers. Staff resources will not need to be expanded managing hundreds or thousands of individual growers who could be managed effectively in a Coalition Group.

Changes to the Fee Regulations

In order to properly fund the application process, staff has reviewed changes to the fee schedule for discharges from irrigated lands. Staff is proposing that the State Water Board apply an administrative fee for applicants who submit an application for Central Valley Water Board approval to join a Coalition Group. The changes to the fee schedule would occur in September 2008. Any State Water Board fees would apply retroactively to the beginning of the fiscal year. Any applications postmarked after 30 June 2008 would be required to submit the administrative fee. This fee would not be assessed to applicants who have already submitted applications for Central Valley Water Board approval. Staff also proposes that the fee not apply to applicants who meet one of the four specific exceptions provided in the current waiver conditions (Conditions A.9.a. through f. of Amended Attachment B).

HOW HAVE STAKEHOLDERS AND THE PUBLIC BEEN ENGAGED IN THIS PROCESS?

Central Valley Water Board staff met with Coalition Group representatives on two occasions⁹ to discuss potential changes to waiver language. The Coalition Group representatives were supportive of tentative language changes that would allow more growers to join a Coalition Group. They were also supportive of a proposed administrative fee and some expressed that it would be appropriate for the State Water Board to impose this fee. The Coalition Groups have also indicated that they intend to recover back fees from growers joining the Coalition after the deadline. Growers who have joined late will, therefore, not have derived an economic benefit over their neighbors who have participated all along.

Staff developed a public notice for stakeholders to describe the process, provide information on the proposed changes, and solicit comments. The notice, *Notice of Availability of Proposed Modifications to the Irrigated Lands Regulatory Program Conditional Waiver for coalition Groups and Opportunity for Public Comment*, provided a comment period from 7 March 2008 through 28 March 2008. This notice was placed on the ILRP webpage and sent through the ILRP lyris mail server.

In addition to the stakeholder notice, staff mailed a letter to current applicants on 18 March 2008 to inform them of proposed changes to the waiver and explain how to comment and participate in the process.

⁹ Meetings occurred on 24 January 2008 and 3 March 2008 in Sacramento, California.

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Comments Received

As of 28 March 2008, there have been no comments received.

WHAT ARE THE POTENTIAL ALTERNATIVES TO THE DEADLINE?

Alternative 1

One hundred and five growers do not qualify to join a Coalition Group under the current specific conditions. Many growers are willing to comply and can be effectively regulated under the Coalition Group waiver, which provides a cost effective method for regulatory coverage. One alternative allows growers willing to work in the Coalition framework to join a Coalition Group. The Executive Officer would have broad discretion to allow these growers into Coalition Groups. Staff would coordinate closely with the Coalition Groups to determine whether growers would be accepted into the Coalition. Recalcitrant dischargers and those not working cooperatively with Coalition Groups could still be regulated under the Individual Waiver.

Alternative 1 includes a Central Valley Water Board recommendation that the State Water Board require an administrative fee for applications, which would be in addition to any fees required under Title 23, section 2200.6 of the California Code of Regulations.¹⁰ This proposed fee with applications will help maintain and enhance the accountability created with the deadline. It will also assist in recuperating staff costs for processing applications. In addition to the State Water Board fee, a grower joining a Coalition Group would pay annual fees after enrolling under the Coalition Group waiver. Coalition Groups have indicated that they will require the grower to pay back fees for the years they were not a participant in that Coalition Group. The proposed changes to the waiver would not impact or limit the Coalition Group's decision to admit or reject a discharger seeking to join the Coalition Group. The Coalition Group will retain their authority to in determining who will be admitted as a participant.

Any administrative fee for applications would apply to dischargers who file an application with the Regional Water Board after 30 June 2008. We recommend that the fee not apply to owners and operators that currently have applications pending with the Regional Water Board. We also recommend that the application fees not apply to dischargers who meet one of the four specific exceptions to the deadline adopted by the Central Valley Water Board on 3 August 2006 (Conditions A.9.a. through d. of the current Attachment B).

Alternative 2

In Alternative 2, there are no changes to the current waiver and the current exceptions² to join a Coalition Group would apply. Applicants who meet an exception would be recommended for Executive Officer approval, while other applicants will be brought under the Individual Waiver. This approach would likely result in hundreds to thousands of growers being regulated individually, since the case-by-case consideration of applications will continue to focus on the reason the applicant missed the December 31, 2006 deadline.

¹⁰ Changes to Title 23, California Code of Regulations would be adopted in September 2008. All changes would be applicable to the 2008/2009 fiscal year, which begins on 1 July 2008.

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STAFF RECOMMENDATIONS

The limited conditions under which growers can join Coalition Groups are creating unforeseen and unintended program impacts. Staff recommends the Board adopt Alternative 1, which clarifies the conditions under which a grower can join a Coalition Group under Amended Attachment B of the Conditional Waiver for Coalitions (Order No. R5-2006-0053). Additionally, staff proposes that the Central Valley Water Board recommend that the State Water Board adopt appropriate fees to cover the cost of processing applications and the costs associated with overseeing individual dischargers.

CENTRAL VALLEY WATER BOARD STAFF CONTACTS

Comments or questions regarding this Staff Report should be directed to the following Central Valley Water Board staff members:

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Attachment:

Figure 1 Fees Collected through the Irrigated Lands Regulatory Program
for Growers Under the Individual Conditional Waiver

FIGURE 1

Fees Collected through the Irrigated Lands Regulatory Program
for Growers Under the Individual Conditional Waiver

