

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

15 September 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."

On 5 August 2005, the Water Board adopted Resolution No. R5-2005-0107 amending Attachments B and C of the Conditional Waivers. Now Water Board staff has prepared an additional Resolution amending the Conditional Waters with respect agricultural dominated waterways and constructed agricultural drains consistent with the Court Order by proposing the addition of Attachment A2.

DISCUSSION

To comply with the Court's ruling, Water Board staff proposes adding Attachment A2, which has been prepared to clarify the issues regarding agricultural dominated waterways and constructed agricultural drains. It was prepared pursuant to the Court Order and is intended solely as clarification of the Conditional Waivers and does not have any other regulatory effect.

Staff has received comments from Deltakeeper; California Farm Bureau Federation; Northern California Water Association; Archer Norris on behalf of the Turlock Irrigation District; Department of Food and Agriculture; Gibson, Dunn & Crutcher LLP; and Southern San Joaquin Valley Water Quality Coalition. These comment letters are attached to this staff report. Revised Attachment A2 and response to comments will be forthcoming.

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, Attachment A2*, and forward the Resolution to the Court.

WATER BOARD STAFF CONTACTS FOR STAFF REPORT

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

Ms. Bill Croyle at (916) 464-4848 or wcroyle@waterboards.ca.gov

Ms. Wendy Cohen at (916) 464-5817 or wcohen@waterboards.ca.gov