

ENVIRONMENTAL LAW FOUNDATION

Hearing on Waiver of Waste
Discharge Requirements for
Discharges from Irrigated Lands

Before the California Regional Water Quality Control Board,
Central Coast Region

March 7-9, 2017

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New Text in the Proposed Order

- The Proposed Order Posted in February contains changes made since comment letters were due
 - Comment letters were due on January 9, 2017
- Changes include:
 - New anti-degradation analysis contained in Attachment A
 - New Attachment 7 containing expanded anti-degradation analysis
 - Reduction to list of crops requiring TNA reporting (Attach. A, ¶ 62.).
 - Attachment 6 containing summary of data

Last-Minute Changes Violate Water Code

- Making these last minute changes without providing a notice and a 30-day comment period violates Water Code § 13167.5.
 - Section 13167.5(a)(3) requires 30-day comment periods for orders issued pursuant to section 13320. This is such an order.
- As detailed below, the changes made since the close of the comment period are significant and change the order's requirements.

Reduction to List of Crops

- Attachment A at ¶ 62 deletes many crops from requirement to report Total Nitrogen.
- Compare:
 - Proposed Order: beet; broccoli; cabbage; cauliflower; celery; Chinese cabbage (Napa); collard; endive; kale; leek; lettuce (leaf and head); mustard; onion (dry and green); spinach; strawberry; pepper (fruiting); Brussel sprout; chicory; radish; rutabaga
 - November text (deleted): beet; broccoli; cabbage; cauliflower; celery; Chinese cabbage (Napa); collard; endive; kale; leek; lettuce (leaf and head); mustard; onion (dry and green); spinach; strawberry; pepper (fruiting); parsley; artichoke; bean; dried bean; bean, unspecified; beet; blackberry; blueberry; broccoli; Brussel sprout; cabbage; carrot; cauliflower; celery; chicory; Chinese cabbage; collard; corn, human consumption; cucumber; daikon; endive; kale; leek; lettuce, head; lettuce, leaf; mustard; onion, dry; onion, green; parsley; peas; pepper, fruiting; potato; pumpkin; radish; raspberry; rutabaga; spinach; squash; squash, summer; strawberry; tomato; and turnip.
- Analysis and reasons for change?

Attachment 6

- Summary of data gathered under expiring waiver and other new information

Attachment 7

- Attachment 7 contains a new antidegradation analysis that was not included in the Draft Order.
- Contains a “Baseline Water Quality Assessment Summary: Groundwater”
 - Lacks data and analysis of water quality. Simply a conclusory matrix of water bodies and pollutants.

Changes to Antidegradation analysis in Attachment A, ¶ ¶ 27-30.

- Last minute changes to antidegradation analysis prevent public from commenting.
- These are significant changes.

New Material Does Not Change Conclusion that Proposed Order Violates Antidegradation Policy

- Regional Board Required under Resolution 68-16 to:
 - Set a baseline level of water quality
 - Determine whether water quality will be degraded by proposed action
 - Determine whether such degradation:
 - Is consistent with maximum benefit to people of the State
 - Will not unreasonably affect present and anticipated beneficial uses
 - Will not result in water quality less than that in Basin Plan and other policies
- Require BPTC necessary to assure:
 - Pollution or Nuisance will not occur
 - The highest water quality consistent with maximum benefit to the people of the State will be maintained

New Material Misstates the Anti-Deg Policy

- Attachment 7, at 6: “Rather, BPTC must be implemented through a combination of practices that will ensure that discharges *ultimately* meet all water quality objectives and eliminate any *unreasonable* degradation.” (Emphasis added)
 - Similar language in Attach. A at ¶ 27.
- The word “reasonable” does not appear in Resolution 68-16
- The policy requires “best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance *will not occur* and (b) the highest water quality consistent with maximum benefit to the people of the State *will be* maintained.” (Resolution 68-16) (emphasis added)
 - The new material improperly reads the word “reasonable” into the amount of degradation permitted. The policy does not permit “reasonable” degradation. It prohibits degradation unless consistent with the maximum benefit to the state. A finding that degradation is “reasonable” violates the Anti-Deg policy.

Best Practicable Treatment and Control

- New material misstates holdings of *Asociación de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255 (“AGUA”) with respect to BPTC.
 - While *AGUA* held that a phased approach to implementing *monitoring* is reasonable in theory, the court makes no such holding with respect to implementation of BPTC. (See *AGUA* at 1277-78, Attach. 7 at 3, 6.)
 - In fact, the *AGUA* court held that the specific time schedule at issue there failed because it lacked enforceable deadlines and enforcement mechanisms.
 - The proposed order suffers from the same flaw: a plan to adopt a later plan is not an enforceable deadline and is not a reasonable time schedule within the meaning of *AGUA* or Resolution 68-16.

BPTC Continued

- *AGUA* holds that “there must be some finding that the Regional Board has determined the methods set forth in the Order to control these possible sources of contamination is the best practicable treatment or control.” (*AGUA*, 210 Cal.App.4th at 1284.)
 - Attachment A does not make this finding (Attach. A at ¶ 27.)
 - The order therefore fails on its face to comply with Anti-Deg.
- Attachment A: “This Order requires growers to continue implementing management practices and conducting monitoring and reporting, to ensure they are *making progress in ongoing efforts not to not cause or contribute* to exceedances of water quality objectives in surface waters or groundwater.” (Attach. A at ¶ 27) (emphasis added).
 - This finding misstates the standard under Resolution 68-16 and *AGUA*. Anti-Deg requires BPTC that assures that pollution and nuisance will not occur and that is compatible with maximum benefit to people of the state.
 - “Making progress towards ongoing efforts” is not sufficient BPTC
 - Nothing in this analysis changes the fact that growers are subject only to the vague requirement to implement practices that “prevent or reduce” discharges by an unspecified amount, and that the only remedy for failure to comply is to improve those management practices further, again by an unspecified amount. (Proposed Order at ¶ 84.) This weak requirement is not sufficient BPTC because it does not and cannot ensure that pollution and nuisance does not occur. “The wish is not father to the action.” (*AGUA*, 210 Cal.App.4th at 1260.)

Maximum Benefit to the People of the State

- Attachment A, at ¶ 27: "The Central Coast Water Board finds that implementing this Order as a short term interim order to control discharges and minimize degradation, is a reasonable next step as part of a phased approach and is consistent with the maximum benefit to the people of the State."
 - This finding misapplies Resolution 68-16. The Board is required to find that the *degradation* is consistent with the maximum benefit to the people of the state. It is insufficient to hold that the Board's *strategy* meets the standard.
 - The record does not support this finding. The Board must consider the amount and scope of groundwater and surface water degradation under the existing order and what is expected to occur under the Proposed Order. The Board must then consider whether that degradation (a summary of which is now included in Attachment 6) is consistent with the maximum benefit to the people of the State.

Iterative Nature of Program Does Not Excuse Failure to Comply with Anti-Degradation Policy

- Attachment A at ¶ 30: “Consistent with the Antidegradation Policy, this Order requires growers to continue the iterative process of implementing best practicable treatment or control and conducting and adapting monitoring and reporting, to ensure *they are making progress in ongoing efforts* not to cause or contribute to exceedances of water quality objectives in surface waters or groundwater.” (emphasis added)
 - Again, this misstates the requirements of the Anti-Deg policy.
 - And it is contradicted later in the paragraph: “The next Order anticipated for adoption in 2020 (2020 Agricultural Order) will continue to improve requirements to ensure that any authorized degradation of existing high quality waters is subject to regulatory conditions *that will result in BPTC* of the discharge necessary to ensure that pollution or nuisance will not occur and that the highest water quality consistent with the maximum benefit to the people of the state will be maintained.” (emphasis added)
- The wish to implement BPTC in the future is not the same as actually implementing BPTC now.

Call to Action